

# Memorandum

## Department of Public Works



**TO:** Michael O. Geisel, P.E.  
City Administrator

**FROM:** James A. Eckrich, P.E. *JAE*  
Public Works Dir. / City Engineer

**DATE:** February 14, 2024

**RE:** Bid Protest Procedure

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On December 5, 2022 the City of Chesterfield City Council approved Resolution 481 authorizing the submittal of a State ARPA grant to fund sanitary sewer improvements along North Outer 40 near the Chesterfield Valley Athletic Complex. The City's application for a \$2,000,000 grant was approved in January of 2023 and we are working toward a formal award, as detailed in the attached memorandum from Assistant City Engineer Zachary Wolff. Note that the grant will pay 70% of the project costs up to \$2,000,000. The remainder of the construction costs will be paid by Gateway Studios, who is developing properties along North Outer 40 in western Chesterfield Valley. Gateway Studios remains responsible for all water, storm sewer, and sanitary sewer costs minus the above-referenced grant. The City of Chesterfield is only responsible for bidding / managing the sanitary sewer project (in accordance with the grant requirements) and for all construction engineering and inspection costs associated with the sanitary sewer project. We expect the sanitary sewer project to be bid later this Spring, and for City Council to consider awarding the project in May. The total estimated construction cost of the sanitary sewer project is \$4,200,000.

An administrative requirement of the ARPA grant program through DNR is that the City's specifications for the project must include bid protest procedures adopted by the City *prior* to bidding the project. Accordingly, Public Works Staff has worked with the City Attorney to draft the attached Resolution containing bid protest procedures. This process would only be implemented in the case where a bidder wants to contest the award of a project. I have worked in local government for 25 years and have never encountered a bid protest, and any kind of bid protest is NOT expected as part of this project. That said, we do have to be prepared and are required to implement these procedures prior to publicly bidding this project.

As a reminder this is an important project for the City as it will facilitate infrastructure improvements along North Outer 40 near the CVAC. While this project

only includes sanitary sewer facilities, Gateway Studios will also be installing storm sewers and water main improvements. These improvements are specifically delineated in the City's Strategic Plan and will help ensure sufficient and reliable utility service at the CVAC. Should you have questions or require additional information regarding this project, please contact me.

Concurrence:

  
\_\_\_\_\_  
Jeannette Kelly, Finance Director

**Action Recommended**

This matter should be forwarded to the Finance and Administration Committee of City Council. Should Council concur with Staff's recommendation, it should recommend approval of the attached bid protest procedures Resolution to the full City Council.

# Memorandum

## Department of Public Works



**TO:** James A. Eckrich, PE - Director of Public Works /City Engineer

**FROM:** Zachary S. Wolff - Assistant City Engineer *ZSW*

**DATE:** February 14, 2024

**RE:** ARPA Project Bidding Protest Procedures

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As you know, the City was identified as a recipient of a maximum legislative priority water infrastructure grant award of \$2,000,000 in Missouri House Bill 3020. The grant program is administered by the Missouri Department of Natural Resources (DNR), Financial Assistance Center in the Division of Environmental Quality. As authorized by City Resolution 481, City Staff filed an application with DNR in 2022 to formally apply for the ARPA grant and confirm the required grant match which will be provided by Gateway Studios.

The City's application was approved in January 2023, and we are working towards formal award which will occur after bidding the project. The ARPA project includes a sanitary sewer extension and construction of a sanitary sewer pump station to serve multiple properties north of I-64, including the Chesterfield Valley Athletic Complex. Plans and bid documents are nearing completion. Upon completion of the plans and bid documents, the next step prior to bidding is to submit the final plans and bid documents to DNR for review.

One administrative requirement of the ARPA grant program through DNR is that the City's specifications for the project must include bidding protest procedures adopted by the City prior to bidding the project. To comply with this requirement, the City Attorney provided the attached resolution to adopt bidding protest procedures and address the grant program requirements.

I recommend providing this information to City Council and placing the Resolution on an upcoming City Council agenda for consideration. Please let me know if you have any questions.

Attachments: ARPA Project Bidding Protest Procedure Resolution

**RESOLUTION NO. \_\_\_\_\_**

**A RESOLUTION OF THE CITY OF CHESTERFIELD, MISSOURI, ADOPTING  
BIDDING PROTEST PROCEDURES FOR USE IN THE NORTH OUTER 40  
SANITARY SEWER IMPROVEMENTS PROJECT.**

**WHEREAS**, the City applied to the Missouri Department of Natural Resources for certain federal grant funds related to the American Rescue Plan Act and was awarded grant funds for use in constructing infrastructure improvements located along North Outer Highway 40; and,

**WHEREAS**, the City's receipt of the aforementioned grant funds is conditioned on the City establishing bidding protest provisions for the project prior to bid solicitation, as required by 2 CFR 200.318(k).

