

TOWN OF LITTLE ELM, TEXAS
MASTER AGREEMENT FOR PROFESSIONAL SERVICES

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 _____, (hereinafter referred to as the "Consultant") for On-Call Consulting Services to the Town of Little Elm for various projects located within Denton County, Texas in accordance with the provisions in this Master Agreement for Professional Services ("Agreement"). In consideration of the premises, covenants and mutual promises contained in this Agreement, and in consideration, the receipt and sufficiency of which is hereby acknowledged, the Owner and the Consultant hereby agree as follows:

ARTICLE I: CONTRACT & CONTRACT DOCUMENTS

1.1 THE CONTRACT

1.1.1 The Contract between the Owner and the Consultant, of which this Agreement is a part, consists of the Contract Documents.

1.2. THE CONTRACT DOCUMENTS

1.2.1 The Contract Documents consist of this Agreement, the Request for Qualifications, Requirements and Instructions to Respondents, Specifications, Terms and Conditions, and each Work Order issued under this Agreement, including all documents pertaining to each Work Order.

ARTICLE 2: TERM / TERMINATION

2.1 TERM

2.1 The term of this Agreement shall be for begin on or about October 1, 2023 and continue through September 30, 2028, a period of five years. This Agreement shall continue for the duration of the term, unless sooner terminated as provided herein.

2.2 TERMINATION

2.2.1 This Agreement may be suspended or terminated by either Party with or without cause at any time by giving a written 30 day 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.

2.2.2 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 3. SCOPE OF SERVICES

3.1 WORK ORDERS

3.1 At Owner's request and in Owner's sole discretion, Owner may engage from time to time the Consultant to perform professional services in connection with a Project (as defined in Section 7-2, below). Consultant agrees to perform such services in accordance with the terms and

conditions of this Agreement and with any individual Work Order. Owner reserves the right, in its sole discretion, to hire other consultants for any reason and for any purpose. In performing its professional services hereunder and in connection with each Project and Work Order, Consultant shall follow the degree of professional standard of care and skill set forth in Section 6.3 of this Agreement.

3.2 SERVICES PROVIDED

3.2.1 The Services to be provided by Consultant to Owner shall be as mutually agreed to in a separate written Work Order executed by Owner and Consultant. [A sample Work Order is attached hereto as Exhibit B.](#) Accordingly, whenever used in this Agreement, the term Professional Services shall mean those services specified in this Agreement and in a Work Order issued pursuant to this Agreement and all related work. Each Work Order shall include, directly or by reference, appropriate cost and pricing data and such other documentation as required by the Owner. Each Work Order shall be subject to and integrated into this Agreement, and the terms of this Agreement are incorporated into and made a part of each Work Order by reference to this Agreement. All Professional Services shall be performed by the employees of Consultant or Consultant's officers, employees, agents, representatives, sub- contractors, or sub-consultants unless otherwise provided in a Work Order. Consultant shall be wholly and solely responsible for any Professional Services or subcontracted Professional Services provided by any officer, employee, agent, representative, sub-contractors or sub- consultants of Consultant (collectively, Consultant's Personnel').

ARTICLE 4. COMPENSATION

4.1 CONSULTANT FEES

4.1.1 Compensation by the Owner to Consultant for Professional Services shall be on a fixed fee or a time and materials basis as specified in the applicable Work Order. All time shall be billed at Consultant's labor billing rates agreed upon by Owner. Said rates shall only be adjusted in writing as may be agreed to between the Parties. [The billing and labor rates in effect on the effective date of this Agreement are attached hereto as Exhibit C.](#) Owner may also reimburse Consultant for any Direct Expenses (as defined in Article 7) reasonably and necessarily incurred by Consultant in performing Professional Services under this Agreement. This Agreement contemplates that alternate compensation may be proposed by either Party on a Work Order specific basis, including fixed price or time and materials tasks, or negotiated rates which, if applicable, shall be specified in the Work Order.

4.2 SUBCONTRACTED SERVICES

4.2.1 When necessary, subcontracted services shall be procured by Consultant in connection with the Professional Services provided pursuant to this Agreement, subject to Owner's prior written consent. Consultant shall issue subcontracts for such subcontracted services in Consultant's own name. Consultant shall be compensated for subcontracted services for the actual amount invoiced by the subcontractor. Except as set forth in this Agreement, neither Consultant nor Owner may assign, sublet, transfer, or otherwise convey (together, an "Assignment"), and neither Consultant nor Owner has the power to enter into an Assignment of any or all of the rights, duties and obligations or interest in this Agreement without the prior written consent of the other party. 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.

