

# **Town of Little Elm, Texas**

## **Professional Services Agreement**

This Agreement is made by and between the Town of Little Elm, Texas, a Texas home-rule municipality (hereinafter referred to as the "Owner") and Kimley-Horn and Associates, Inc., (hereinafter referred to as the "Consultant") for Manhole Condition Assessment, (hereinafter referred to as the "Project"). In consideration of the premises, covenants and mutual promises contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Owner and the Consultant hereby agree as follows:

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### **ARTICLE I: CONTRACT & CONTRACT DOCUMENTS**

#### **1.1 THE CONTRACT**

The Contract between the Owner and the Consultant, of which this Agreement is a part, consists of the Contract Documents. It shall be effective on the date this Agreement is executed by the last Party to execute it.

#### **1.2. THE CONTRACT DOCUMENTS**

The Contract Documents consist of this Agreement, the Solicitation, Requirements and Instructions to Bidders/Proposers, the Specifications, terms and conditions, Attachments, Maps, Drawings, Scope of Service, Time Line, all Change Orders issued hereafter, any other amendments hereto executed by the parties hereafter, together with the following (if any):

Documents not enumerated in this Paragraph 1.2.1 are not Contract Documents and do not form part of this Agreement.

### **ARTICLE 2: RECITALS**

- 2.1 The Town desires to have the Consultant develop the program and provide necessary services to develop the same ("PROJECT"); and
- 2.2 The Consultant has the knowledge, ability and expertise to provide such services; and
- 2.3 The Town desires to engage the services of Consultant, as an independent Consultant and not as an employee, to provide services as set forth herein and in Exhibit A: Scope of Services and Exhibit B: Time Line/Milestone which is attached hereto and incorporated herein.

### **ARTICLE 3: TERM / TERMINATION**

#### **3.1 TERM**

The term of this Agreement shall begin on the date of its execution by all Parties. This Agreement shall continue until Consultant completes the services required herein to the satisfaction of the Town, unless sooner terminated as provided herein.

#### **3.2 TERMINATION**

This Agreement may be suspended or terminated by either Party with or without cause at any time by giving written notice to the other Party. In the event suspension or termination is without cause, payment to the Consultant, in accordance with the terms of this Agreement, will be made on the basis of services reasonably determined by Town to be satisfactorily performed to the date of suspension or termination. Such payment will be due upon delivery of all instruments of service to Town.

In the event that the Town requires a modification of this Agreement with Consultant, and in the event the Parties fail to agree upon a modification of this Agreement, the Parties shall have the option of terminating this Agreement. Payment to Consultant shall be made by the Town in accordance with the

terms of this Agreement, for the services mutually agreed upon by the Parties to be properly performed by the Consultant prior to such termination date.

#### **ARTICLE 4: SCOPE OF SERVICES**

##### **4.1 SCOPE**

The following services, when authorized in writing by a Notice to Proceed from the Town, shall be performed by Consultant in accordance with the Town's requirements and as set forth in the attached Exhibit A, Scope of Services:

Provide services associated with evaluation and assessment of existing manholes along with recommendations for repairs and/or replacements as needed.

If there is a conflict between the above quoted subjects and Exhibit A or B, then such conflict shall be resolved pursuant to the provisions of Section 10.9, below.

##### **4.2 AUTHORIZED AGENT**

All work performed by the Consultant will be performed under this Agreement, signed by a duly authorized agent of the Town as approved by resolution of the Town Council of the Town of Little Elm, Texas, and the designated authorized agent for the Consultant.

#### **ARTICLE 5: COMPENSATION / PAYMENT TERMS AND CONDITIONS**

5.1 Compensation for the performance of Professional Services described herein shall be paid to Consultant by the Town in a total amount not to exceed Seventy-Three Thousand Two Hundred dollars (\$73,200) which shall accrue and be payable as provided in Sections 5.1 and 5.2 hereof.

5.2 Work will be performed at the rates set forth in Exhibit B – Cost Proposal and Fee Schedule, which is attached hereto and incorporated herein by reference, or as otherwise provided in negotiated fee schedules approved within this Agreement, if any.