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF CHESTERFIELD, MISSOURI AS FOLLOWS:**

**Section I:**

- A. Applicability. The bidding protest procedures set forth in this section shall only be applicable to the City of Chesterfield North Outer 40 Sanitary Sewer Improvements project (the "Project").
- B. Notice. The Director of Public Works shall include the protest procedures in the bid specifications for the Project, as set forth in this Resolution, prior to bid solicitation.
- C. Protest Provisions. Any actual or prospective bidder who is aggrieved in connection with the solicitation or award of a contract for the Project may protest to the Director of Public Works as set forth below.
  - 1. Time Limit. Any protest shall be submitted in writing within forty-eight (48) hours after such aggrieved person knows or should have known the facts giving rise to their protest. In no case shall a protest be submitted later than seventy-two (72) hours following award of a bid.
  - 2. Contents. The protest shall identify specific issues that are being protested and the facts that the protestor believes supports the protestor's claim. It shall be the protestor's responsibility to establish the protestor's claim(s).
  - 3. Intervenors. The Director of Public Works shall send a copy of any timely filed written protest to the party awarded the bid. Any party

which was awarded a bid shall have the right to intervene and submit a written statement in response to the protest.

4. **Review of Protest.** The Director of Public Works shall have the authority to resolve a protest of an aggrieved bidder concerning the solicitation or award of a contract. This authority shall be exercised in accordance with the city's purchasing policies and subject to the approval of the City Administrator.
5. **Decision.** The Director of Public Works shall issue a written decision no later than the third business day following receipt of the protest. The decision shall state the reasons for the action taken.
6. **Notice of Decision.** A copy of the decision shall be mailed or otherwise furnished immediately to the protestor or any other party intervening.
7. **Appeal.** A protestor may appeal the decision of the Director of Public Works by submitting a written appeal to the City Administrator within forty-eight (48) hours following receipt of the Director of Public Works' decision. The written appeal shall state with specificity the facts supporting the protestor's position. The appeal shall be reviewed by the City Administrator, or his designee, who will issue a decision in writing no later than the third business day following receipt of the timely filed written appeal.
8. **Finality of Decision.** A decision shall be considered final and is not subject to appeal or further consideration unless a timely appeal is filed. In the event a timely appeal is filed, the decision of the City Administrator, or the City Administrator's designee, shall be considered final and not subject to appeal or further consideration.
9. **Stay of Procurements.** In the event a timely written protest has been made to the Director of Public Works, the City shall not proceed further with the solicitation, the award of the contract, or the execution of the contract until the Director of Public Works issues a decision and the time for an appeal has expired. If a timely written appeal has been filed, the City shall not proceed further with the solicitation, the award of the contract, or the execution of the contract until the City Administrator issues a decision.
10. **Lifting Stay of Procurements.** The Director of Public Works may, following consultation with the City Administrator, make a written determination that the award of the contract and/or execution of the contract without delay is necessary to protect the substantial interest of the City.

Passed and approved this \_\_\_\_ day of \_\_\_\_\_, 2024.

\_\_\_\_\_  
Presiding Officer

\_\_\_\_\_  
Bob Nation, Mayor

ATTEST:

\_\_\_\_\_  
Vickie McGownd

RESOLUTION NO. 481

**A RESOLUTION AUTHORIZING THE FILING OF AN APPLICATION WITH THE MISSOURI DEPARTMENT OF NATURAL RESOURCES, FINANCIAL ASSISTANCE CENTER'S STATE ARPA GRANT PROGRAM FOR SUBAWARD OF FEDERAL FINANCIAL ASSISTANCE PROVIDED TO THE STATE OF MISSOURI BY THE U.S. DEPARTMENT OF THE TREASURY PURSUANT TO SECTION 602(b) OF THE SOCIAL SECURITY ACT, AS ADDED BY SECTION 9901 OF THE AMERICAN RESCUE PLAN ACT.**

**WHEREAS**, under the terms of section 602(c) of the Social Security Act and U.S. Department of the Treasury's regulations, the State of Missouri has authorized the making of grants to authorized applicants to aid in the completion of specific public projects, and

**WHEREAS**, the City of Chesterfield was identified as a recipient of a maximum legislative priority water infrastructure grant award of \$2,000,000 in Missouri House Bill 3020 to be administered by the Department of Natural Resources for water infrastructure projects, and

**WHEREAS**, the City of Chesterfield must provide a local match on a one-to-one basis to receive the appropriated funds, and

**WHEREAS**, Gateway Studios, LLC has committed to providing a \$2,000,000 match for the infrastructure improvements in the City of Chesterfield.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHESTERFIELD, MISSOURI AS FOLLOWS:**

Section 1. City Council approves Michael O. Geisel, City Administrator, to execute and file an application on behalf of the City of Chesterfield with the State of Missouri for grant funding to aid in completion of a project to extend and/or improve water, wastewater, and/or storm water infrastructure along North Outer 40 Road.