ARTICLE 5. TERMS OF PAYMENT

5.1 PAYMENT

5.1.1 Consultant shall submit to Owner monthly invoices for Professional Services and any compensation due under Section 2. Each invoice shall be accompanied by such documentation as Owner may reasonably require to verify the accuracy of the invoice, and

the sum of all prior payments made under this Agreement in connection with each Work Order. Payment to Consultant shall be made within thirty (30) days of receipt of such invoice and accompanying documentation, subject to Owner ' s right to withhold payment pursuant to Section 3-2 of this Agreement. Consultant shall not be entitled to any compensation for any services or work not actually performed or for any lost profits as a result of any abandonment or suspension of any work by the Owner.

- 5.1.2 Any provision hereof to the contrary notwithstanding, Owner shall not be obligated to make payment to Consultant hereunder if:
 - 5.1.2.1 Consultant is in default of any of Consultant's obligations under this Agreement or any Work Order or any other documents in connection with a Project (and payment may be withheld to the extent of any such default);
 - 5.1.2.2 Any part of such payment is attributable to any services of Consultant which are not performed in accordance with this Agreement;
 - 5.1.2.3 Consultant has failed to make payment promptly to subcontractors or sub-consultants or other third parties used by Consultant in connection with Consultant's services hereunder for which the Owner has made payment to Consultant; or
 - 5.1.2.4 If Owner, in its good faith judgment and after consultation with Consultant, determines that the portion of the compensation then remaining unpaid will not be sufficient to complete the Professional Services in connection with a Work Order, no additional payments will be due Consultant hereunder unless and until Consultant performs a sufficient portion of the Professional Services so that such portion of the compensation remaining unpaid is determined by Owner to be sufficient to complete the Professional Services.

5.2 DISPUTED BILLING

- 5.2.1 In the event Owner disputes or contests any invoice submitted by Consultant under this Agreement, Owner shall nevertheless pay any undisputed amounts in accordance with Section 5.1. Any dispute shall be resolved by dispute resolution procedures set forth in Section 8-2.

5.3 BILLING ADDRESS

- 5.3.1 Consultant shall submit monthly invoice and necessary and reasonable accompanying documentation to the following address.

Physical Address:

Town of Little Elm
Accounts Payable
100 West Eldorado Parkway
Little Elm, Texas 75068

Electronic Submittal:

accounts.payable@littleelm.org

- 5.3.2 Invoices shall include the project name, purchase order number, work order number and be individually numbered.
- 5.3.3 Billing Period shall be for a calendar month and all work submitted shall be for the entire month ending on the 30th or 31st respectfully.

5.4 ACCOUNTING RECORDS

- 5.4.1 Consultant shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement; Consultant's accounting and control systems shall be reasonably satisfactory to Owner. Owner and Owner's accountants shall be afforded reasonable access to the Consultant's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, memoranda, and other data relating to this Agreement and any Work Order issued pursuant to this Agreement, during normal business hours at the location where such documents are stored by Consultant, including the ability of Owner to audit or inspect the same. Consultant shall preserve all such documentation related to this Agreement and any Work

Order issued pursuant to this Agreement for a period of five (5) years after final payment is made under each Work Order.

5.5 UNSATISFACTORY WORK

- 5.5.1 Nothing contained in this Agreement shall require Owner to pay for any work that is unsatisfactory as determined by Owner or which is not submitted in compliance with the terms of this Agreement, nor shall such failure to withhold payment pursuant to the provisions of this Section constitute a waiver of any right, at law or in equity, which Owner may have if Consultant is in default, including the right to bring legal action for damages or for specific performance of this Agreement.

