

PROFESSIONAL SERVICES AGREEMENT
between the
CITY OF JOHNSON CITY AND SEH, INC.

This Professional Services Agreement ("Agreement") is entered into by and between the City of Johnson City, Texas ("City"; "Client") a Type A General-Law municipality, and Short Elliott Hendrickson Inc. ("SEH"; "Consultant"), individually "Party", collectively "the Parties", for assistance by SEH with the City's interim aeration equipment selection project.

WHEREAS, the City is performing upgrades and improvements to its existing wastewater aeration basins ("Project"); and

WHEREAS, SEH has extensive experience and expertise regarding the Project and the City seeks to retain SEH to assist in the Project in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual agreements and covenants set forth herein, the Parties agree as follows:

- 1. Purpose.** Through this Agreement, SEH will assist the City with the following:
 - a. Sewer loading mathematical calculations based on loading (concentration) and flow;
 - b. Determination on sufficient and adequate electric output from the City wastewater plant;
 - c. Evaluation of square footage sewer aeration basins for operation of additional devices;
 - d. Design of a plan to bring the minimum current dissolved oxygen level from a range of .06-2.0 to a standard minimum range of 2.0-plus to be achieved with additional aeration equipment, if necessary; and
 - e. Assist City Engineer with after-build inspection to evaluate the dissolved oxygen levels.
- 2. Scope of Agreement.**
 - a. The Parties agree that the Parties shall perform services related to the Project in accordance with the terms and conditions outlined herein, and in the "Agreement for Professional Services", attached hereto as *Exhibit A* and incorporated fully herein. To the extent there is a conflict or discrepancy between the provisions of this Agreement and those in Exhibit A, it is understood and agreed that the provisions of this Agreement shall be controlling.
 - b. SEH is not a generator, handler, arranger, transporter, or disposer of hazardous substances. If hazardous substances are found on the project site, then SEH may stop work until the City has remediated the site.
- 3. Compensation and Payment.**
 - a. The total compensation for the Project services shall not exceed \$4,500. Local and state sales taxes are excluded from the contract price. SEH is responsible for sales taxes absent a sales tax exemption certificate.
 - b. The City shall not be under any obligation to pay for services and/or expenses, including expenses for overtime work, special expense and subconsultant services, incurred by SEH beyond those described in this Agreement without prior written authorization approved by the City.

- #### 4. Documents.

- ## 5. Insurance.

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- v. Professional Liability and Errors and Omissions \$1,000,000 each claim/\$1,000,000 each policy year aggregate.
 - vi. Each policy shall be maintained to cover claims made within three (3) years after termination of the Agreement.
 - c. Required Provisions. The City of Johnson City shall be named as an additional insured on Commercial General Liability, Automobile, and Umbrella policies and shall be granted a waiver of subrogation under those policies. The certificates shall include a 30-day advance written notice to the City of any reduction in the limit of liability by endorsement of the policy, cancellation or non-renewal of the insurance coverage required under this Agreement.
 - d. Failure as Breach. Failure to maintain the required insurance during the term of the Agreement shall be deemed a breach of the Agreement.
 - e. Copy to City. Upon its execution of this Agreement, and prior to initiation of the work, SEH shall furnish the certificates of insurance to the City evidencing compliance with the stated insurance requirements.
6. **Effective Date; Term.** This Agreement shall be effective upon the latest date of its execution by the Parties, and shall remain in force until all obligations under this Agreement have been fulfilled, or unless sooner terminated as provided herein. The Parties estimate that services will be completed within one month of SEH obtaining the necessary data for performance from the City.
7. **Termination.** This Agreement may be terminated by either Party for convenience upon 30-day advance notice to SEH. This Agreement may be terminated by either Party for cause upon notice setting forth the basis for the termination and failure by the recipient party to cure the default described in the notice within ten business (10) days after the date of the notice. Upon termination in either circumstance, compensation shall issue for services up to the date of termination.
8. **Independent Contractor; No Joint Venture or Third-Party Rights.** SEH is an independent contractor and shall not be considered an employee or agent of the City. This Agreement shall not be deemed or construed by the Parties or by any third person to create the relationship of principal and agent, partnership, joint venture, or any other association between the Parties, other than the relationship described herein. This Agreement is not intended to confer any, rights, privileges, or causes of action upon any third party.
9. **Standard of Care and Skill.** SEH asserts that it is experienced and fully qualified to perform the services contemplated by this Agreement, and that it is properly licensed, pursuant to applicable law, to perform such services. The standard of care for all professional engineering and related services performed by or furnished by SEH under this Agreement will be the care and skill ordinarily exercised by members of SEH's profession practicing under the similar circumstances at the same time and in the same locality.
10. **Assignment.** This Agreement may not be assigned or transferred to any other person, firm, or corporation without the prior written consent of the parties.
11. **Entire Agreement; Amendment.** This Agreement represents the entire agreement between the Parties. This Agreement supersedes any prior oral or written communications,

