

FORSYTH COUNTY)
)
NORTH CAROLINA)

PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made this _____ day of _____, 2010 by and between the **CITY OF WINSTON-SALEM**, North Carolina, a North Carolina Municipal Corporation with principal offices at 101 North Main Street, Winston-Salem, North Carolina 27101 (hereinafter "City") and _____, a North Carolina Corporation with its principal place of business located at _____ (hereinafter "Consultant").

WITNESSETH:

Professional Services Rendered

In consideration of the monetary payment hereinafter described in Attachment A- Project Scope, Schedule and Fee Proposal, attached hereto and made a part hereof, the Consultant shall provide services as detailed in the aforementioned Attachment A.

Relationship

The City and Consultant agree that the Consultant is a professional corporation, and that the relationship created by this contract is that of employer and independent contractor. The Consultant is not an employee of the City of Winston-Salem, and is not entitled to the benefits provided by employer to its employees, including, but not limited to, group insurance and pension plan. The Consultant may practice his profession for others during those periods when the Consultant is not performing work under this contract for the City. This Agreement will not be construed in any way to be a joint venture, partnership or employer-employee relationship. The Consultant further understands and agrees that he is responsible for the payment of all state and federal income taxes. In addition, where applicable, the Consultant shall provide the City with a business license and/or any other licenses or certifications required by federal, state or local law as well as copies of any amendments or renewals thereof. The Consultant shall give the City at least thirty (30) days written notice prior to any cancellation, modification or non-renewal of any license and/or certification required by federal, state or local law.

Supervision and Control

In the performance of the work contemplated in this Agreement, the Consultant is an independent contractor with the authority to control and direct the performance of the details of the services that are the subject of this contract. However, the work contemplated in this Agreement must meet the approval of the City (Owner's Representative/Agent) and shall be subject to City's general rights of inspection, review and supervisory control to secure the satisfactory completion thereof. This Agreement shall be administered on behalf of the City by the Owner's Representative (see p. 6 of 8). This supervision and control by the Owner's Representative shall include regular and frequent communication with the Consultant's Project Manager and key City staff. The Owner's representative shall coordinate review/approval of all project deliverables including pay requests, reports, etc.

Compensation

The City agrees to pay the Consultant compensation as detailed in Attachment A, attached hereto and made a part hereof. Bills for fees or other compensation for Services or expenses shall be submitted to the City in detail sufficient for a proper pre-audit and post-audit thereof. Consultant will complete project work pursuant to the schedule detailed in Attachment A.

Invoices

1. Submittal

Invoices to the City for compensation shall be submitted on a monthly basis for work completed. Each invoice shall be based on the approved Attachment A- Project Scope, Schedule and Fee Proposal. The proposal shall be broken into major phases with respect to project deliverables, schedule and cost and shall be acceptable to the City Representative. Monthly invoices shall reflect the approved fees for each phase and shall reflect previous payments; percent complete previous invoice, this invoice and remaining fee. Reimbursable expenses shall be detailed with accompanying receipts and shall indicate previous, current reimbursable expenses and remaining estimate for same. The proposal shall provide space for the Owner's Representative, Assistant City Manager, and City Manager approval.

2. Receipts Required

Where invoices are based in part on reimbursable expenses, the Consultant shall collect and maintain receipts for said expenses and shall make the receipts available to the City, if requested. The requirement to retain receipts shall generally follow the established rules of the Federal Internal Revenue Service regarding what type of expenditure must be supported by receipts for income tax purposes.

3. Disputed Items

If any items in any invoices submitted by the Consultant are disputed by City for any reason, including the lack of supporting documentation, City shall temporarily delete the item(s) and shall promptly notify the Consultant of dispute and request clarification and/or remedial action. After the dispute has been settled, the Consultant shall include the disputed item on a subsequent regularly scheduled invoice or on a special invoice for the disputed item only. The undisputed portion of the invoices shall, however, be paid within the normal 30-day period.