Section 2. City Council approves and directs Michael O. Geisel, City Administrator, to furnish such information as the Missouri Department of Natural Resources may reasonably request in connection with the application which is herein authorized, to sign all necessary documents on behalf of the City, to furnish such assurances to the Missouri Department of Natural Resources as may be required by law or regulation, and to receive payment of behalf of the City.

Passed and approved this 5th day of December 2022.

Mary Monachella  
Presiding Officer

Bob Nation  
Bob Nation, Mayor

ATTEST:

Vickie McGownd  
Vickie McGownd, City Clerk





## DEVELOPMENT AGREEMENT

This **DEVELOPMENT AGREEMENT** (the “**Agreement**”) is made and entered into as of April 25, 2023 (the “**Effective Date**”) between the **CITY OF CHESTERFIELD, MISSOURI**, a third-class city organized and existing under the laws of the State of Missouri (the “**City**”), and **GATEWAY STUDIOS, LLC**, a Missouri limited liability company (“**Gateway Studios**”).

### RECITALS

**WHEREAS**, the City has properties located along North Outer Highway 40 within Chesterfield Valley (the “**Unimproved Areas**”) that are not connected to the Metropolitan Sewer District Sanitary Sewer System, which operates a centralized high-capacity public sewer system (the “**System**”) serving approximately 87% of property located in St. Louis County and St. Louis City; and,

**WHEREAS**, infrastructure improvements are necessary to connect the Unimproved Areas to the System, including a new pump station, and as more particularly described herein and as shown and described as Exhibit A (the “**Improvements**”); and,

**WHEREAS**, House Bill 3020, signed by Governor Parson and delivered to the Secretary of State on June 30, 2022, authorized the appropriation of funds for grants for infrastructure and development under the American Rescue Plan Act (“**ARPA**”), including a local match of funds for grant utilization; and,

**WHEREAS**, Resolution No. 481, adopted by the City Council on December 5, 2022, authorized the City Administrator to apply to the Missouri Department of Natural Resources, for an extension of the System to a portion of the Unimproved Areas; and,

**WHEREAS**, On January 31, 2023, the City received preliminary approval for \$2,000,000.00 in grant funds (the “**ARPA Grant**”) which requires \$2,000,000.00 in local match funds (the “**Matching Funds**”) to be utilized for Improvements; and,

**WHEREAS**, Gateway Studios has agreed to provide the Matching Funds and, in the event that Gateway Studios agrees to proceed with a bid for the Improvements at a cost in excess of \$4,000,000.00, to provide additional funds to complete the Improvements (the “**Overage Funds**”); and,

**WHEREAS**, the City’s sole financial contribution to the Improvements shall be the funds from the ARPA Grant and the costs for the Engineering inspections. The City has no obligation to fund any portion of the Matching Funds and any applicable Overage Funds and Gateway Studios acknowledges that it alone will fund the Matching Funds and any applicable Overage Funds, except that the portion of the Matching Funds and any Overage Funds for actual sewer line construction work will be paid over to the City and disbursed by the City, subject to the City’s obligations as set forth in Section 5 hereunder; and,

**WHEREAS**, completion of the Improvements, which will provide an extension of the System to connect unserved properties located in Chesterfield Valley, will promote the public safety and health of the citizens, as well as promote the economic welfare and development of the City, St. Louis County and the State of Missouri.

## **AGREEMENT**

**NOW, THEREFORE**, in consideration of the premises and mutual promises contained herein and other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**Section 1. Recitals and Exhibits.** The representations, covenants and recitations set forth in the foregoing Recitals and the exhibits attached to this Agreement are material to this Agreement and are hereby incorporated into and made a part of this Agreement as though they were fully set forth in this Section, and the appropriate exhibits are incorporated into each Section of this Agreement that makes reference to an exhibit.

**Section 2. Definitions.** In addition to words and terms defined elsewhere defined in this Agreement, the following words and terms as used in this Agreement shall have the following meanings, unless some other meaning is plainly intended and, in the event of a conflict between words and terms elsewhere defined herein and this Section, this Section shall govern.