representations or agreements between the Parties relating to the Project. This Agreement may be modified or amended at any time in writing signed by both Parties and upon City Council approval.

12. Severability. If for any reason any clause, sentence, paragraph, section or part of this Agreement is held invalid, unconstitutional, or unenforceable by a court of law or administrative agency with jurisdiction over the matter, such action shall not affect any valid provision of this Agreement.

13. INDEMNIFICATION. SEH AGREES TO AND SHALL INDEMNIFY AND HOLD HARMLESS (BUT NOT DEFEND) THE CITY AND CITY'S ELECTED OFFICIALS, OFFICERS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL THIRD-PARTY TORT CLAIMS, SUITS, LOSSES, DEMANDS, DAMAGES, COSTS, LIABILITIES, AND EXPENSES, INCLUDING ATTORNEY'S FEES, OF ANY NATURE WHATSOEVER BY A THIRD PARTY ARISING OUT OF SEH'S NEGLIGENT PERFORMANCE OF THE DUTIES REQUIRED BY THIS AGREEMENT. NOTHING CONTAINED IN THIS AGREEMENT SHALL BE CONSTRUED AS A WAIVER OF OR RELINQUISHMENT OF GOVERNMENTAL OR SOVEREIGN IMMUNITY BY THE CITY. THE INDEMNITY PROVIDED HEREIN SHALL SURVIVE TERMINATION AND/OR EXPIRATION OF THIS AGREEMENT.

14. Limitation of Liability.

- a. Neither Party shall be liable to the other for any indirect, incidental, consequential, special, reliance or punitive damages or lost or imputed profits or lost data arising from or relating to this Agreement save for actions arising of SEH's negligent performance of this Agreement in accordance with the indemnity provision herein.
- b. In the event the City incurs costs and expenses to remedy errors as a result of a breach by SEH, SEH shall reimburse the City for those remediation costs and expenses.
- c. The City hereby agrees that SEH's total liability to the City for all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to the Project or this Agreement from any cause or causes including, but not limited to, SEH's negligence, errors, omissions, strict liability, breach of contract or breach of warranty shall not exceed the maximum as provided under the applicable insurance policy or \$500,000, whichever is less.

15. Waiver of Contractual Right. A waiver by either Party of a breach of this Agreement must be in writing to be effective. Such waiver shall not affect the waiving party's rights with respect to any other or subsequent breach. The failure of any Party to enforce any provision of this Agreement shall not be construed as a waiver of limitation to that Party's right to subsequently enforce and compel strict compliance with every provision of the Agreement.

16. Applicable Law; Venue. The laws of the State of Texas shall govern this Agreement. Venue for any disputes arising under this Agreement shall be in Blanco County, Texas.

17. Dispute Resolution; Litigation Costs. In the event of any disagreement or conflict concerning the interpretation of this Agreement, and such disagreement cannot be resolved by the Parties, such disagreement shall be submitted to non-binding mediation prior to

commencing any litigation or other dispute resolution procedure. The costs associated with any such mediation shall be equally shared by the parties. Each party shall be responsible for the payment of its own attorney fees. In the event of litigation, each Party shall be responsible for its own costs and fees of negotiation, mediation and/or litigation, and waives its right to recovery from the prevailing Party of litigation costs and fees, including attorneys' fees. No Party will be liable to the other under this Agreement for consequential damages, including lost profits, or exemplary damages.

