

**CITY OF SCAPPOOSE, OREGON
ENGINEERING SERVICES AGREEMENT**

THIS ENGINEERING SERVICES AGREEMENT (“Agreement”) is made and entered into this ___ day of (MONTH), 2019, by and between the City of Scappoose, a municipal corporation, hereinafter referred to as the "City," and _____, whose authorized representative is _____ and having a principal being a registered Consultant of the State of Oregon, hereinafter referred to as the "Consultant."

RECITALS

WHEREAS, the City’s Fiscal Year _____ budget provides for engineering services for the _____ Project; and

WHEREAS, the accomplishment of the work and services described in this Agreement is necessary and essential to the program of the City; and

WHEREAS, the City desires to engage the Consultant to render professional engineering services relating to the _____, and the Consultant is willing and qualified to perform such services.

THEREFORE, in consideration of the promises and covenants contained herein, the parties hereby agree as follows:

1. Consultant's Scope of Services

The Consultant shall perform professional engineering services relevant to the _____ Project in accordance with the terms and conditions set forth herein, and as provided in Exhibit 1 (“Basic Services”), which is attached hereto and by this reference made a part of this Agreement.

2. Sub-Contractors

If Consultant intends to utilize subcontractors to perform any of the Basic Services, Consultant shall provide written notice to the City. The written notice will identify the subcontractors, describe the services intended to be provided by the subcontractors and include such information on the qualifications of the subcontractors as may be required by the City. The City reserves the right to review the subcontractors proposed. Consultant will not retain a subcontractor to which the City has a reasonable objection.

3. Other Consultants

The City, at the City’s sole option, may retain other consultants. The costs of other consultants retained by the City are to be paid by the City. When retained by the City, other consultants’ duties are not to be interpreted as conflicting with the duties of

Consultant or relieving Consultant of any responsibility or duty incurred under this Agreement.

4. Effective Date and Duration

This Agreement shall become effective upon the date of execution and shall expire, unless otherwise terminated, on _____, whichever comes first. All work under this Agreement must be completed prior to the expiration of this Agreement.

5. Key Personnel

This Agreement was awarded based on the unique background and abilities of the key personnel of Consultant (collectively, the "Key Personnel" and individually, the "Key Person"). If requested, Consultant will provide to the City a list of the proposed Key Personnel to be assigned to perform the Services. To the extent any individuals employed by Consultant are identified in this Agreement, or Exhibit A, those individuals are Key Personnel for the Services. If any Key Person becomes unavailable to Consultant, the Parties shall mutually agree upon an appropriate replacement. Without providing prior notice to, and obtaining the written consent of the City (which shall not be unreasonably withheld), Consultant will not: (i) re-assign or transfer any Key Person to other duties or positions so that the Key Person is unable to fully perform his or her responsibilities under this Agreement; (ii) allow any Key Person to delegate to anyone his or her performance of any management authority or other responsibility required under this Agreement; or (iii) substitute any Key Person. Consultant shall utilize any individual or Subcontractor in the performance of the Services to which the City has a reasonable objection. Consultant shall have a reasonable time period within which to find a suitable replacement if the City objects to Consultant's use of any individual or Subcontractor.

6. Additional Services

Additional services may be provided after execution of this Agreement, without invalidating this Agreement. The Basic Services, and any additional services authorized under this Agreement, are collectively referred to herein as "Services". Except for services required due to the fault of Consultant, additional services shall entitle Consultant to additional compensation on condition that the Consultant first have received written authorization from the City describing the scope of additional services and the amount of additional compensation to be paid for the additional services. In any case in which Consultant performs additional Services without first receiving written authorization from the City and without an express agreement on the total compensation to be paid for the additional services or the method from which the total amount of compensation is to be determined, Consultant will not be entitled to compensation for such services.

7. Contract Performance

Consultant shall at all times perform the Services diligently and without delay and shall punctually fulfill all requirement under this Agreement consistent with any schedule required by the City for the performance of the Services. Expiration or termination of the Agreement shall not extinguish, prejudice, or limit either party's right to enforce this Agreement with respect to any default or defect in performance.