**“Agreement”** means this Development Agreement, as amended from time to time in accordance with its terms.

**“ARPA”** means the American Rescue Plan Act.

**“ARPA Grant”** means the up-to \$2,000,000.00 in matching ARPA Grant funds provided to the City by the State of Missouri for the Improvements to the Unimproved Areas.

**“Bid Review Period”** means the 30 day period following written notification by the City to Gateway Studios in which Gateway Studios shall have the right to terminate it’s obligation under the Agreement, as more fully described in Section 5(c) hereof.

**“City”** means the City of Chesterfield, Missouri, a third-class city and political subdivision duly organized and existing under the laws of the State of Missouri.

**“City Administrator”** means the City Administrator of the City.

**“City Clerk”** means the City Clerk of the City.

**“City Council”** means the governing body of the City of Chesterfield, Missouri.

**“Gateway Studios”** means Gateway Studios, LLC.

**“Event of Default”** means any event specified in Section 15 of this Agreement.

**“Grant Administration”** means management of the ARPA Grant including, but not limited to, ensure compliance with State and Federal grant requirements.

**“Improvements”** means those improvements to the System including the construction of a pump station, force main and gravity PVC, described generally in Exhibit A to this Agreement and all associated work required to complete said infrastructure improvements.

**“Matching Funds”** means the local match portion of up-to \$2,000,000.00 in funds required under the ARPA Grant.

**“Material Changes”** means a change approved by City Council to the cost or scope of the Recommended Award or the selection of a bid by City Council other than the Recommended Award.

**“Overage Funds”** means those funds required to complete the Improvements in excess of \$4,000,000.00 which Gateway Studios has agreed to provide by deciding to proceed with the Improvements during the Bid Review Period.

**“Parties”** means the City and Gateway Studios collectively.

**“Recommended Award”** means the bid approved by Gateway Studios and City Staff during the Bid Review Period for recommendation to City Council.

**“Uniform Act”** means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 et seq.).

**“State”** means the State of Missouri.

**“System”** means the Metropolitan Sewer District Sanitary Sewer System.

**Section 3. Representations by the City.** As of the Effective Date, the City represents that:

(a) The City is a third-class city and a political subdivision duly organized and existing under the laws of the State of Missouri.

(b) The City is authorized to enter into this Agreement and to carry out its obligations under this Agreement, the City Administrator has been duly authorized to execute and deliver this Agreement and the City Clerk has been duly authorized to attest to the City Administrator’s execution of this Agreement.

(c) The execution and delivery of this Agreement, the consummation of the transactions contemplated by this Agreement, and the performance of or compliance with the terms and conditions of this Agreement by the City shall not conflict with or result in a breach of any of the terms, conditions or provisions of, or constitute a default under, any mortgage, deed of trust,

lease or any other restriction or any agreement or instrument to which the City is a party or by which it or any of its property is bound, or any order, rule or regulation of any court or governmental body applicable to the City or any of its property, or result in the creation or imposition of any prohibited lien, charge or encumbrance of any nature whatsoever upon any of the property or assets of the City under the terms of any instrument or agreement to which the City is a party.

(d) There is no litigation or proceeding pending or, to the City's knowledge, threatened against the City affecting the right of the City to execute or deliver this Agreement or the ability of the City to comply with its obligations under this Agreement.

(e) The Improvements, as set forth herein, serve a significant public purpose to the City, St. Louis County and the State of Missouri. The extension of the System and the availability of the System's capacity will not only reduce single-use sanitary sewer systems which benefits the public health, the Improvements will immediately enhance and spur additional economic development in the City, St. Louis County and the State of Missouri.

**Section 4. Representations by Gateway Studios.** As of the Effective Date, Gateway Studios represents that:

(a) Gateway Studios has all necessary power and authority to execute and deliver and perform the terms and obligations of this Agreement and to execute and deliver the documents required of Gateway Studios herein, and such execution and delivery has been duly and validly authorized and approved by all necessary proceedings. Accordingly, this Agreement constitutes the legal valid and binding obligation of Gateway Studios, enforceable in accordance with its terms, except to the extent that such enforceability is limited by (i) applicable reorganization, insolvency, receivership, liquidation, readjustment of debt, moratorium or other similar laws affecting the enforcement of the rights of creditors generally, as such laws may be applied in the event of reorganization, insolvency, receivership, liquidation, readjustment of debt, moratorium applicable to Gateway Studios, and (ii) general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(b) The execution and delivery of this Agreement, the consummation of the transactions contemplated thereby, and the fulfillment of the terms and conditions hereof by Gateway Studios do not and will not conflict with or result in a breach of any of the terms or conditions of any organizational restriction or of any agreement or instrument to which it is now a party, and do not and will not constitute a default under any of the foregoing.