ARTICLE 6 OBLIGATIONS OF CONSULTANT

6.1 GENERAL

- 6.1.1 Consultant shall serve as Owner's professional consultant for all Professional Services or subcontracted services in connection with any Work Order between the Parties and shall provide professional consultation and advice and furnish customary services incidental thereto. Consultant shall perform all work hereunder in a manner satisfactory and acceptable to Owner in accordance with the terms and conditions of this Agreement, and in accordance with the professional standards applicable to Consultant applicable in the North Texas area. Consultant shall perform all Professional Services in a timely and professional manner, utilizing at all times an economical and expeditious manner for performing such Professional Services consistent with the standard of care defined in Section 4-3, below, and shall cause all subcontracted services to be similarly undertaken and performed. No less than monthly, Consultant shall keep Owner informed, in writing, as to the status and progress of all Professional Services and subcontracted services being provided under this Agreement and any Work Order issued pursuant to this Agreement. All oral information shall be subsequently confirmed in writing. Notwithstanding anything to the contrary in this Agreement, Consultant shall not be deemed to be an agent of Owner for any purpose but shall in all events be an independent contractor exercising control over its work and the manner in which it is performed. Except as specifically set forth in this Agreement or in a Work Order issued pursuant to this Agreement, (a) this Agreement shall not make Consultant a partner or agent of Owner for any purpose, and Owner shall not be deemed an agent for Consultant, and (b) neither Consultant nor Owner shall have the right or authority to assume, create, or enlarge any obligations or commitment on behalf of the other party and shall not represent itself as having the authority to bind the other party in any manner. Nothing in this Agreement is intended nor shall be construed to create an employer-employee relationship, a joint venture or joint enterprise relationship, or to allow Owner to exercise discretion or control over the means or methods in which Consultant performs the Professional Services which are the subject of this Agreement or any Work Order issued pursuant to this Agreement; provided, however, that the Professional Services provided by Consultant pursuant to this Agreement and any Work Order issued pursuant to this Agreement shall be provided in a manner consistent with all applicable standards and regulations governing such Professional Services. The means and methods in which Consultant's Professional Services provided hereunder and under any Work Order issued pursuant to this Agreement shall be performed, shall be determined by the Consultant in its sole discretion. The employees, agents, and representatives of, and the methods, equipment and facilities used by, Consultant shall at all times be under Consultant's exclusive direction and control.
- 6.1.2 Upon completion of any documents, drawings, specifications, and information, Consultant shall provide to Owner three (3) sets of such documents for review and approval. Notwithstanding Owner's approval of any of such documents, drawings, specifications or information, Consultant warrants that such documents, drawings, specifications, and information, as the same may be amended or supplemented by Consultant, shall be sufficient and adequate for the Project for which they are prepared. Notwithstanding Owner's approval

of any of the documents, drawings, specifications, and information, Consultant warrants and represents that the documents, drawings, specifications, and information, as the same may be amended or supplemented by Consultant, per the standard of care defined in Section 4-3, below, shall, to the best of Consultant's knowledge, information and belief as a professional performing in accordance with the standards, duties, and obligations set forth herein, be free from material error, and shall be satisfactory to the Owner. In accordance with this standard of care, Consultant agrees that if it shall recommend unsuitable materials in connection with any Project and this Agreement or if the design of a Project should be defective in any way, Consultant will assume sole responsibility for any damages, loss, claims, or expenses to the extent caused by Consultant's recommendation of unsuitable materials or defective design. Approval by the Owner of any of Consultant's documents, drawings, specifications, and information or work pursuant to this Agreement shall not constitute nor be deemed a release of the responsibility and liability of Consultant, its employees, subcontractors, agents and consultants for the accuracy and competency of the same, nor shall such approval be deemed to be an assumption of or an indemnification for such responsibility or liability by the Owner for any defect, error or omission in such documents, drawings, specifications, and information or work, it being understood that the Owner at all times is relying on Consultant's skill and knowledge in preparing the documents, drawings, specifications, and information.

6.2 AUTHORIZATION TO PROCEED

6.2.1 Consultant shall not begin work on any Professional Services until the Owner directs Consultant in writing to proceed. Unless otherwise specified in a Work Order, each Work Order shall constitute notice and authorization to proceed in connection with the applicable Professional Services specified in such Work Order.

6.3 STANDARD OF CARE-REPRESENTATIONS

6.3.1 The standard of care applicable to Consultant, including Consultant's Personnel, in providing Professional Services or subcontracted services under this Agreement or any Work Order issued pursuant to this Agreement, shall be the standard of professional ethics and the degree of skill, care and diligence normally employed by Consultant's profession performing the same or similar Professional Services or subcontracted services in the North Texas area. Consultant shall re-perform and otherwise remedy any Professional Services, including subcontracted services, not meeting the standard of care set forth herein, without additional compensation. Further, Consultant and all subcontractors shall perform all Professional Services in accordance with any applicable law, rule, regulation or order of any federal, state or local agency having jurisdiction over any matter related to this Agreement that is in effect or effective at the time such Professional Services or subcontracted services are performed.