- 18. Notice.** Any notice required shall be in writing and shall be delivered either in person or deposited in the United States mail, postage prepaid, addressed to the party at the address shown herein. A notice shall be deemed delivered when received if delivered personally or if sent by Federal Express or other carrier, or 72 hours after deposit if sent by First Class, certified mail, return receipt requested, through the U.S. Postal Service.
- 19. Authority; Counterparts.** Each person who signs this Agreement states that he has the express authority to sign this Agreement and to bind the entity he represents to all of the terms and conditions stated herein. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document. Facsimile or electronic transmission of executed signatures are deemed to constitute fully enforceable and binding originals.
- 20. City Duty.** The City shall, in proper time and sequence and where appropriate to the Project, at no expense to SEH, provide full information as to the City's requirements for the Services provided by SEH and access to all public and private lands required for SEH to perform its Services.

Remainder of page intentionally left blank.

Signature page[s] follow.

IN WITNESS WHEREOF, the Parties execute this Agreement and to be effective as of the last written date indicated below.

CITY OF JOHNSON CITY, TEXAS

Rhonda Stell, Mayor
City of Johnson City
P.O. Box 369
303 E. Pecan Drive
Johnson City, Texas 78636

Date

Attest:

Whitney Walston, City Secretary

Date

SHORT ELLIOTT HENDRICKSON INC. "SEH"

133 Otto Eckhardt Road
Fredericksburg, TX 78624-5078
Alternate address:
2351 Connecticut Avenue, Suite 300
Sartell, MN 56377



Signature

March 29, 2023

Date

Colin Marcusen, Associate

Printed Name and Title

EXHIBIT A

**SEH AGREEMENT FOR PROFESSIONAL SERVICES
The “SEH Letter Agreement”**

Including

Exhibit A-2 Payments to Consultant for Services and Expenses

and

Attachment - General Conditions of the Agreement for Professional Services

Agreement for Professional Services

This Agreement is effective as of January 31, 2023, between City of Johnson City, Texas (Client) and Short Elliott Hendrickson Inc. (Consultant).

This Agreement authorizes and describes the scope, schedule, and payment conditions for Consultant's work on the Project described as: **Interim Aeration Equipment Selection Assistance.**

Client's Authorized Representative: Brent Sultemeier, Public Works Director
Address: 303 East Pecan Drive, PO Box 369
Johnson City, TX 78636
Telephone: 830.868.7111 **email:** bsultemeier@johnsoncitytx.org

Project Manager: Colin Marcusen
Address: 2351 Connecticut Avenue, Suite 300
Sartell, MN 56377
Telephone: 320.290.3610 **email:** cmarcusen@sehinc.com

Scope: The Basic Services to be provided by Consultant as set forth herein are provided subject to the attached General Conditions of the Agreement for Professional Services (General Conditions Rev. 05.15.22), which is incorporated by reference herein and subject to Exhibits attached to this Agreement.

Johnson City's existing aeration basins are not meeting the oxygen demand necessary for secondary treatment. Knowing that that City is likely to embark on a project to replace the aeration basins in the coming years, SEH proposes to assist the City in selecting a temporary solution to increase oxygen supply to the aeration basins to ultimately allow the plant to meet effluent ammonia limits and reduce filamentous bacteria by maintaining higher dissolved oxygen levels in the basins. Specifically, SEH proposes the following scope of services:

- Flow and Loading Data Collection and Summary: SEH will obtain influent flow and loading information from City staff for the past year and will summarize the average and peak flows and loadings. Flow, CBOD, TSS, and Ammonia will be analyzed and reported.
- Total Oxygen demand required for maintaining a dissolved oxygen concentration of 2.0 mg/L or greater in the basins will be calculated based on the influent flow and load summaries and basin volume calculations based on dimensions shared by City staff.
- Calculations to determine the amount of air/oxygen supplied by the existing blowers and aeration system will be conducted. Assumptions for existing pipe sizing will be made based on input from City staff. Investigation into existing blower capacity will be conducted by contacting the manufacturer of the existing blowers.
- Based on the above calculations, SEH will calculate the amount of additional oxygen demand needed above what is currently installed.
- SEH will review equipment selections to meet the oxygen demand needs calculated. Equipment provided by EI² will be reviewed.
- SEH will work with the EI² product representative to determine electrical, structural, or other installation review needs. This scope includes a high level structural and electrical analysis for equipment selected.
- SEH's wastewater operations staff will review the equipment selection and make recommendations for installation or operation details.
- The findings of the above analysis will be summarized in a memo to be delivered to the City.
- SEH will conduct one site visit during installation of the proposed equipment.