8. Consultant's Fee

A. Basic Fee

As compensation for Services performed pursuant to this Agreement, the parties agree that Consultant will perform, the Consultant shall be paid a not to exceed amount of _____ (\$), unless the City authorizes additional compensation in writing.

B. Payment Schedule for Basic Fee

Payments shall be made upon receipt of billings based on the work completed. Billings shall be submitted by the Consultant periodically, but not more frequently than monthly. Payment by the City shall release the City from any further obligation for payment to the Consultant for service or services performed or expenses incurred as of the date of the statement of services. Payment shall be made only for work actually completed as of the date of invoice. Payment shall not be considered acceptance or approval of any work or waiver of any defects therein. Disputed amounts may be withheld without penalty or interest pending resolution of the dispute. The City may suspend or withhold payment if Contractor fails to comply with requirements of this Agreement.

C. Cost Records

The Consultant will furnish billing records that reflect the fee per task as indicated in the attached scope of work. The billing records will have sufficient detail for the City to make clear what tasks were performed and the completion date of the tasks.

D. Contract Identification

The Consultant shall furnish to the City its employer identification number, as designated by the Internal Revenue Service, or social security number, as the City deems applicable.

E. Payment – General

- ~~1) Consultant shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.~~
- ~~2) Consultant shall pay employees at least time and a half pay for all overtime worked in excess of 40 hours in any one week except for individuals under the contract who are excluded under ORS 653.010 to 653.261 or under 29 USC sections 201 to 209 from receiving overtime.~~
- ~~3) Consultant shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention incident to sickness or injury to the employees of Consultant or all sums which Consultant agrees to pay for such services and all moneys and sums which Consultant collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.~~

~~4) The City certifies that sufficient funds are available and authorized for expenditure to finance costs of this Agreement.~~

~~5) Consultant shall make payments promptly, as due, to all persons supplying services or materials for work covered under this Agreement. Consultant shall not permit any lien or claim to be filed or prosecuted against the City on any account of any service or materials furnished.~~

~~6) If Consultant fails, neglects or refuses to make prompt payment of any claim for labor, materials, or services furnished to Consultant, sub-consultant or subcontractor by any person as such claim becomes due, City may pay such claim and charge the amount of the payment against funds due or to become due to the Consultant. The payment of the claim in this manner shall not relieve Consultant or their surety from obligation with respect to any unpaid claims.~~

9. Ownership of Work Product

A. Definitions. As used in this Agreement, the following terms have the meanings set forth below:

1) “Consultant Intellectual Property” means any intellectual property that is owned by Consultant and developed independently from this Agreement and that is applicable to the Basic Services, and any additional services to be performed under this Agreement (collectively, “Services”).

2) “Third Party Intellectual Property” means any intellectual property that is owned by parties other than the City or Consultant and that is applicable to the Services.

3) “Work Product” means the Services Consultant delivers or is required to deliver to the City under this Agreement. Work Product includes every invention, discovery, work of authorship, trade secret or other tangible or intangible item and all intellectual property rights therein, and all copies of plans, specifications, reports and other materials, whether completed, partially completed or in draft form.

B. The Work Product for which the Consultant has received payment becomes the property of the City. Consultant and the Subcontractors shall be deemed the authors and owners of their respective Work Product, and will retain all common law, statutory and other reserved rights, including copyrights. Consultant grants the City a nonexclusive license to use and reproduce the Work Product for any purpose the City deems necessary. Consultant shall obtain similar nonexclusive licenses from Consultant’s subcontractors. The license granted permits the City to authorize any contractors, subcontractors, and material or equipment suppliers, as well as any other consultants, to reproduce applicable portions of the Work Product solely and exclusively for use in performing services or construction for projects for which the Services were performed. If the City uses Work Product for some other purpose without first obtaining the consent of Consultant, the City releases Consultant and Consultant’s subcontractors from all claims and causes of action arising from such uses. Unless Consultant is terminated for cause, the City, subject to the limits of the Oregon Tort Claims Act, and the Oregon Constitution, and to the extent permitted by law, further agrees to indemnify Consultant and its Subcontractors from all costs and expenses related to claims and causes of action

asserted by any third person or entity to the extent such costs and expenses arise from the City's use of Work Product for some purpose other than the purposes described in this paragraph without the consent of Consultant.