5.3 Consultant payment for work under this Agreement shall be made in installments billed not more frequently than once each month upon receipt of invoices from the Consultant. If the Town fails to make any payment due the Consultant within thirty (30) days after receipt of Consultant's invoice, the amounts due the Consultant will be increased at the rate of 1.5% per month from said thirtieth day, unless there is a good faith refusal by the Town to pay. Payment shall be remitted to Consultant by Town as instructed on invoices.

#### **ARTICLE 6: TIME FOR COMPLETION**

6.1 The Consultant's services and compensation under this Agreement have been agreed to in anticipation of orderly and continuous progress of the Assigned Project(s) through completion of the project(s). Specific periods of time for rendering services are set forth in Exhibit B to this Agreement, by which times defined services are to be completed.

6.2 If the Town fails to give prompt written authorization to proceed with any phase of services after completion of the immediately preceding phase, the Consultant shall be entitled to equitable adjustment of rates and amounts of compensations to reflect reasonable costs incurred by Consultant as a result of the delay or changes in the various elements that comprise such rates of compensation, but in no event shall such compensation exceed the scope of services schedule of maximum payment unless a written amendment to this Agreement is executed between the Parties.

#### **ARTICLE 7: INDEMNIFICATION**

7.1 THE CONSULTANT AGREES, TO THE FULLEST EXTENT PERMITTED BY LAW, TO INDEMNIFY AND HOLD HARMLESS THE TOWN, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "INDEMNITEES") FROM AND AGAINST SUITS, ACTIONS, CLAIMS, LOSSES, ANY DAMAGE, LIABILITY, AND FROM AND AGAINST ANY COSTS AND EXPENSES, INCLUDING, IN PART, ATTORNEY'S FEES

INCIDENTAL TO THE DEFENSE OF SUCH SUITS, ACTIONS CLAIMS, LOSSES, DAMAGES OR LIABILITY ON ACCOUNT OF INJURY, DISEASE, SICKNESS, INCLUDING DEATH, TO ANY PERSON OR DAMAGE TO PROPERTY INCLUDING, IN PART, THE LOSS OF USE RESULTING THEREFROM, ARISING FROM ANY NEGLIGENT ACT, ERROR OR OMISSION OF THE CONSULTANT, ITS OFFICERS, EMPLOYEES, SERVANTS, AGENTS OR SUBCONTRACTORS, OR ANYONE ELSE UNDER THE CONSULTANT'S DIRECTION AND CONTROL, AND ARISING OUT OF, RESULTING FROM, OR CAUSED BY THE PERFORMANCE OR FAILURE OF PERFORMANCE OF ANY WORK OR SERVICES UNDER THIS AGREEMENT, OR FROM CONDITIONS CREATED BY THE PERFORMANCE OR NON-PERFORMANCE OF SAID WORK OR SERVICES. IN THE EVENT ONE OR MORE OF THE INDEMNITEES IS DETERMINED BY A COURT OF LAW TO BE JOINTLY OR DERIVATIVELY NEGLIGENT OR LIABLE FOR SUCH DAMAGE OR INJURY, THE CONSULTANT SHALL BE OBLIGATED TO INDEMNIFY INDEMNITEES AS PROVIDED HEREIN ON A PROPORTIONATE BASIS IN ACCORDANCE WITH THE FINAL JUDGMENT, AFTER ALL APPEALS ARE EXHAUSTED, DETERMINING SUCH JOINT OR DERIVATIVE NEGLIGENCE OR LIABILITY. THIS INDEMNIFICATION IS SUBJECT TO THE LIMITATIONS IN TEXAS LOCAL GOVERNMENT CODE, § 271.904(A) AND TEXAS CIVIL PRACTICE AND REMEDIES CODE, § 130.002(B), AS SAME MAY BE APPLICABLE TO CONSULTANT AS A MATTER OF LAW.