Schedule:

SEH will initiate analysis immediately after notice to proceed by the City. It is anticipated that the calculations, equipment selection, and memo could be completed within one month of obtaining the necessary data noted above.

Payment:

The lump sum fee is \$4,900 including expenses and equipment.

The payment method, basis, frequency, and other special conditions are set forth in attached Exhibit A-2.

This Agreement for Professional Services, attached General Conditions, Exhibits and any Attachments (collectively referred to as the "Agreement") supersedes all prior contemporaneous oral or written agreements and represents the entire understanding between Client and Consultant with respect to the services to be provided by Consultant hereunder. In the event of a conflict between the documents, this document and the attached General Conditions shall take precedence over all other Exhibits unless noted below under "Other Terms and Conditions". The Agreement for Professional Services and the General Conditions (including scope, schedule, fee, and signatures) shall take precedence over attached Exhibits. This Agreement may not be amended except by written agreement signed by the authorized representatives of each party.

Other Terms and Conditions: Other or additional terms contrary to the General Conditions that apply solely to this project as specifically agreed to by signature of the Parties and set forth herein:
None.

[https://sehincazure.sharepoint.com/sites/contractmanagement/contract documents/contracts/1517 - Interim/contract/tr agreement for prof services.docx](https://sehincazure.sharepoint.com/sites/contractmanagement/contract%20documents/contracts/1517-Interim/contract/tr%20agreement%20for%20prof%20services.docx)

Short Elliott Hendrickson Inc.

City of Johnson City, Texas

By: 
Colin Marcusen
Title: Associate

By: _____
Title: _____

Exhibit A-2
to Supplemental Letter Agreement
Between City of Johnson City, Texas (Client)
and
Short Elliott Hendrickson Inc. (Consultant)
Dated January 31, 2023

Payments to Consultant for Services and Expenses
Using the Lump Sum Basis Option

The Agreement for Professional Services is amended and supplemented to include the following agreement of the parties:

A. Lump Sum Basis Option

The Client and Consultant select the Lump Sum Basis for Payment for services provided by Consultant. During the course of providing its services, Consultant shall be paid monthly based on Consultant's estimate of the percentage of the work completed. Necessary expenses and equipment are provided as a part of Consultant's services and are included in the initial Lump Sum amount for the agreed upon Scope of Work. Total payments to Consultant for work covered by the Lump Sum Agreement shall not exceed the Lump Sum amount without written authorization from the Client.

The Lump Sum amount includes compensation for Consultant's services and the services of Consultant's Consultants, if any for the agreed upon Scope of Work. Appropriate amounts have been incorporated in the initial Lump Sum to account for labor, overhead, profit, expenses and equipment charges. The Client agrees to pay for other additional services, equipment, and expenses that may become necessary by amendment to complete Consultant's services at their normal charge out rates as published by Consultant or as available commercially.

B. Expenses Not Included in the Lump Sum

The following items involve expenditures made by Consultant employees or professional consultants on behalf of the Client and shall be paid for as described in this Agreement.

1. Expense of overtime work requiring higher than regular rates, if authorized in advance by the Client.
2. Other special expenses required in connection with the Project.
3. The cost of special consultants or technical services as required. The cost of subconsultant services shall include actual expenditure plus 10% markup for the cost of administration and insurance.

The Client shall pay Consultant monthly for expenses not included in the Lump Sum amount.

General Conditions of the Agreement for Professional Services

SECTION I – SERVICES OF CONSULTANT

A. General

1. Consultant agrees to perform professional services as set forth in the Agreement for Professional Services or Supplemental Letter Agreement ("Services"). Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or the Consultant. The Consultant's services under this Agreement are being performed solely for the Client's benefit, and no other party or entity shall have any claim against the Consultant because of this Agreement or the performance or nonperformance of services hereunder.