C. In the event that Consultant Intellectual Property is necessary for the use of any Work Product, Consultant hereby grants to the City a non-exclusive license to use Consultant Intellectual Property, including the right of the City to authorize contractors, consultants and others to use Consultant Intellectual Property, for the purposes described in this Agreement.

D. In the event that Third Party Intellectual Property is necessary for the use of any Work Product, Consultant shall secure on the City's behalf and in the name of the City, a non-exclusive license to use the Third Party Intellectual Property, including the right of the City to authorize contractors, consultants and others to use the Third Party Intellectual Property, for the purposes described in this Agreement.

E. Consultant's Use of Work Product. Consultant may refer to the Work Product in its brochures or other literature that Consultant utilizes for advertising purposes.

F. Publicity. Consultant agrees that news releases and other publicity relating to the subject of this Agreement will be made only with the prior written consent of the City.

G. Security. Consultant shall comply with all virus-protection, access control, back-up, password, and other security and other information technology policies of the City when using, having access to, or creating systems for any of the City's computers, data, systems, personnel, or other information resources.

H. The City shall make copies, for the use of and without cost to the Consultant, of all of its maps, records, laboratory tests, or other data pertinent to the work to be performed by the Consultant pursuant to this Agreement, and also make available any other maps, records, or other materials available to the City from any other public agency or body.

I. The Consultant shall furnish to the City, copies of all maps, records, field notes, and soil tests which were developed in the course of work for the City and for which compensation has been received by the Consultant at no additional expense to the City except as provided elsewhere in this Agreement.

10. Assignment/Delegation

Neither party shall assign, sublet or transfer any interest in or duty under this Agreement without the written consent of the other and no assignment shall be of any force or effect whatsoever unless and until the other party has so consented. If City agrees to assignment of tasks to a subcontract, Consultant shall be fully responsible for the acts or omissions of any subcontractors and of all persons employed by them, and neither the approval by City of any subcontractor nor anything contained herein shall be deemed to create any contractual relation between the subcontractor and City.

11. Consultant is Independent Contractor

A. The City's project director, or designee, shall be responsible for determining whether Consultant's work product is satisfactory and consistent with this Agreement, but Consultant is not subject to the direction and control of the City. Consultant shall be an independent contractor for all purposes and shall be entitled to no compensation other than the compensation provided for under Section 3 of this Agreement.

B. Consultant is an independent contractor and not an employee of City. Consultant acknowledges Consultant's status as an independent contractor and acknowledges that Consultant is not an employee of the City for purposes of workers compensation law, public employee benefits law, or any other law. All persons retained by Consultant to provide services under this contract are employees of Consultant and not of City. Consultant acknowledges that it is not entitled to benefits of any kind to which a City employee is entitled and that it shall be solely responsible for workers compensation coverage for its employees and all other payments and taxes required by law.

C. The undersigned Consultant represents that no employee of the City or any partnership or corporation in which a City employee has an interest, has or will receive any remuneration of any description from the Consultant, either directly or indirectly, in connection with the letting or performance of this Agreement, except as specifically declared in writing.

D. If this payment is to be charged against Federal funds, Consultant certifies that he/she is not currently employed by the Federal Government and the amount charged does not exceed his/her normal charge for the type of service provided.

E. Consultant represents that Consultant and its employees, if any, are not active members of the Oregon Public Employees Retirement System and are not employed for a total of 600 hours or more in the calendar year by any public employer participating in the Retirement System.