Payment of Taxes and Insurance

The Consultant assumes full responsibility for the payment of all assessments, payroll taxes, or contributions, whether State or Federal, as to all employees engaged in the performance of work under this contract. In addition, the Consultant agrees to pay any and all gross receipts, compensation, transaction, sales, use, or other taxes in effect at the time of signing this contract and assessments of whatever nature and kind levied or assessed as a consequence of the work performed or on the compensation paid under this contract.

Release and Indemnity

The Consultant hereby releases and forever discharges the City, its agents and employees, from any and all claims, demands, expenses, costs and liabilities of any kind or nature directly or indirectly related to any personal injury and/or property damage arising out of the performance of the Services, except those claims that result from the negligence of the City or a City employee acting within the scope of the employment. The Consultant shall indemnify and hold

harmless the City from and against all losses, costs, claims, damages, and expense, including but not limited to reasonable attorneys' fees, which the City may incur, arising out of the intentional or negligent act, error, or omission of the Consultant or any person or organization for whom the Consultant is responsible. The Consultant shall be solely responsible for all services provided within the Scope of Services and for the completeness and accuracy of all documents and supporting data prepared by the Consultant, regardless of the City's approval of same. The Consultant shall be held responsible for any damage to property or injury to persons occurring by reason of the Consultant's services on this project. Upon completion of all services, obligations and duties provided for in this Agreement, or in the event of termination of this Agreement for any reason, the terms and conditions of this section shall survive.

Insurance

The Consultant shall, during the continuance of all work under this Agreement, provide the following:

1. Workers' Compensation insurance, such as meets the statutory requirements of the State of North Carolina, and Employer's Liability insurance of at least \$100,000.00 per incident to protect the Consultant from any liability or damages for any injuries (including death and disability) to any and all of its employees, volunteers, or subcontractors, including any and all liability or damage which may arise by virtue of any law in force within the State of North Carolina or which may be hereinafter enacted.
2. Commercial General Liability insurance (including contractual liability insurance) of at least \$1,000,000.00 per occurrence to protect the Consultant, and its consultants, agents, successors, assigns, officers or employees, and the City against any and all losses, costs, claims, damages, liabilities, judgments, awards and expenses, including, but not limited to, reasonable attorneys' fees, wherever located, resulting from any negligent or willful action or operation by the Consultant, or its consultants, agents, successors, assigns, officers or employees, pursuant to or in connection with this Agreement. The Commercial General Liability insurance shall also include coverage for explosion, collapse, and underground hazards, where required.
3. Professional Liability insurance of at least \$1,000,000.00 per claim to protect the Consultant and the City against any and all losses, costs, claims, damages, liabilities, judgments, awards and expenses, including, but not limited to, reasonable attorneys' fees, wherever located, resulting from the Consultant's negligent errors and/or omissions.
4. Owned, non-owned, and hired Automobile Liability insurance, including property damage insurance, covering all owned, non-owned, borrowed, leased, or rented vehicles operated by the Consultant in furtherance of these services. In addition, all mobile equipment used by the Consultant in connection with the contract work, will be insured under either a standard Automobile Liability policy, or a Comprehensive General Liability policy. This insurance shall provide bodily injury and property damages limits of not less than \$1,000,000 combined single limit/aggregate.

Prior to execution of this Agreement, the Consultant shall provide to City of Winston-Salem's Risk Manager an original, signed Certificate of Insurance evidencing that the Consultant has in

place the insurance described above and that, with regards to Commercial General Liability, Employer's Liability and Professional Liability insurance, such insurance is primary to any other coverage available to the City. With regards to the Commercial General Liability policy, the City shall be named as an additional insured. Said Certificate of Insurance shall be attached hereto as Attachment B.

The Consultant will secure and maintain similar insurance policies of its consultants or subcontractors, which shall be made available to the City on demand. The Consultant shall furnish the City thirty days' written notice of any changes or cancellation of the policies set out above. The Consultant's failure to deliver a new and valid certificate will result in suspension of all payments until the new certificate is furnished to the City of Winston-Salem's Risk Manager. Should the Consultant fail to provide acceptable evidence of current insurance within seven days of written notice at any time during this Agreement, the City shall have the absolute right to terminate this Agreement without any further obligation to the Consultant, other than paying for services rendered as of the date of termination, and the Consultant shall be liable to the City for the **entire additional cost of procuring the uncompleted** portion of this Agreement from another source.