B. Schedule

1. Unless specific periods of time or dates for providing services are specified, Consultant's obligation to render Services hereunder will be for a period which may reasonably be required for the completion of said Services.
2. If Client has requested changes in the scope, extent, or character of the Project or the Services to be provided by Consultant, the time of performance and compensation for the Services shall be adjusted equitably. The Client agrees that Consultant is not responsible for damages arising directly or indirectly from delays beyond Consultant's control. If the delays resulting from such causes increase the cost or the time required by Consultant to perform the Services in accordance with professional skill and care, then Consultant shall be entitled to a equitable adjustment in schedule and compensation.

C. Additional Services

1. If Consultant determines that any services it has been directed or requested to perform are beyond the scope as set forth in the Agreement or that, due to changed conditions or changes in the method or manner of administration of the Project, Consultant's effort required to perform its services under this Agreement exceeds the stated fee for the Services, then Consultant shall promptly notify the Client regarding the need for additional Services. Upon notification and in the absence of a written objection, Consultant shall be entitled to additional compensation for the additional Services and to an extension of time for completion of additional Services absent written objection by Client.
2. Additional Services, including delivery of documents, CAD files, or information not expressly included as deliverables, shall be billed in accord with agreed upon rates, or if not addressed, then at Consultant's standard rates.

D. Suspension and Termination

1. If Consultant's services are delayed or suspended in whole or in part by Client, or if Consultant's services are delayed by actions or inactions of others for more than 60 days through no fault of Consultant, then Consultant shall be entitled to either terminate its agreement upon seven days written notice or, at its option, accept an equitable adjustment of compensation provided for elsewhere in this Agreement to reflect costs incurred by Consultant.
2. This Agreement may be terminated by either party upon seven days written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination.
3. This Agreement may be terminated by either party upon thirty days' written notice without cause. All provisions of this Agreement allocating responsibility or liability between the Client and Consultant shall survive the completion of the Services hereunder and/or the termination of this Agreement.
4. In the event of termination, Consultant shall be compensated for Services performed prior to termination date, including charges for expenses and equipment costs then due and all termination expenses.

SECTION II – CLIENT RESPONSIBILITIES

A. General

1. The Client shall, in proper time and sequence and where appropriate to the Project, at no expense to Consultant, provide full information as to Client's requirements for the Services provided by Consultant and access to all public and private lands required for Consultant to perform its Services.

2. The Consultant is not a municipal advisor and therefore Client shall provide its own legal, accounting, financial and insurance counseling, and other special services as may be required for the Project. Client shall provide to Consultant all data (and professional interpretations thereof) prepared by or services performed by others pertinent to Consultant's Services, such as previous reports; sub-surface explorations; laboratory tests and inspection of samples; environmental assessment and impact statements, surveys, property descriptions; zoning; deed; and other land use restrictions; as-built drawings; and electronic data base and maps. The costs associated with correcting, creating or recreating any data that is provided by the Client that contains inaccurate or unusable information shall be the responsibility of the Client.

3. Client shall provide prompt written notice to Consultant whenever the Client observes or otherwise becomes aware of any changes in the Project or any defect in Consultant's Services. Client shall promptly examine all studies, reports, sketches, opinions of construction costs, specifications, drawings, proposals, change orders, supplemental agreements, and other documents presented by Consultant and render the necessary decisions and instructions so that Consultant may provide Services in a timely manner.

4. Client shall require all utilities with facilities within the Project site to locate and mark said utilities upon request, relocate and/or protect said utilities to accommodate work of the Project, submit a schedule of the necessary relocation/protection activities to the Client for review, and comply with agreed upon schedule. Consultant shall not be liable for damages which arise out of Consultant's reasonable reliance on the information or services furnished by utilities to Client or others hired by Client.

5. Consultant shall be entitled to rely on the accuracy and completeness of information or services furnished by the Client or others employed by the Client and shall not be liable for damages arising from reasonable reliance on such materials. Consultant shall promptly notify the Client if Consultant discovers that any information or services furnished by the Client is in error or is inadequate for its purpose.