**7.02** NOTHING CONTAINED HEREIN SHALL CONSTITUTE A WAIVER OF GOVERNMENTAL IMMUNITY IN FAVOR OF ANY PARTY.

**7.03** CONSULTANT AGREES THAT IT IS AN INDEPENDENT CONTRACTOR AND NOT AN AGENT OF THE TOWN, AND THAT CONSULTANT IS SUBJECT, AS AN EMPLOYER, TO ALL APPLICABLE UNEMPLOYMENT COMPENSATION STATUTES, SO FAR AS TO RELIEVE THE TOWN OF ANY RESPONSIBILITY OR LIABILITY FROM TREATING CONSULTANT'S EMPLOYEES AS EMPLOYEES OF TOWN FOR THE PURPOSE OF KEEPING RECORDS, MAKING REPORTS OR PAYMENTS OF UNEMPLOYMENT COMPENSATION TAXES OR CONTRIBUTIONS. CONSULTANT FURTHER AGREES TO INDEMNIFY AND HOLD THE TOWN HARMLESS AND REIMBURSE IT FOR ANY EXPENSES OR LIABILITY INCURRED UNDER SAID STATUTES IN CONNECTION WITH EMPLOYEES OF CONSULTANT.

**7.04** CONSULTANT SHALL DEFEND AND INDEMNIFY AND HOLD THE TOWN HARMLESS FROM ANY AND ALL CLAIMS, SUITS OR LIENS BASED UPON OR ALLEGED TO BE BASED UPON THE NON-PAYMENT OF LABOR, TOOLS, MATERIALS, EQUIPMENT, SUPPLIES, TRANSPORTATION AND MANAGEMENT COSTS INCURRED BY CONSULTANT IN PERFORMING THIS AGREEMENT.

## **ARTICLE 8: INSURANCE**

### **8.1 Insurance**

The Consultant shall provide and maintain insurance as listed in the insurance requirements document.

## **ARTICLE 9: DEFAULT**

In the event Consultant fails to comply or becomes disabled and unable to comply with the provisions of this Agreement as to the quality or character of the service or time of performance, and the failure is not corrected within thirty (30) days after written notice by Town to Consultant, Town may, at its sole discretion without prejudice to any other right or remedy.

- (a) Terminate this Agreement and be relieved of the payment of any further consideration to Consultant except for all work determined by the Town to be satisfactorily completed prior to termination. Payment for work satisfactorily completed shall be for actual costs, including reasonable salaries and travel expenses of Consultant to and from meetings called by the Town at which Consultant is required to attend, but shall not include any loss of profit of Consultant. In the event of such termination, the Town may proceed to complete the services in any manner deemed proper by the Town, either by the use of its own forces or by resubmitting to others. Consultant agrees that any costs incurred to complete the services herein provided for may be deducted and paid by the Town out of such monies as may be due or that may thereafter become due to Consultant under and by virtue of this Agreement.

- (b) The Town may, without terminating this Agreement or taking over the services, furnish the necessary materials, equipment, supplies and/or help necessary to remedy the situation, at the expense of Consultant.

## **ARTICLE 10: MISCELLANEOUS**

### **10.1 Reuse of Documents:**

All documents including Maps, Plans and Specifications provided or furnished by the Consultant pursuant to this Agreement are instruments of service; and Consultant shall retain ownership and property interest therein whether or not the work is completed. The Town may make and retain copies of any plans or specifications provided under this Agreement for the use by Town and others; such documents are not intended or suitable for reuse by Town or others on extension of the Project or on any other Project. Any such reuse without written approval or adaptation by the Consultant for the specific purpose intended will be at the Town's sole risk and without liability to the Consultant.

### **10.2 Entire Agreement.**

This Agreement constitutes the sole and only Agreement of the Parties and supersedes any prior understandings or written or oral agreements between the Parties with respect to this subject matter.

### **10.3 Assignment.**

Neither this Agreement nor any duties or obligations under it shall be assignable by Consultant without the prior written consent of the Town. In the event of an assignment by Consultant to which the Town has consented, the assignee or the assignee's legal representative shall agree in writing with the Town to personally assume, perform, and be bound by all the covenants, obligations, and agreements contained in this Agreement.

### **10.4 Adjustments in Services/Amendment.**

This Agreement may be amended by the mutual written agreement of the Parties. Consultant shall not make any claims for extra services, additional services or changes in the services without a written agreement with the Town prior to the performance of such services.

### **10.5 Governing law.**

The validity of this Agreement and any of its terms or provisions, as well as the rights and duties of the Parties, shall be governed by the laws of the State of Texas; and venue for any action concerning this Agreement shall be in Denton County, Texas.