6.3.2 Consultant represents that it is authorized to practice its profession in the State of Texas and that any necessary licenses, permits or other authorization to practice its profession and to provide the Professional Services set forth herein have been heretofore acquired as required by law, rule or regulation. Consultant agrees and acknowledges that Owner is entering into this Agreement in reliance on Consultant's professional abilities with respect to performing the Professional Services set forth herein or in any Work Order issued pursuant to this Agreement.

6.4 INSURANCE

6.4.1 Consultant shall, at its own expense, procure, pay for and maintain during the term of this Agreement the insurance listed in the insurance requirements document included as [Exhibit A](#).

6.5 FEDERAL, STATE, AND LOCAL REGULATIONS

6.5.1 Consultant shall comply with all federal, state and local laws, standards, rules, and regulations applicable to this Agreement and to any Work Order issued pursuant to this Agreement.

6.6 CONFIDENTIALITY

- 6.6.1 Consultant acknowledges that Owner is a municipality and must comply with all the rules and regulations of the Texas Public Information Act, as the same may be amended. Consultant is not an employee of, but a contractor for, the Owner, however, and as such Consultant hereby agrees that it shall not use the Owner's insignia, logo, service mark, or other intellectual property of Owner, but shall be allowed to use photographs of the Professional Services work, or any other publicity pertaining to the work, in any magazine, trade paper, newspaper, or other medium.

6.7 CONSULTANT'S PERSONNEL

- 6.7.1 If at any time after entering into this Agreement, Owner has any objection to Consultant's representative or to any of Consultant's Personnel, or any objection to any personnel of sub-consultants retained by Consultant and assigned to the Project, Consultant shall promptly propose substitutes to whom Owner has no objection.

ARTICLE 7 OBLIGATIONS OF THE OWNER

7.1 OWNER FURNISHED DATA AND ACCESS TO SITE

- 7.1.1 The Owner shall provide to Consultant available (*i.e.*, in the Owner's custody and control) technical data that Owner determines to be needed to perform the Professional Services on the Project. Subject to the standard of care set forth in Section 4-3, above, Consultant may reasonably rely upon the accuracy, timeliness, and completeness of the information provided by the Owner. Consultant may be entitled to additional compensation and time to complete the Professional Services to the extent the cost or time to complete the Professional Services are increased due to inaccurate technical data or inaccurate information provided by the Owner.

7.2 PROMPT NOTICE

- 7.2.1 The Owner shall give prompt written notice to Consultant whenever Owner observes or becomes aware of any development that affects the scope or timing of Professional Services or any subcontracted services, or any defect in the Professional Services or subcontracted services of Consultant, including Consultant's Personnel; provided, however, that Owner's failure to comply with its obligations under this paragraph shall not be construed to adversely affect any liability, responsibility or obligation of Consultant to Owner under this Agreement. Consultant shall give prompt written notice to Owner whenever Consultant observes or becomes aware of any development or event that affects the scope or timing of Professional Services, or any defect in the Professional Services of Consultant, including Consultant's Personnel, provided under this Agreement or any Work Order issued pursuant to this Agreement.

7.3 CHANGES

- 7.3.1 No changes in the general scope of Professional Services or subcontracted services under this Agreement, and no amendment may be made to any Work Order issued pursuant to this Agreement, unless such changes are first agreed to by Owner and Consultant in writing. Consultant's personnel shall not be permitted to be changed or substituted unless first authorized in writing by the Owner. If any approved changes affect Consultant's cost of or time required for performance of the Professional Services, an equitable adjustment may be made through a written amendment to this Agreement or Work Order issued pursuant to this Agreement.