6. Client agrees to reasonably cooperate, when requested, to assist Consultant with the investigation and addressing of any complaints made by Consultant's employees related to inappropriate or unwelcomed actions by Client or Client's employees or agents. This shall include, but not be limited to, providing access to Client's employees for Consultant's investigation, attendance at hearings, responding to inquiries and providing full access to Client files and information related to Consultant's employees, if any. Client agrees that Consultant retains the absolute right to remove any of its employees from Client's facilities if Consultant, in its sole discretion, determines such removal is advisable. Consultant, likewise, agrees to reasonably cooperate with Client with respect to the foregoing in connection with any complaints made by Client's employees.

7. Client acknowledges that Consultant has expended significant effort and expense in training and developing Consultant's employees. Therefore, during the term of this Agreement and for a period of two years after the termination of this Agreement or the completion of the Services under this Agreement, whichever is longer, Client shall not directly or indirectly: (1) hire, solicit or encourage any employee of Consultant to leave the employ of Consultant; (2) hire, solicit or encourage any consultant or independent contractor to cease work with Consultant; or (3) circumvent Consultant by conducting business directly with its employees. The two-year period set forth in this section shall be extended commensurately with any amount of time during which Client has violated its terms.

SECTION III – PAYMENTS

A. Invoices

1. Undisputed portions of invoices are due and payable within 30 days. Client must notify Consultant in writing of any disputed items within 15 days from receipt of invoice. Amounts due Consultant will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) for invoices 30 days past due. Consultant reserves the right to retain Services or deliverables until all invoices are paid in full. Consultant will not be liable for any claims of loss, delay, or damage by Client for reason of withholding Services, deliverables, or Instruments of Service until all invoices are paid in full. Consultant shall be entitled to recover all reasonable

- costs and disbursements, including reasonable attorney's fees, incurred in connection with collecting amounts owed by Client.
- Should taxes, fees or costs be imposed, they shall be in addition to Consultant's agreed upon compensation.
 - Notwithstanding anything to the contrary herein, Consultant may pursue collection of past due invoices without the necessity of any mediation proceedings.

SECTION IV – GENERAL CONSIDERATIONS

A. Standards of Performance

- The standard of care for all professional engineering and related services performed or furnished by Consultant under this Agreement will be the care and skill ordinarily exercised by members of Consultant's profession practicing under similar circumstances at the same time and in the same locality. Consultant makes no warranties, express or implied, under this Agreement or otherwise, in connection with its Services.
- Consultant neither guarantees the performance of any Contractor nor assumes responsibility for any Contractor's failure to furnish and perform the work in accordance with its construction contract or the construction documents prepared by Consultant. Client acknowledges Consultant will not direct, supervise or control the work of construction contractors or their subcontractors at the site or otherwise. Consultant shall have no authority over or responsibility for the contractor's acts or omissions, nor for its means, methods, or procedures of construction. Consultant's Services do not include review or evaluation of the Client's, contractor's or subcontractor's safety measures, or job site safety or furnishing or performing any of the Contractor's work.
- Consultant's Opinions of Probable Construction Cost are provided if agreed upon in writing and made on the basis of Consultant's experience and qualifications. Consultant has no control over the cost of labor, materials, equipment or service furnished by others, or over the Contractor's methods of determining prices, or over competitive bidding or market conditions. Consultant cannot and does not guarantee that proposals, bids or actual construction cost will not vary from Opinions of Probable Construction Cost prepared by Consultant. If Client wishes greater assurance as to construction costs, Client shall employ an independent cost estimator.

B. Indemnity for Environmental Issues

- Consultant is not a user, generator, handler, operator, arranger, storer, transporter, or disposer of hazardous or toxic substances. Therefore the Client agrees to hold harmless, indemnify, and defend Consultant and Consultant's officers, directors, subconsultant(s), employees and agents from and against any and all claims; losses; damages; liability; and costs, including but not limited to costs of defense, arising out of or in any way connected with, the presence, discharge, release, or escape of hazardous or toxic substances, pollutants or contaminants of any kind at the site.