### **10.6 Notices.**

All notices required by this Agreement shall be in writing and addressed to the following, or such other Party or address as either Party designates in writing, by certified mail, postage prepaid or by hand delivery:

#### **Town of Little Elm**

Purchasing  
100 W. Eldorado Pkwy.  
Little Elm, TX 75068  
214-975-0411  
[purchasing@littleelm.org](mailto:purchasing@littleelm.org)

#### **Kimley-Horn and Associates, Inc.**

M. Anthony Samarripas, P.E.  
13455 Noel Road, Two Galleria Tower, Ste 700  
Dallas, Texas, 75240  
972.770.1300  
anthony.samarripas@kimley-horn.com

### **10.7 Legal construction.**

In the event any one or more of the provisions contained in this Agreement shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in this Agreement.

#### **10.8 Successors and Assigns.**

- (a) The Town and Consultant each is hereby bound and the partners, successors, executors, administrators, legal representatives and assigns of Town and Consultant are hereby bound to the other Party to this Agreement and to the partners, successors, executors, administrators, legal representatives and assigns of such other Party in respect of all covenants and obligations of this Agreement.
- (b) Neither the Town nor the Consultant may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in this Agreement without the written consent of the other Party, 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.
- (c) Nothing in this Agreement shall be construed to create, impose or give rise to any duty owed by the Consultant to any Consultant, subcontractor, supplier, other person or entity, or to any surety for or employee of any of them, or give any rights in or benefits under this Agreement to anyone other than the Town and the Consultant.

#### **10.9 Conflict.**

If a conflict exists between this Agreement, and an Exhibit, the Solicitation, and/or the Response, then such conflicts shall be resolved as follows:

- (a) If a conflict exists between this Agreement and an Exhibit, the Solicitation, or the Response, then this Agreement shall control.
- (b) If a conflict exists between the Response and an Exhibit, the Exhibit shall control.
- (c) If a conflict exists between the Response and the Solicitation, the Solicitation shall control.

#### **10.10 Severability**

Any provision or part of this Agreement that is held to be void or unenforceable under any law or regulation or by a court of competent jurisdiction shall be deemed stricken and all remaining provisions shall continue to be valid and binding upon the Town and the Consultant, who agree that this Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

#### **10.11 Captions**

The captions used in this Agreement are for convenience only and shall not affect in any way the meaning or interpretations of the provisions set forth herein.

#### **10.12 Counterparts**

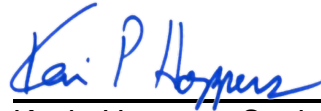
This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on this the \_\_\_\_ day of \_\_\_\_\_, 2022.

**TOWN OF LITTLE ELM**

**CONSULTANT**

\_\_\_\_\_  
Matt Mueller, Town Manager



\_\_\_\_\_  
Kevin Hoppers, Senior Vice President

Exhibit A: Scope of Services  
Exhibit B: Schedule of Fees

## Exhibit A Scope of Services

### **PROJECT NAME: Manhole Condition Assessment**

### **PROJECT UNDERSTANDING:**

Recently, the Town of Little Elm (Town) discovered corrosion damage to approximately 25 manholes located primarily along two wastewater interceptors near the Town's wastewater treatment plant. The Town has asked Kimley-Horn and Associates, Inc. (Kimley-Horn) to conduct a condition assessment of the identified manholes and recommend rehabilitation and/or replacement measures to improve the damaged manholes. Kimley-Horn will conduct site investigations of the existing manholes, coordinate with manufacturers and contractors to determine recommended improvements and compile results in a technical memorandum.