F. Consultant is not an officer, employee, or agent of the City as those terms are used in ORS 30.265.

12. Standard of Care

A. The City has relied upon the professional ability and training of the Consultant as a material inducement to enter into this Agreement. Consultant represents to the City that the work under this Agreement will be performed in accordance with the professional standards of skill, care, diligence and standards ordinarily exercised by members of the Consulting profession under similar conditions and circumstances as well as the requirements of applicable federal, state and local laws ("Standard of Care"). Consultant will prepare, in accordance with the Standard of Care, all drawings, specifications, deliverables and other documents so that they accurately reflect, fully

comply with and incorporate all applicable laws, rules, and regulations, and so that they are complete and functional for the purposes intended, except as to any deficiencies which are due to causes beyond the control of Consultant. The parties understand and agree that acceptance of Consultant's work by the City shall not operate as a waiver or release. Acceptance of documents by City does not relieve Consultant of any responsibility for design deficiencies, errors or omissions, nor will it relieve Consultant of any responsibility for complying with the Standard of Care.

B. Consultant will be responsible for correcting any inconsistencies, errors or omissions in the drawings, specifications, deliverables and other documents prepared by Consultant at no additional cost to the City.

C. During the term of the Agreement, Consultant will obtain, hold, maintain and fully pay for all licenses and permits required by law for Consultant to conduct its business and perform the Basic Services.

13. Indemnity

A. Claims for other than Professional Liability. Consultant agrees and shall indemnify, defend, save and hold harmless the City of Scappoose, its officers, employees, agents, and representatives for, from and against all claims, suits, actions, losses, damages, liabilities, costs and all expenses incidental to the investigation and defense thereof, of whatsoever nature, including intentional acts resulting from or arising out of the activities of Consultant or its subcontractors, sub-consultants, agents or employees in performance of this Agreement at both trial and appeal level, whether or not a trial or appeal ever takes place including any hearing before federal or state administrative agencies.. If any aspect of this indemnity shall be found to be illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this indemnification.

B. Claims for Professional Liability. Consultant agrees and shall indemnify, defend, save and hold harmless the City of Scappoose, its officers, employees, agents, and representatives for, from and against all claims, suits, actions, losses, damages, liabilities, costs and all expenses incidental to the investigation and defense thereof, arising out of the professional negligent acts, errors or omissions of Consultant or its subcontractors, sub RFP consultants, agents or employees in performance of professional services under this Agreement. Any work by Consultant that results in a design of a facility that is not readily accessible to and usable by individuals with disabilities shall be considered a professionally negligent act, error or omission.

C. Notwithstanding the obligations above, the City may, at any time and at its election, assume its own defense and settlement of any claims in the event that it determines that Consultant is not adequately defending the City or the City believes it is in the City's best interests to do so. The City reserves all rights to pursue any claims it may have against Consultant if the City elects to assume its own defense.

14. Insurance

Consultant and its subcontractors shall maintain insurance acceptable to City in full force and effect throughout the term of this Agreement. Such insurance shall cover risks arising directly or indirectly out of Consultant’s activities or work hereunder, including the operations of its subcontractors of any tier. Such insurance shall include provisions that such insurance is primary insurance with respect to the interests of City and that any other insurance maintained by City is excess and not contributory insurance with the insurance required hereunder. The policy or policies of insurance maintained by the Consultant and its subcontractors shall provide at least the following limits and coverages:

A. Commercial General Liability Insurance

Consultant shall obtain, at Consultant’s expense, and keep in effect during the term of this Agreement, Comprehensive General Liability Insurance covering Bodily Injury and Property Damage on an “occurrence” form (CG 2010 1185 or equivalent). This coverage shall include Contractual Liability insurance for the indemnity provided under this contract. The following insurance will be carried:

Coverage	Limit
General Aggregate	\$3,000,000
Products-Completed Operations Aggregate	\$2,000,000
Personal & Advertising Injury	\$1,000,000
Each Occurrence	\$2,000,000
Fire Damage (Any one fire)	\$50,000

B. Professional Liability

Consultant shall obtain, at Consultant’s expense, and keep in effect during the term of this Agreement, Professional Liability Insurance covering any damages caused by an error, omission or any negligent acts. Combined single limit per claim shall not be less than \$2,000,000, or the equivalent. Annual aggregate limit shall not be less than \$2,000,000 and filed on a “claims-made” form.