(c) No litigation, proceedings or investigations are pending or, to the knowledge of Gateway Studios, threatened against Gateway Studios or any member or owners of Gateway Studios which would have a material adverse effect on the improvements. In addition, no litigation, proceedings or investigations are pending or, to the knowledge of Gateway Studios, threatened against Gateway Studios seeking to restrain, enjoin or in any way limit the approval or issuance and delivery of this Agreement or which would in any manner challenge or adversely affect the existence or powers of Gateway Studios to enter into and carry out the transactions

described in or contemplated by the execution, delivery, validity or performance by Gateway Studios of the terms and provisions of this Agreement.

(d) To its knowledge, Gateway Studios is in material compliance with all laws, ordinances, orders, decrees, decisions, rules, regulations and requirements of every duly constituted governmental authority, commission and court applicable to any of its affairs, business, or operations as contemplated by this Agreement.

**Section 5. City's Obligations.**

(a) The City shall be responsible for the following:

(i) Grant Administration, including submitting and managing the ARPA Grant, execution of a Financial Assistant Agreement with DNR and overseeing the Improvements to ensure compliance with State and Federal Grant requirements.

(ii) Provide standard City review and comments on design plans, as they relate to City requirements and property.

(iii) Assemble bid packets using City standard contract documents. Contract documents may be supplemented by drawings, specifications, and bid forms provided by Gateway Studios.

(iv) Manage project bidding and award of project pursuant to Federal, State, and City ordinances, policies and practices.

(v) The City will assist with the acquisition of any necessary property/easements for any work not on Gateway Studios' or the City's property to ensure all acquisitions comply with the Uniform Act

(vi) Provide necessary easements for work or improvements on City property at no additional cost to Gateway Studios.

(vii) Provide funding for the Project for up to a maximum amount of \$2,000,000.00 from General Funds – Fund Reserves. These funds will be reimbursed directly to the City through the ARPA Grant. The amount of funding provided by the City shall never exceed the ARPA Grant or the amount of Matching Funds provided by Gateway Studios (e.g., if the cost of the Improvements is \$3.8 million, the City would provide \$1.9 million, which would be reimbursed by the ARPA Grant, and Gateway Studios would provide \$1.9 million in Matching Funds).

(viii) Provide City staff to perform, or provide funding for, engineer inspection services as set forth in Exhibit A from General Fund – Fund Reserves.

(ix) Review and pay contractor invoices.

(Collectively, the City's Obligations (i) through (ix) are referred to as the "**Project Management**").

(b) *Condition Precedent to City's Obligation.* The City's obligation to provide Project Management is expressly conditioned on the City timely receiving the ARPA Grant and the Matching Funds, as set forth herein.

(c) *Bidding.* Prior to the compilation of the bid package, Gateway Studios and City shall work cooperatively to review all bid specifications. Upon written acknowledgement of acceptance by Gateway Studios and City as to the final agreed bid specifications and documents, City staff will solicit bids, review, and recommend to the City Council a bid to complete the Project in the same manner and method as other City projects, subject to applicable State and Federal laws, the City's ordinances, policies, practices and procedures and any requirements of the granting authorities. After City staff open and review responsive bid documents and prior to providing a recommendation to City Council, the City shall provide Gateway Studios written notification of the recommended bidder and Gateway Studios and City shall have 30 days from written notification provided by the City to review and consider the recommend bid and alternate bids from City staff (the "**Bid Review Period**"). At any time during the Bid Review Period, Gateway Studios and City shall have the right to terminate this Agreement for any reason by providing written notice to either party. If either Party does not terminate the Agreement during the Bid Review Period, Gateway Studios agrees to provide Matching Funds and any agreed upon Overage Funds required to complete the Improvements.

(d) *Construction.* In the event the Agreement is not terminated by Gateway Studios or City during the Bid Review Period, a project award recommendation will be provided to City Council for award of the construction contract to the recommended bidder (the "**Recommended Award**"). If the City Council approves the Recommended Award with no Material Changes, Gateway Studios shall deposit with the City the Matching Funds and any Overage Funds within 72 hours following the City Council's approval. If the City Council makes any Material Changes to the project award documents, Gateway Studios shall have the right, within ten (10) days after receiving written notice of the City Council's decision, to approve the same or terminate this Agreement. If the City Council makes any Material Changes to the project award documents and if Gateway Studios does not terminate the Agreement, then Gateway Studios shall deposit the Matching Funds and any Overage Funds shall be within ten (10) days following the City Council's approval. Upon receipt of the Matching Funds and Overage Funds, the City shall proceed with execution of the construction contract. Changes to the construction contract will be executed by change order signed by the City, Gateway Studios, and contractor.