Compliance by the Consultant and its consultants with the foregoing insurance requirements shall not relieve the Consultant or its consultants of their liabilities and obligations under this heading or under any other section or provision of this Agreement.

Contractual and other Liability insurance provided under this Agreement shall not contain a supervision, inspection or consultant services exclusion that would preclude the City from supervising and/or inspecting the project as to the end result. The Consultant shall assume all on-the-job responsibilities as to the control of persons directly employed by it and of its consultants and their respective employees.

Municipal Exclusions shall be deleted from the above-referenced insurance policies.

Upon completion of all services, obligations and duties provided for in this Agreement, or in the event of termination of this Agreement for any reason, the terms and conditions of these insurance provisions shall survive for a period of one year.

The above-mentioned indemnity and insurance provisions are hereby incorporated, by reference, into all agreements related to this project and entered into between the Consultant and the City.

Termination

The obligation to provide further services under this Agreement may be terminated by either party upon thirty (30) days written notice in the event of substantial failure by the other party to perform in accordance with the terms thereof through no fault of the terminating party. The nonperforming party shall be given a ten (10) calendar day cure period to show progress (satisfactory to the terminating party) after the written notice (delivered by certified mail, return receipt requested) of intent to terminate. In the event of any termination, the Consultant will be paid for all services properly rendered and Reimbursable Expenses properly incurred to the date of termination. The City reserves the right to terminate the Agreement for reasons of

convenience or if the services are no longer needed with the same termination conditions previously stated except the ten (10) day cure period. In the event of any termination, the section governing Reuse of Documents applies to any and all documentation, drawings, reports, calculations, etc. produced by the Consultant up to the date of termination.

Upon any termination, the Consultant shall (1) promptly discontinue all services affected (unless a termination notice from the City directs otherwise); and (2) deliver or otherwise make available to the City all documents, data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the Consultant in performing this Agreement, whether completed or in process.

Reuse of Documents

All documents, including reports, photographs, spreadsheets, cost estimates, drawings, specifications, supporting calculations, computer software, etc., prepared by the Consultant pursuant to this Agreement are instruments of service with respect to this Agreement. The reuse of these documents by others authorized by the City entitles the Consultant to no additional compensation as the documents are the property of the City. The City reserves the right to require the Consultant to submit copies to the City of any Project file information and documentation during and after the completion of the Project with the Consultant's compensation being only the direct printing and copying expense and/or direct expenses to copy and supply computer information on a diskette. The Consultant's work product which is prepared solely for the purposes of this Agreement, including, but not limited to, drawings, test results, recommendations and technical specifications, whether in hard copy or electronic form, shall become the property of the City when the Consultant has been fully compensated as set forth herein. The Consultant may keep copies of all work products for its records, unless otherwise agreed with the City that all work products shall be returned to the City.

Rights

City retains the exclusive rights to cancel, stop or re-schedule any or all services associated with the Contract.

Successors and Assigns

The City and Consultant are hereby bound and the partners, successors, executors, administrators and legal representatives of the City and Consultant are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements and obligations of this Agreement.

Neither the City nor Consultant may assign, sublet or transfer any rights under or interest (including, but without limitation, moneys that may become due or moneys that are due) in this Agreement without the written consent of the other, except to the extent that any assignment, subletting or transfer is mandated by law or the effect of this limitation may be restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.

Except as may be expressly stated otherwise in this Agreement, nothing under this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than the City and Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of the City and Consultant and not for the benefit of any other party.

Notices

Any notice required under this Agreement will be in writing, addressed to the appropriate party at the address appearing below (as modified in writing from time to time by such party) and given personally, by registered or certified mail, return receipt requested, by facsimile, or by a nationally recognized overnight courier service. All notices shall be effective upon the date of receipt.