C. Commercial Automobile Insurance

Consultant shall also obtain, at Consultant’s expense, and keep in effect during the term of the Agreement (Symbol 1 or Symbols 8 and 9 as applicable) Commercial Automobile Liability coverage on an “occurrence” form including coverage for all owned, hired, and non-owned vehicles. The Combined Single Limit per occurrence shall not be less than \$2,000,000. If Contractor operates a personally-owned vehicle for business use under this Agreement, the Contractor shall obtain, at Contractor’s expense, and keep in effect during the term of the Agreement, business automobile liability coverage for all owned vehicles on an “occurrence” form. The Combined Single Limit per occurrence shall not be less than \$2,000,000.

D. Workers’ Compensation Insurance

The Consultant, its subcontractors, if any, and all employers providing work, labor or materials under this Agreement are subject employers under the Oregon Workers’

Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage that satisfies Oregon law for all their subject workers. Out-of-state employers must provide Oregon workers' compensation coverage for their workers who work at a single location within Oregon for more than 30 days in a calendar year. Consultants who perform work without the assistance or labor of any employee need not obtain such coverage. This shall include Employer's Liability Insurance with coverage limits of not less than \$1,000,000 each accident.

E. Additional Insured Provision

All policies aforementioned, other than Workers' Compensation and Professional Liability, shall include the City its officers, employees, agents and representatives as additional insureds with respect to this Agreement. Coverage will be endorsed to provide a "per project" aggregate.

F. Extended Reporting Coverage

If any of the aforementioned liability insurance is arranged on a "claims-made" basis, Extended Reporting coverage will be required at the completion of this Agreement to a duration of 24 months or the maximum time period the Consultant's insurer will provide such if less than 24 months. Consultant will be responsible for furnishing certification of Extended Reporting coverage as described or continuous "claims-made" liability coverage for 24 months following contract completion. Continuous "claims-made" coverage will be acceptable in lieu of Extended Reporting coverage, provided its retroactive date is on or before the effective date of this Agreement. Coverage will be endorsed to provide a "per project" aggregate.

G. Notice of Cancellation

There shall be no cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage without 30 days written notice to the City. Any failure to comply with this provision will not affect the insurance coverage provided to the City. The 30 days' notice of cancellation provision shall be physically endorsed on to the policy.

H. Insurance Carrier Rating

Coverage provided by the Consultant must be underwritten by an insurance company deemed acceptable by the City. All policies of insurance must be written by companies having an A.M. Best rating of "A-VII" or better, or equivalent. The City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.

I. Self-Insurance

The City understands that some Contractors may self-insure for business risks and the City will consider whether such self-insurance is acceptable if it meets the minimum insurance requirements for the type of coverage required. If the Contractor is self-insured for commercial general liability or automobile liability insurance the Contractor must provide evidence of such self-insurance. The Contractor must provide a Certificate of Insurance showing evidence of the coverage amounts on a form acceptable to the

City. The City reserves the right in its sole discretion to determine whether self-insurance is adequate.

J. Certificates of Insurance

As evidence of the insurance coverage required by the Agreement, the Consultant shall furnish a Certificate of Insurance to the City. No contract shall be effective until the required Certificates of Insurance have been received and approved by the City. The certificate will specify and document all provisions within this Agreement and include a copy of Additional Insured Endorsement. A renewal certificate will be sent to the address below prior to coverage expiration.

K. Primary Coverage Clarification

The parties agree that Consultant's coverage shall be primary to the extent permitted by law. The parties further agree that other insurance maintained by the City is excess and not contributory insurance with the insurance required in this section.

L. Cross-Liability Clause

A cross-liability clause or separation of insureds clause will be included in all general liability and commercial automobile policies required by this Agreement.

A certificate in form satisfactory to the City certifying to the issuance of such insurance will be forwarded to:

City of Scappoose
Attn: City Manager
33568 E Columbia Ave
Scappoose, Oregon 97056

Such policies or certificates must be delivered prior to commencement of the work. The procuring of such required insurance shall not be construed to limit Consultant's liability hereunder. Notwithstanding said insurance, Consultant shall be obligated for the total amount of any damage, injury, or loss caused by negligence or neglect connected with this Agreement.