C. Limitations on Liability

- The Client hereby agrees that to the fullest extent permitted by law, Consultant's total liability to the Client for all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to the Project or this Agreement from any cause or causes including, but not limited to, Consultant's negligence, errors, omissions, strict liability, breach of contract or breach of warranty shall not exceed five hundred thousand dollars (\$500,000). In the event Client desires limits of liability in excess of those provided in this paragraph, Client shall advise Consultant in writing and agree that Consultant's fee shall increase by 1% for each additional five hundred thousand dollars of liability limits, up to a maximum limit of liability of five million dollars (\$5,000,000).
- Neither Party shall be liable to the other for consequential damages, including without limitation lost rentals; increased rental expenses; loss of use; loss of income; lost profit, financing, business, or reputation; and loss of management or employee productivity, incurred by one another or their subsidiaries or successors, regardless of whether such damages are foreseeable and are caused by breach of contract, willful misconduct, negligent act or omission, or other wrongful act of either of them. Consultant expressly disclaims any duty to defend Client for any alleged actions or damages.
- It is intended by the parties to this Agreement that Consultant's Services shall not subject Consultant's employees, officers or directors to any personal legal exposure for the risks associated with this Agreement. The Client agrees that as the Client's sole and exclusive remedy, any claim, demand or suit shall be directed and/or

asserted only against Consultant, and not against any of Consultant's individual employees, officers or directors, and Client knowingly waives all such claims against Consultant individual employees, officers or directors.

- Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued, and the applicable statutes of limitations shall commence to run, not later than either the date of Substantial Completion for acts or failures to act occurring prior to substantial completion or the date of issuance of the final invoice for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Services are substantially completed.

D. Assignment

- Neither party to this Agreement shall transfer, sublet or assign any rights under, or interests in, this Agreement or claims based on this Agreement without the prior written consent of the other party. Any assignment in violation of this subsection shall be null and void.

E. Dispute Resolution

- Any dispute between Client and Consultant arising out of or relating to this Agreement or the Services (except for unpaid invoices which are governed by Section III) shall be submitted to mediation as a precondition to litigation unless the parties mutually agree otherwise. Mediation shall occur within 60 days of a written demand for mediation unless Consultant and Client mutually agree otherwise.
- Any dispute not settled through mediation shall be settled through litigation in the state and county where the Project at issue is located.

SECTION V – INTELLECTUAL PROPERTY

A. Proprietary Information

- All documents, including reports, drawings, calculations, specifications, CADD materials, computers software or hardware or other work product prepared by Consultant pursuant to this Agreement are Consultant's Instruments of Service ("Instruments of Service"). Consultant retains all ownership interests in Instruments of Service, including all available copyrights.
- Notwithstanding anything to the contrary, Consultant shall retain all of its rights in its proprietary information including without limitation its methodologies and methods of analysis, ideas, concepts, expressions, inventions, know how, methods, techniques, skills, knowledge, and experience possessed by Consultant prior to, or acquired by Consultant during, the performance of this Agreement and the same shall not be deemed to be work product or work for hire and Consultant shall not be restricted in any way with respect thereto. Consultant shall retain full rights to electronic data and the drawings, specifications, including those in electronic form, prepared by Consultant and its subconsultants and the right to reuse component information contained in them in the normal course of Consultant's professional activities.

B. Client Use of Instruments of Service

- Provided that Consultant has been paid in full for its Services, Client shall have the right in the form of a nonexclusive license to use Instruments of Service delivered to Client exclusively for purposes of constructing, using, maintaining, altering and adding to the Project. Consultant shall be deemed to be the author of such Instruments of Service, electronic data or documents, and shall be given appropriate credit in any public display of such Instruments of Service.
- Records requests or requests for additional copies of Instruments of Services outside of the scope of Services, including subpoenas directed from or on behalf of Client are available to Client subject to Consultant's current rate schedule. Consultant shall not be required to provide CAD files or documents unless specifically agreed to in writing as part of this Agreement.

C. Reuse of Documents

- All Instruments of Service prepared by Consultant pursuant to this Agreement are not intended or represented to be suitable for reuse by the Client or others on extensions of the Project or on any other Project. Any reuse of the Instruments of Service without written consent or adaptation by Consultant for the specific purpose intended will be at the Client's sole risk and without liability or legal exposure to Consultant; and the Client shall release Consultant from all claims arising from such use. Client shall also defend, indemnify, and hold harmless Consultant from all claims, damages, losses, and expenses including attorneys' fees arising out of or resulting from reuse of Consultant documents without written consent.