ARTICLE 8 GENERAL LEGAL PROVISIONS

8.1 FORCE MAJEURE

- 8.1.1 Consultant is not responsible to Owner for any damages to Owner or delay in performance caused by acts of God, strikes, lockouts, accidents, or other events beyond the control of

Consultant and not avoidable by the diligence of Consultant; in such event, Consultant shall give Owner prompt notice of such event and the cause of delay and the performance of this Agreement shall be excused for the period of such delay caused by a force majeure event. If such force majeure event necessitates a change in the time required for performance of the Professional Services or subcontracted services, the Parties may make an equitable adjustment to the schedule and contract amount; provided, however, that Consultant shall continue to promptly perform all of its obligations under this Agreement, while the Parties are determining the nature and extent of any such adjustments. This Section shall not excuse Owner's obligation to make payment for Professional Services or subcontracted services in accordance with this Agreement; provided, however, that Owner's obligations under this Agreement, including Owner's obligation to pay Consultant, may be excused for such period of time as Owner is not able to perform as a result of acts of God, strikes, lockouts, accidents, or other events beyond the control of Owner and not avoidable by the diligence of Owner.

8.2 TERMINATION

- 8.2.1 This Agreement or any Work Order issued pursuant to this Agreement may be terminated by either Party for convenience through written notice to the other Party to be effective thirty (30) calendar days after the other Party's receipt of such notice; provided, however, that Owner shall be responsible to pay Consultant for all authorized Professional Services and subcontracted services properly performed up to the termination date. Upon receipt of notice of termination for any reason, Consultant shall cause to be promptly delivered to Owner a copy of all confidential information and Work Product. In the event of a termination for convenience by either Party, Consultant shall have no recourse against Owner except as stated in the preceding sentence; additionally, in the event of a termination for convenience by the City, Consultant may also be entitled to receive reimbursement from Owner of an amount equal to the sum of: (i) the reasonable out-of-pocket costs actually and necessarily incurred by Consultant in withdrawing its equipment and personnel from the Project and otherwise demobilizing; and (ii) the actual, reasonable and necessary costs incurred by Consultant in terminating those contracts, not assumed by Owner, for subcontractors services. Consultant shall document any cost claimed by it to Owner's reasonable satisfaction and shall supply Owner with copies of all invoices for subcontracted services covering the amounts claimed as costs for such purpose. Consultant shall submit an invoice to Owner for the amount of reimbursement claimed by Consultant with all supporting information and requisite documents. Payment by Owner of such invoice shall be based upon Owner's determination of the reasonableness of said costs.
- 8.2.2 Either Party may terminate this Agreement or any Work Order issued pursuant to this Agreement, because of default of the other Party, to be effective fifteen (15) days after receipt by the breaching Party of a written notice specifying such default, unless the breaching Party corrects such default or presents a mutually agreeable plan to cure such default within such time.
- 8.2.3 Notwithstanding any termination of this Agreement, unless otherwise agreed to by Owner, Consultant shall complete all Work Orders executed prior to the effective date of termination. Owner shall pay for such work in accordance with Article 3. Upon termination of this Agreement for any reason, if Owner has compensated Consultant for work not yet performed, Consultant shall promptly return such compensation to Owner.

8.3 SUSPENSION, DELAY, OR INTERRUPTION OF WORK

- 8.3.1 Upon five (5) days prior written notice, the Owner may suspend, delay, or interrupt for up to six (6) months the services of Consultant for the convenience of the Owner. Nothing in this Section shall be construed to apply to any such suspension, delay or interruption caused by an event identified in Section 6-1. A suspension may be withdrawn by Owner upon five (5) days written notice to Consultant. Any suspension, delay or interruption that exceeds six (6) months shall be deemed to be a termination by Owner for convenience, and Consultant may be compensated by Owner as if this Agreement were a termination for convenience.

8.4 INDEMNIFICATION

- 8.4.1 Notwithstanding any other provision in the Contract Documents to the contrary:

- 8.4.1.1 **CONSULTANT SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS OWNER, ITS TOWN COUNCIL, OFFICERS, EMPLOYEES AND AGENTS FROM AND AGAINST ALL CITATIONS, CLAIMS, COSTS, DAMAGES, DEMANDS, EXPENSES, FINES, JUDGMENTS, LOSSES, PENALTIES OR SUITS, WHICH IN ANY WAY ARISE OUT OF, RELATE TO, OR RESULT FROM THE PERFORMANCE OF PROFESSIONAL SERVICES OR WHICH ARE CAUSED BY THE INTENTIONAL ACTS OR NEGLIGENT ACTS OR OMISSIONS OF CONSULTANT OR ITS SUBCONTRACTORS, AND ANY OTHER THIRD PARTIES FOR WHOM OR WHICH CONSULTANT IS LEGALLY RESPONSIBLE (THE "INDEMNIFIED ITEMS"). BY WAY OF EXAMPLE, THE INDEMNIFIED ITEMS MAY INCLUDE PERSONAL INJURY AND DEATH CLAIMS AND PROPERTY DAMAGE CLAIMS, INCLUDING THOSE FOR LOSS OF USE OF PROPERTY. INDEMNIFIED ITEMS SHALL INCLUDE ATTORNEY'S FEES AND COSTS OF COURT, COURT COSTS, AND SETTLEMENT COSTS. INDEMNIFIED ITEMS SHALL ALSO INCLUDE ANY EXPENSES, INCLUDING ATTORNEY'S FEES AND EXPENSES, INCURRED BY AN INDEMNIFIED INDIVIDUAL OR ENTITY IN ATTEMPTING TO ENFORCE THIS INDEMNITY.**

- 8.4.1.2 **THE OBLIGATIONS SET FORTH IN THIS SECTION SHALL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.**

- 8.4.1.3 **CONSULTANT SHALL CAUSE ALL CONTRACTS FOR SUBCONTRACTED SERVICES TO INCLUDE A LIKE INDEMNITY THAT SHALL COVER BOTH THE OWNER AND CONSULTANT. NOTHING HEREIN SHALL LIMIT THE INSURANCE REQUIREMENTS OR APPLICABILITY OF SAME SET FORTH IN THIS AGREEMENT AND THE CONTRACT DOCUMENTS.**

- 8.4.2 The above indemnity is a business understanding between the Parties and applies to all different theories of recovery, including breach of contract or warranty, tort including negligence, statutory liability or any other cause of action.

8.5 JURISDICTION

- 8.5.1 The law of the State of Texas shall govern the validity of this Agreement, its interpretation and performance, and any other claims related to it; and, with respect to any conflict of law provisions, the parties agree that such conflict of law provisions shall not affect the application of the law of Texas (without reference to its conflict of law provisions) to the governing, interpretation, validity and enforcement of this Agreement. In the event of any legal action under this Agreement, venue for all causes of action shall be instituted and maintained in courts of competent jurisdiction located in Denton County, Texas.

8.6 SEVERABILITY

- 8.6.1 If any of the provisions contained in this Agreement are held for any reason to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceable provisions shall not affect any other provision, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

8.7 ASSIGNMENT

- 8.7.1 Neither Party may sell, transfer or assign any or all of its respective rights nor obligations under this Agreement to a third party without the prior written consent of the other Party.

8.8 SURVIVAL

8.8.1 Any of the representations, warranties, covenants, and obligations of the Parties, as well as any rights and benefits of the Parties, pertaining to a period of time following the termination or expiration of this Agreement shall survive termination or expiration. Without limiting the foregoing, Articles 6 and 8 shall survive termination of this Agreement.

8.9 NO THIRD PARTY RIGHTS

8.9.1 Except as provided in Sections 6-4 and 8-4, this Agreement shall not create any rights or benefits to parties other than Consultant, Owner, and any Owner-affiliated entity including, but not limited to, an entity formed for purposes of developing and/or owning the Project.

8.10 USE OF WORK PRODUCT

8.10.1 All materials, documents and Work Product prepared or assembled by Consultant under this Agreement shall become the sole property of the Owner and shall be delivered to the Owner without restriction on future use. Consultant may retain in its files copies of all drawings, specifications and other pertinent information for the work. Consultant shall have no liability for changes made to any materials or other documents by others subsequent to the completion of this Agreement.

8.11 NOTICE

8.11.1 Except as otherwise provided herein, all notices and other communications required or permitted to be given under this Agreement, including Exhibits and Work Orders, shall be in writing, addressed to the Parties at their respective addresses as provided below, and may be delivered in person, sent by overnight express mail or courier service, or by certified mail, postage prepaid, return receipt requested. The address of each Party is as follows:

IF TO OWNER: Town of Little Elm Town Manager
100 West Eldorado Parkway, Little Elm, Texas 75068
Contracts@littleelm.org

IF TO CONSULTANT:

8.11.2 Each Party may from time to time change its address for receipt of notices by sending notice thereof in the manner provided herein to the other Party. Each notice given by certified mail shall be deemed delivered on the date of delivery as shown on the return receipt, or if delivery is attempted, at the last address specified and the notice is returned, notice shall be deemed delivered on the date the notice was originally sent. Each notice delivered in any other manner shall be deemed delivered as of the time of actual receipt thereof. The Parties acknowledge and agree to provide to the other Party within seventy-two (72) hours of transmission such documents bearing the original signatures.