15. Termination Without Cause

At any time and without cause, either party shall have the right in its sole discretion, to terminate this Agreement by giving notice to the other party. If City terminates the Agreement pursuant to this paragraph, it shall pay Consultant for services rendered to the date of termination.

16. Termination With Cause

A. City may terminate this Agreement effective upon delivery of written notice to Consultant, or at such later date as may be established by City, under any of the following conditions:

- 1) If City funding from federal, state, local, or other sources is not obtained and continued at levels sufficient to allow for the purchase of the indicated quantity of services. This Agreement may be modified to accommodate a reduction in funds.
- 2) If Federal or State regulations or guidelines are modified, changed, or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this Agreement.
- 3) If any license or certificate required by law or regulation to be held by Consultant, its subcontractors, agents, and employees to provide the services required by this Agreement is for any reason denied, revoked, or not renewed.
- 4) If Consultant becomes insolvent, if voluntary or involuntary petition in bankruptcy is filed by or against Consultant, if a receiver or trustee is appointed for Consultant, or if there is an assignment for the benefit of creditors of Consultant. Any such termination of this Agreement under paragraph (A) shall be without prejudice to any obligations or liabilities of either party already accrued prior to such termination.

B. City, by written notice of default (including breach of contract) to Consultant, may terminate the whole or any part of this Agreement:

- 1) If Consultant fails to provide services called for by this Agreement within the time specified herein or any extension thereof, or
- 2) If Consultant materially breaches any term of this Agreement, fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from City, fails to correct such failures within ten days or such other period as City may authorize.

C. In the event of a termination for cause, Consultant will be entitled to compensation for Services performed only to the extent that the City 's cost in obtaining replacement services is less than the amount that would be Consultant under this Agreement for such services. To the extent the cost of such replacement services exceed the amount that would be due Consultant under this Agreement for such service, Consultant will be responsible for paying the difference to the City within 10 days of receipt of proof of the cost of such replacement services. In the event of a termination for cause, the City will also be entitled to pursue any remedy available to it in law or in equity. Termination of this Agreement by the City shall not constitute a waiver or termination of any rights, claims, or causes of action the City may have against Consultant. Upon a determination by a court or an arbitrator that any termination for cause by the City was wrongful, such termination will be deemed converted to a termination for convenience as set forth above.

17. Cessation of Services

Upon receiving a notice of termination, and except as otherwise directed in writing by the City, Consultant will immediately cease all activities related to the Services.

18. Delivery of Work Product

As directed by the City, Consultant shall, upon termination, promptly deliver to the City all documents, information, works in progress and other property that are deliverables or would be deliverables if the Agreement had been completed.

19. Non-Waiver

The failure of City to insist upon or enforce strict performance by Consultant of any of the terms of this Agreement or to exercise any rights hereunder, should not be construed as a waiver or relinquishment to any extent of its rights to assert or rely upon such terms or rights on any future occasion.

20. Debt Limitations.

Any provision of this Agreement that is held by a court to create an obligation that violates the debt limitation of Article XI, Section 9 of the Oregon Constitution will be void. The City's obligation to make payments under this Agreement is conditioned upon appropriation of funds pursuant to ORS 294.305 to 294.565.

21. Method and Place of Giving Notice, Submitting Bills and Making Payments

All notices, bills and payments shall be made in writing and may be given by personal delivery, mail, or by fax. Payments may be made by personal delivery, mail, or electronic transfer. The following addresses shall be used to transmit notices, bills, payments, and other information:

CITY OF SCAPPOOSE

Attn:
Address: 33568 E Columbia Ave
Scappoose, Oregon 97056
Phone:
Fax: (503) 543-5679
Email :

(NAME OF ENGINEERING FIRM)

Attn:
Address:

Phone:
Fax:
Email:

Attn: Jill Herr, Finance Administrator
Address: 33568 E Columbia Ave
Scappoose, Oregon 97056
Phone: 503-543-7146
Fax: (503) 543-7182
Email: jherr@cityofscappoose.org

and when so addressed, shall be deemed given upon deposit in the United States mail, postage prepaid, or when so faxed, shall be deemed given upon successful fax. In all other instances, notices, bills and payments shall be deemed given at the time of actual delivery. Changes may be made in the names and addresses of the person to whom notices, bills and payments are to be given by giving written notice pursuant to this paragraph.