### **SCOPE OF PROFESSIONAL SERVICES:**

#### **Task 100. Condition Assessment (Lump Sum)**

This task involves conducting field work to collect data, including visual observation of general condition of manhole and documentation of defects, associated pipe connections, photographs, and manhole locations. Kimley-Horn will:

101. Kick-off Meeting – Conduct one (1) meeting with Town to confirm the goals, schedule, and deliverables for the project.
102. Record Research Evaluation – Evaluate record drawings and maintenance records provided by Town staff.
103. Location Map – Based on record drawings and available information from Town staff, utilize GIS information to create a location map of the existing wastewater lines including locations of manholes. The location map will be numbered to reference back to analysis provided in the technical memorandum.
104. Site Visits – Perform site visits in conjunction with Town to collect field data to assist with evaluating the condition of existing manholes. Up to two (2) site visits are anticipated. All condition assessment shall be visual observation and no confined space entry or structural analysis will be performed. All right-of-entry and access coordination will be handled by the Town.
105. Document and Categorize Manhole Conditions – Review all field data collected and assess the condition of each manhole. Categorize each manhole based on the degree of deterioration observed. The following data will be compiled into condition reports for each manhole: Manhole number, station, depth, and size of connecting wastewater lines, assessment notes, and photos (if applicable).

**Task 200. Odor Control Monitoring (Lump Sum)**

This task involves odor control monitoring at existing manholes to investigate the levels of H<sub>2</sub>S within the system. Evaluation of the Town's existing odor control systems is excluded from this scope of services.

201. Odor Control Monitoring & Evaluation – Temporarily install (2) Arculog sensors inside manholes at critical locations for (1) week to measure the extend and concentration of H<sub>2</sub>S levels. Kimley-Horn will review the monitoring results and present findings to Town staff.
202. Review Meeting – Meet with the Town to review the findings and evaluate next steps.

**Task 300. Rehabilitation Evaluation and Technical Memorandum (Lump Sum)**

This task involves evaluating available rehabilitation approaches and techniques for the different conditions encountered and making recommendations on the appropriate approach for each manhole. Kimley-Horn will evaluate the anticipated construction disturbance, associated lifecycle, and cost considerations.

301. Evaluate Rehabilitation Methods – Evaluate different methods of rehabilitation based on the conditions encountered and provide recommendations. Factors that will be taken into consideration include lifecycle, maintenance, construction disturbance, and cost. Below illustrates methods that will be evaluated.
  - Replacement:
    - Fiberglass manholes
    - Polymer concrete manholes
    - Concrete manholes with protective liner
  - Rehabilitation
    - Fiberglass liner
    - Polymer concrete inserts
    - Cured-in-place manhole liner
    - Cementitious repairs
  - Lining/Coatings:
    - Epoxy Coating
    - Polyurea resins
    - Polyurethane linings
    - Composite liners



302. Opinion of Probable Construction Cost (OPCC) – Develop an OPCC for each of the manholes to provide to Town staff.
303. Draft Technical Memorandum – Prepare a technical memorandum to summarize the results of the condition assessment, provide recommendations regarding rehabilitation methods, and cost projections for the improvements. Provide map showing the proposed rehab approach along with a priority list base on inspected condition. Provide a PDF copy to the Town for review.
304. Review Meeting – Meet with the Town to review the draft technical memorandum and receive comments.
305. Final Technical Memorandum – Incorporate comments and provide a final memorandum. Provide a PDF copy of the memorandum to the Town.

## **ADDITIONAL SERVICES**

Any services not specifically provided for in the above scope will be considered additional services and can be performed at our then current hourly rates. Additional services we can provide include, but are not limited to, the following:

- Preparing construction documents for manhole improvements
- Providing construction phase services
- Assisting Town or contractor in the defense or prosecution of litigation in connection with or in addition to those services contemplated by this Agreement. Such services, if any, shall be furnished by the Consultant on a fee basis negotiated by the respective parties outside of and in addition to this Agreement.
- Preparing applications and supporting documents for government grants, loans, or planning advances, and providing data for detailed applications.
- Providing additional presentations to the Town Council.
- Providing construction staking, additional platting, or other surveying services not identified in the above Scope of Services.
- Attending additional public meetings during the project.
- Attending a Pre- Bid Meeting
- Preparing a Bid Tabulation or Recommendation Letter
- Preparing right-of-entry letters.
- Any services not listed in the Scope of Services.

Exhibit B  
Schedule of Fees

Task 100. Condition Assessment	\$24,000
Task 200. Odor Control Evaluation	\$11,600
Task 300. Rehabilitation Evaluation and Technical Memorandum	\$37,600
<b>TOTAL CONTRACT AMOUNT</b>	<b>\$73,200</b>