(e) *General Contractor.* The City shall engage a reputable and experienced general contractor to construct the Improvements who shall warrant and insure work and construction activities with all risk coverages including Gateway Studios as an additional insured, name Gateway Studios as an intended third party beneficiary, and shall require a bond for performance and to protect Gateway Studios' properties from mechanics' and materialmen's liens.

(f) *Copies of Documents.* The City shall provide Gateway Studios with copies of documents, invoices, bids and awards relating to the Improvements as reasonably requested by Gateway Studios from time to time.

(g) *Determination of Actual Costs.* If the actual costs of the Improvements are less than agreed upon during the Bid Review Period, the City shall refund Gateway Studios the unused Matching and Overage Funds, or, if the Parties agree, the Parties shall proceed with additional improvements as set forth in Section 7(e) instead of the refund. If the actual costs of the Improvements are more than anticipated during the Bid Review Period, the City shall provide written notice to Gateway Studios that additional funds are required within thirty (30) days and Gateway Studios agrees to deposit those funds with the City within 30 days of receipt of written notice from the City.

**Section 6. Gateway Studios' Obligations.** Gateway Studios shall be responsible for the following:

(a) Provide, at Gateway Studios' sole cost and expense, the required Engineering Report in accordance with the ARPA Grant requirements.

(b) Provide additional documentation reasonably necessary for the City to receive reimbursement from the ARPA Grant.

(c) Provide complete design documents and final cost estimates for the Improvements.

(d) Submit plans to all applicable governing bodies and receive required approvals prior to bidding.

(e) Grant easements for necessary work and improvements on Gateway Studios' property at no cost to Metropolitan Sewer District or City.

(f) Acquire the necessary property and/or easements for any work not on Gateway Studios or the City's property in accordance with the Uniform Act. The City Council, in its sole and absolute discretion, may use the power of eminent domain to assist Gateway Studios with acquisition of necessary easement, however Gateway Studios shall reimburse the City for its reasonable costs.

(g) Provide complete plans for Project, specifications, final cost estimates and any supplemental bid forms to City prior to bidding.

(h) Assist City in bidding and awarding of Project by timely answering questions and assisting in review of bids.

(i) Review the recommended bidder and, during the Bid Review Period, determine whether to terminate this Agreement or proceed with the Improvements as set forth in Section 5(c). If Gateway Studios does not wish to terminate this Agreement, then Gateway Studios shall provide the City with written notice to proceed with the Improvements. If Gateway Studios provides written notice to the City to proceed with the Improvements, Gateway Studios agrees to provide

Matching Funds and any Overage Funds required for the Improvements.

(j) If the City Council approves the Recommended Award with no Material Changes, Gateway Studios shall deposit with the City the Matching Funds and any Overage Funds within 72 hours following the City Council's approval. If the City Council makes any Material Changes to the project award documents, Gateway Studios shall have the right, within ten (10) days after receiving written notice of the City Council's approval, to approve the same or terminate this Agreement. If the City Council makes any Material Changes to the project award documents and if Gateway Studios does not terminate the Agreement, then Gateway Studios shall deposit the Matching Funds and any Overage Funds shall be within ten (10) days following the City Council's approval. Gateway Studios acknowledges that the amount of funding provided by the City, and reimbursed by the ARPA Grant, shall never exceed the amount of Matching Funds provided by Gateway Studios as set forth in Section 5(a)(vii) above, except for the City's cost for engineering inspections.

(k) If the actual cost to complete the Improvements is less than agreed upon during the Bid Review Period, then the City shall refund Gateway Studios the unused portion of the Matching and Overage Funds.

(l) If the actual cost to complete the Improvements is more than agreed upon during the Bid Review Period, then Gateway Studios shall provide additional funds to the City within thirty (30) days of written notification by the City unless the increase is due to City approval of changes to the Improvements without Gateway Studios' agreement or concurrence.

(m) Gateway Studios shall provide engineering assistance during construction including, but not limited to, shop drawing review, responding to requests for information, and quantity and invoice review to ensure costs are controlled.

**Section 7. Release, Indemnification, Contractor Contract Obligations and Excess Funds.**

(a) Notwithstanding anything herein to the contrary, the City, its governing body, officials, agents, employees and independent contractors shall not be liable to Gateway Studios for damages of any kind or nature whatsoever if any ordinance adopted by the City or transaction completed by the City in connection with this Agreement is declared invalid or unconstitutional in whole or in part by the final (as to which all rights of appeal have expired or have been exhausted) judgment of any court of competent jurisdiction, and by reason thereof either the City is prevented from performing any of the covenants and agreements herein or Gateway Studios is prevented from enjoying the rights and privileges hereof.