22. Merger

This writing is intended both as a final expression of the Agreement between the parties with respect to the included terms and as a complete and exclusive statement of the terms of the Agreement. No modification of this Agreement shall be effective unless and until it is made in writing and signed by both parties.

23. Professional Services

The City requires that services provided pursuant to this Agreement shall be provided to the City by a Consultant, which does not represent clients on matters contrary to City interests. Further, Consultant shall not engage services of a Consultant and/or other professional who individually, or through members of his/her same firm, represents clients on matters contrary to City interests. Should the Consultant represent clients on matters contrary to City interests or engage the services of a Consultant and/or other professional who individually, or through members of his/her same firm, represents clients on matters contrary to City interests, Consultant shall consult with the appropriate City representative regarding the conflict. After such consultation, the Consultant shall have seven (7) days to eliminate the conflict to the satisfaction of the City. If such conflict is not eliminated within the specified time period, the Agreement may be terminated pursuant to Section 10 (B) of this Agreement.

24. Force Majeure

Neither City nor Consultant shall be considered in default because of any delays in completion and responsibilities hereunder due to causes beyond the control and without fault or negligence on the part of the parties so disenabled, including but not restricted to, an act of God or of a public enemy, civil unrest, volcano, earthquake, fire, flood, epidemic, quarantine restriction, area-wide strike, freight embargo, unusually severe weather or delay of subcontractor or supplies due to such cause; provided that the parties so disenabled shall within ten days from the beginning of such delay, notify the other party in writing of the cause of delay and its probable extent. Such notification shall not be the basis for a claim for additional compensation. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon cessation of the cause, diligently pursue performance of its obligation under the Agreement.

25. Non-Discrimination

Consultant agrees to comply with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Consultant also shall comply with the Americans with Disabilities Act of 1990, ORS 659A.142, and all regulations and administrative rules established pursuant to those laws.

26. Errors

Consultant shall perform such additional work as may be necessary to correct errors in the work required under this Agreement without undue delays and without additional cost.

27. Governing Law

The provisions of this Agreement shall be construed in accordance with the laws of the State of Oregon without regard to the principles of conflicts of law. Any action or suits involving any question arising under this Agreement must be brought in the Columbia County Circuit Court, of the State of Oregon.

28. Compliance With Applicable Law

Consultant shall comply with all federal, state, and local laws and ordinances applicable to the work under this Agreement, including those set forth in ORS 279A, 279B, and 279C.

29. Conflict Between Terms

It is further expressly agreed by and between the parties hereto that should there be any conflict between the terms of this instrument in the proposal of the Agreement, this instrument shall control and nothing herein shall be considered as an acceptance of the said terms of said proposal conflicting herewith.

30. Access to Records

City shall have access to such books, documents, papers and records of Consultant and subcontractors as are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcripts.

31. Audit

Consultant shall maintain records to assure conformance with the terms and conditions of this Agreement, and to assure adequate performance and accurate expenditures within the contract period. Consultant agrees to permit City, the State of Oregon, the federal government, or their duly authorized representatives to audit all records pertaining to this Agreement to assure the accurate expenditure of funds.

32. Severability

In the event any provision or portion of this Agreement is held to be unenforceable or invalid by any court of competent jurisdiction, the validity of the remaining terms and provisions shall not be affected to the extent that it did not materially affect the intent of the parties when they entered into the Agreement.

33. Representations and Warranties

Consultant represents and warrants to the City that:

A. Consultant has the power and authority to enter into and perform this Agreement.

B. The person executing this Agreement on behalf of Consultant has actual authority to bind Consultant to the terms of this Agreement.