Name and contact information for giving notices:

CITY OF WINSTON-SALEM:
CITY REPRESENTATIVE/AGENT/PROJECT MANAGER
Russell W. Byrd, PE, Building Projects Engineer
Capital Buildings Division
Suite 53, City Hall
101 N. Main Street
P.O. Box 2511
Winston-Salem, NC 27102
Email: russellb@cityofws.org
Office Phone: 336-747-6830
Mobile Phone: 336-414-0714

CONSULTANT:
CONSULTANT PROJECT MANAGER
Company Name: _____
Project Manager Name and Title: _____
Physical Address: _____
Mailing Address: _____
Email: _____
Office Phone: _____
Mobile Phone: _____

Americans with Disabilities Act

The Consultant shall use its reasonable professional efforts and judgment to interpret and comply with all applicable provisions of the Americans with Disabilities Act (ADA) and all rules and regulations promulgated thereunder. The Consultant hereby agrees to indemnify and hold harmless the City from and against all damages, costs, losses and expenses, including reasonable attorney’s fees, arising out of or connected with the failure of the Consultant or its consultants, agents, successors, assigns, officers or employees to comply with provisions of the ADA or the rules and regulations promulgated thereunder. The Consultant cannot and does not warrant or

guarantee that the Project will comply with all interpretations of the ADA or the rules and regulations promulgated thereunder.

Safety Rules

The Consultant hereby acknowledges that it has reviewed and agrees to abide by the City's "Safety and Environmental Requirements for Contractors" located on the City's website – www.cityofws.org – and whose specific address is:

[http://www.cityofws.org/Assets/CityOfWS/Documents/Employee Health and Safety/SafetyReq.pdf](http://www.cityofws.org/Assets/CityOfWS/Documents/Employee_Health_and_Safety/SafetyReq.pdf)

Ethics Policy

The Consultant hereby acknowledges that he has reviewed and agrees to abide by the City's Ethics Policy located on the City's website – www.cityofws.org – and whose specific address is: <http://www.cityofws.org/Home/FormsAndReports/Articles/Information#policies>.

OSHA and Equal Opportunity

The Consultant shall comply with the State of North Carolina Occupational/Safety and Health Act (OSHA) and the State and Federal Equal Opportunity Statutes, as well as all rules and regulations promulgated thereunder.

Waiver

No waiver by either party of any default by the other party in performance of any provision of this Agreement should operate or be construed as a waiver of any future default, whether like or different in character.

Compliance With Applicable Law

Any term or condition of the Contract which by operation or existence is in conflict with applicable Local, State, or Federal Law shall be rendered void and inoperative. City and the Consultant agree to accept the remaining terms and conditions.

Agreement Form

Headings within the Agreement are for convenience only and do not define, limit, or construe the contents of such sections.

Severance

If any provision or part of the Agreement is held to be void, invalid, illegal or unenforceable under any law or regulation such void, invalid, illegal or unenforceable provision shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon both the City and Consultant and this Agreement shall be considered as if such void, invalid, illegal or unenforceable provision had never been included herein.

Governing Law

This Agreement is made under, and in all respects shall be interpreted, construed, and governed by and in accordance with, the laws of the State of North Carolina. Venue for any legal action resulting from this Agreement shall lie in Forsyth County.

Scope of Agreement

This Agreement (consisting of Pages 1 to 8 inclusive, and Attachments A and B identified above) is intended by the parties hereto to be the final expression of their Agreement, and it constitutes the full and entire understanding between the parties with respect to the subject hereof, notwithstanding any representations, statements, or agreements to the contrary heretofore made.

Amendments

Alterations, deletions, and/or additions to the terms and conditions of this Agreement may only be made by the mutual written consent of the parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the date first above written.

ATTEST:

(SEAL)

Signature: _____
Print Name: _____
Secretary

Signature: _____
Print Name: _____
Title: _____

ATTEST:

CITY OF WINSTON-SALEM

(SEAL)

By: _____
Renée L. Phillips
City Secretary

By: _____
Lee D. Garrity
City Manager

This instrument has been preaudited in the manner required by the Local Government and Fiscal Control Act.

Approved as to form and legality.

This ____ day of _____, 2010.

This ____ day of _____, 2010.

By Lisa Saunders, Assistant Financial Officer

By Angela I. Carmon, City Attorney

Attached hereto on following pages:
Attachment A- Project Scope, Schedule and Fee Proposal dated __/__/__
Attachment B- Certificates of Insurance dated __/__/__