(b) The City and its governing body, officials, agents, employees and independent contractors shall not be liable for any damage or injury to the persons or property of Gateway Studios or their respective officers, agents, independent contractors or employees or any other person who may be about Gateway Studios' property, or the Improvements due to any act of negligence of any person, except as such may be caused by the willful misconduct or negligence of the City, its governing body, officials, agents, employees, or independent contractors.



(c) No member of the governing body, officials, agents, employees or independent contractors of the City shall be personally liable to Gateway Studios in the event of a default or breach by any party under this Agreement, and no owner or officer of Gateway Studios shall be personally liable to the City in the event of the default or breach by any party under this Agreement.

(d) All covenants, stipulations, promises, agreements and obligations of the City and Gateway Studios contained herein shall be deemed to be the covenants, stipulations, promises, agreements and obligations of the City and Gateway Studios and not of their governing body, officials, agents, employees, owners, affiliates or independent contractors, as the case may be, in their individual capacities.

(e) Should there be additional funds available from the ARPA Grant and matching funds, such excess funds may be used for additional improvements as reasonably agreed by City and Gateway Studios.

**Section 8. Termination.** This Agreement shall terminate upon the earliest of any of the following:

(a) The City Council fails to award a bid for the Improvements.

(b) The satisfaction of the City's Obligations.

(c) Upon written notice of termination by the non-defaulting party pursuant to Section 9(b) of this Agreement.

**Section 9. Default and Remedies.**

(a) *Events of Default.* The following shall be an Events of Default with respect to this Agreement:

(i) If any material representation made by a party in this Agreement, or in any certificate, notice, demand or request made by a party, in writing and delivered to the other party pursuant to or in connection with this Agreement proves to be untrue or incorrect in any material respect as of the date made; or

(ii) Breach by a party of any material covenant, warranty, or obligation set forth in this Agreement.

(b) *Remedies on Default.* In the case of an Event of Default by a party hereto or any successor to such party, such party or successor shall, upon written notice from another party, take immediate action to cure or remedy such Event of Default within thirty (30) days after receipt of such notice. If the Event of Default is not cured or remedied within such thirty (30) day period (or, in the case of Events of Default that cannot be cured within a thirty (30) day period, the defaulting party does make reasonable progress toward curing the default and does not notify the non-defaulting party of when default will be cured), then the non-defaulting party may terminate

this Agreement or institute such proceedings as may be necessary or desirable in its opinion to cure or remedy such default, including but not limited to, proceeding to compel specific performance by the party in default of its obligations.

(c) *Other Rights and Remedies of Parties; Delay in Performance Waiver.*

(i) Any delay by a party in instituting or prosecuting any actions or proceedings or otherwise asserting their rights under this Agreement shall not operate to act as a waiver of such rights or to deprive them of or limit such rights in any way (it being the intent of this provision that the parties should not be constrained so as to avoid the risk of being deprived of or limited in the exercise of the remedies provided in this Agreement because of concepts of waiver, laches or otherwise); nor shall any waiver in fact made by a party with respect to any specific Event of Default by a party under this Agreement be considered or treated as a waiver of the rights of a party under this Section or with respect to the particular Event of Default, except to the extent specifically waived in writing by the other parties.

(ii) The rights and remedies of the parties to this Agreement (or their permitted successors or assigns) whether provided by law or by this Agreement, shall be cumulative, and the exercise by any party of any one or more of such remedies shall not preclude the exercise by it, at the time or different times, of any other such remedies for the same Event of Default by another party. No waiver made by any party with respect to the performance, nor the manner of time thereof, or any obligation of another party or any condition to its own obligation under this Agreement shall be considered a waiver of any rights of the party making the waiver with respect to the particular obligation of another party or condition to its own obligation beyond those expressly waived in writing and to the extent thereof, or a waiver in any respect to regard to any other rights of the party making the waiver or any other obligations of another party.

(iii) Neither the City nor Gateway Studios, nor any successor in interest, as the case may be, shall be considered in breach of, or in default of, any of its obligations under this Agreement or otherwise with respect to the Improvements as contemplated herein, or progress in respect thereto, in the event of delay in the performance of any such obligations due to unforeseeable causes beyond its control and without its fault or negligence, including, but not restricted to acts of God, acts of a public enemy, acts of federal, state or local government (other than the City), litigation instituted by third parties, acts of the other party, fires, floods, epidemics, quarantine restrictions, strikes, embargoes, acts of nature, unusually severe weather or delays of subcontractors due to such causes; it being the purpose and intent of this provision that in the event of the occurrence of any such delay, the time or times for performance of such obligations by the City or Gateway Studios shall be extended for the period of the enforced delay; provided, that the party seeking the benefit of the provisions of this Section, shall within fifteen (15) days after the beginning of any such enforced delay, have first notified the other party or parties thereof in writing, of the cause or causes thereof, and requested an extension of the period of delay.