C. This Agreement, when executed and delivered, is a valid and binding obligation of Consultant, enforceable in accordance with its terms.

D. Consultant is an experienced firm having the skill, legal capacity, and professional ability necessary to perform the Basic Services and any additional services required under this Agreement.

D. Consultant (to the best of Consultant's knowledge, after due inquiry), for a period of no fewer than six calendar years (or since the firm's inception if less than that) preceding the effective date of this Agreement, faithfully has complied with:

1) All tax laws of this state, including but not limited to ORS 305.620 and ORS chapters 316, 317, and 318;

2) Any tax provisions imposed by a political subdivision of this state that applied to Consultant, to Consultant's property, operations, receipts, or income, or to Consultant's performance of or compensation for any work performed by Consultant;

3) Any tax provisions imposed by a political subdivision of this state that applied to Consultant, or to goods, services, or property, whether tangible or intangible, provided by Consultant; and

4) Any rules, regulations, charter provisions, or ordinances that implemented or enforced any of the foregoing tax laws or provisions.

E. Any intellectual property rights, or similar rights, delivered to the City under this Agreement, and Consultant's services rendered in the performance of Consultant's obligations under this Agreement, shall be provided to the City free and clear of any and all restrictions on or conditions of use, transfer, modification, or assignment, and shall be free and clear of any and all liens, claims, mortgages, security interests, liabilities, charges, and encumbrances of any kind.

F. The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided in this Agreement or at law.

34. Compliance with Tax Laws

A. Consultant must, throughout the duration of this Agreement and any extensions, comply with all tax laws of this state and all applicable tax laws of any political subdivision of the State of Oregon. For the purposes of this Section, "tax laws" includes all the provisions described in subsection 25.C. 1) through 4) of this Agreement.

B. Any violation of subsection A of this section shall constitute a material breach of this Agreement. Further, any violation of Consultant's warranty, in subsection 25.C of this Agreement, that the Consultant has complied with the tax laws of the State of Oregon and the applicable tax laws of any political subdivision of this state also shall constitute a material breach of this Agreement. Any violation shall entitle the City to terminate this Agreement, to pursue and recover any and all damages that arise from the breach and the termination of this Agreement, and to pursue any or all of the remedies available under this Agreement, at law, or in equity, including but not limited to:

- 1) Termination of this Agreement, in whole or in part;
- 2) Exercise of the right of setoff, and withholding of amounts otherwise due and owing to Consultant, in an amount equal to State's setoff right, without penalty; and
- 3) Initiation of an action or proceeding for damages, specific performance, declaratory or injunctive relief. The City shall be entitled to recover any and all damages suffered as the result of Consultant's breach of this Agreement, including but not limited to direct, indirect, incidental and consequential damages, costs of cure, and costs incurred in securing a replacement Consultant. These remedies are cumulative to the extent the remedies are not inconsistent, and the City may pursue any remedy or remedies singly, collectively, successively, or in any order whatsoever.

35. No Third Party Beneficiaries

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against the City or Consultant. Consultant's Services under this Agreement shall be performed solely for the City's benefit and no other entity or person shall have any claim against Consultant because of this Agreement for the performance or nonperformance of the Services.

36. Complete Agreement

This Agreement, including the exhibits, is intended both as a final expression of the Agreement between the Parties and as a complete and exclusive statement of the

terms. In the event of an inconsistency between a provision in the main body of the Agreement and a provision in the Exhibits, the provision in the main body of the Agreement shall control. No waiver, amendment, consent, modification, or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. Such waiver, amendment consent, modification, or change if made, shall be effective only in specific instances and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. Consultant, by the signature of its authorized representative, hereby acknowledges that he/she has read this Agreement, understands it and agrees to be bound by its terms and conditions.

IN WITNESS WHEREOF, City has caused this Agreement to be executed by its duly authorized undersigned officer and Consultant has executed this Agreement on the date hereinabove first written.

CITY OF SCAPPOOSE

ENGINEER

By: Michael Sykes, City Manager

By: Authorized Contractor Representative

Date

Date