**Section 10. Amendment or Modification.** The Parties to this Agreement may amend or modify this Agreement only by written instrument duly executed by the Parties hereto.

**Section 11. Third Party Rights.** No person or entity who or which is not a party to this Agreement shall have any right of action under this Agreement.

**Section 12. Scope.** This Agreement constitutes the entire Agreement between the Parties, and no statements, promises or inducements that are not contained in this Agreement shall be binding on the Parties.

**Section 13. Severability.** If any part, term or provision of this Agreement is held by a court of law to be illegal or otherwise unenforceable, such illegality or unenforceability shall not affect the validity of any other part, term or provision, and the rights of the parties shall be construed as if the part, term or provision was never part of this Agreement.

**Section 14. Transferability.** This Agreement may not be assigned without the express written approval of the City unless such assignment is (i) to an entity succeeding to all or substantially all of the business of Gateway Studios (in which case Gateway Studios shall provide notice to the City of such assignment within 10 days from the date of such assignment), (ii) to an entity created by Gateway Studios for the purpose of redeveloping Gateway Studios' property. The City shall cooperate and negotiate reasonable assignment language, permitting Gateway Studios to assign its rights under this Agreement and any other agreements entered into in connection with this Agreement by and between Gateway Studios, the City and or the City's designee.

**Section 15. Notice.** Except as otherwise provided herein, any notice required or permitted by this Agreement shall be deemed effective when personally delivered in writing or three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified, return receipt requested, and addressed as follows:

The City

City of Chesterfield  
690 Chesterfield Parkway West  
Chesterfield, Missouri 63017  
Attention: City Administrator

With a copy to:

The Graville Law Firm, LLC  
13354 Manchester Road, Ste 210  
Des Peres, Missouri 63131  
Attn: Chris Graville

Gateway Studios:

Gateway Studios, LLC  
3615 Tree Court Industrial Boulevard  
St. Louis, Missouri 63122

With a copy to:

Jenkins & Kling, P.C.  
150 N. Meramec Ave, Ste 400  
St. Louis, Missouri 63105  
Attn: Stephen L. Kling, Jr.

**Section 16. Immunity.** Nothing contained in this Agreement constitutes a waiver of the City's sovereign immunity under any applicable state law.

**Section 17. Jurisdiction and Venue.** Personal jurisdiction and venue for any civil action commenced by any party to this Agreement shall be deemed to be proper only if such action is commenced in the St. Louis County Circuit Court, Missouri. Gateway Studios and City expressly waives its rights to bring such action in or to remove such action to any other court whether state or federal.

**Section 18. Missouri Law.** This Agreement shall be construed in accordance with and governed by the laws of the State of Missouri.

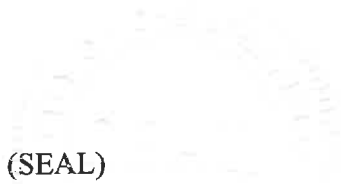
**Section 19. Counterparts.** This Agreement may be executed in any number of counterparts, each of which so executed shall be deemed to be an original, but all such counterparts shall together constitute the same instrument.

**Section 20. Electronic Transmission and Storage.** The Parties hereby agree that the transactions described herein may be conducted and related documents may be received or stored by electronic means. Copies, telecopies, facsimiles, electronic files, and other reproductions of original executed documents shall be deemed to be authentic and valid counterparts of such original documents for all purposes, including the filing of any claim, action, or suit in the appropriate court of law.

*[Remainder of Page Intentionally Left Blank. Signature Page to Follow]*

**IN WITNESS WHEREOF**, the City has caused this Agreement to be executed and the City has caused its seal to be affixed hereto and attested as of the date first written above.

**CITY OF CHESTERFIELD, MISSOURI**



(SEAL)


By: *Mark J. Smith*  
City Administrator

ATTEST:

By: *Vickie M. Dound*  
City Clerk

**IN WITNESS WHEREOF**, Gateway Studios, LLC has caused this Agreement to be duly executed as of the date first written above.

**GATEWAY STUDIOS, LLC**

By:  \_\_\_\_\_

Name: \_\_\_\_\_ Jerry Kerr

Title: Manager \_\_\_\_\_

**EXHIBIT A**