8.12 RIGHT OF ENTRY

8.12.1 Owner shall permit Consultant reasonable access to a Project as may be required to permit Consultant to perform the Professional Services under this Agreement; provided, however, Consultant shall coordinate all Professional Services so as not to interfere with any of Owner's operations at a Project site.

8.13 INTERPRETATION AND FAIR CONSTRUCTION OF AGREEMENT

8.13.1 This Agreement has been reviewed and approved by each of the Parties. In the event it should be determined that any provision of this Agreement is uncertain or ambiguous, the language in all parts of this Agreement shall be in all cases construed as a whole according to the fair meaning of the provision.

8.14 NON-WAIVER

8.14.1 The failure of either Party to insist upon or enforce strict performance by the other Party of

any provision of this Agreement or to exercise any right under this Agreement shall not be construed as a waiver or relinquishment to any extent of such Party's right to assert or rely upon any such provision or right in that or any other instance, rather, the same rights shall be and remain in full force and effect.

8.15 OPINIONS OF PROBABLE COST (COST ESTIMATES)

- 8.15.1 Any opinions provided by Consultant concerning probable project cost or probable construction cost are made on the basis of information available to Consultant and on the basis of Consultant's experience and qualifications, and represents Consultant's best judgment as an experienced and qualified professional. Since Consultant has no control over the cost of labor, materials, equipment or services furnished by others, or over the contractor(s) methods of determining prices, or over competitive bidding or market conditions, however, Consultant does not guarantee that proposals, bids or actual project or construction costs shall not vary from the opinions of probable cost that Consultant prepares. Consultant shall advise the Owner if it appears that construction costs may exceed the latest approved Project budget and make recommendations for corrective action.

8.16 CONSTRUCTION PROCEDURES

- 8.16.1 For construction work contracted directly to or with Owner, Consultant's observation or monitoring portions of the work performed under construction contracts shall not relieve the contractor from its responsibility for performing work in accordance with applicable contract documents. Consultant shall not control or have charge of, and shall not be responsible for, construction means, methods, techniques, sequences, procedures of construction, health or safety programs or precautions connected with the construction work and shall not manage, supervise, control or have charge of construction. Further, Consultant shall not be responsible for the acts or omissions of the contractor or other parties on a Project.
- 8.16.2 Consultant's visits to a Project site during the construction phase of a Project are to allow Consultant to become generally familiar with and to observe the progress and quality of the construction work, and to determine in general if the work is being performed and is proceeding in a manner indicating that the work, when completed, will be in accordance with the Work Product prepared by or for Consultant hereunder. Consultant shall attend all pre-construction and construction meetings, and such other meetings as set forth in this Agreement or requested by Owner. It is understood, however, that the contractor, not Consultant, is solely responsible for the construction of the Project, for safety programs and procedures at the site, and for its own acts or omissions and those of any subcontractor with whom contractor has a contract. Consultant shall recommend to Owner that contractor's work be disapproved and rejected while it is in progress if, on the basis of such on-site visits and observations, Consultant believes that such work will not produce a completed Project that conforms generally to the contract documents and Work Product or that it will prejudice the integrity of the design concept of the completed Project as a functioning whole as indicated in the contract documents and Work Product.
- 8.16.3 On the basis of on-site visits and observations, Consultant shall keep the Owner informed of the progress and quality of the construction work, and shall endeavor to guard the Owner against defects and deficiencies in the work. To the extent Consultant observes or is made aware of such defects and deficiencies, Consultant will report any such defects and deficiencies to the Owner. Consultant shall require such special inspections or tests of contractor's work as Consultant deems appropriate, and shall receive and review certificates of or other documents regarding inspections, tests and approvals as requested by the Owner and as required by laws, rules, regulations, ordinances, codes, orders or the contract documents and Work Product; Consultant's review of such certificates will be for the purpose of determining that the results certified indicate compliance with applicable laws, rules, regulations, ordinances, codes, orders or the contract documents and Work Product.
- 8.16.4 Consultant shall promptly correct any defective Work Product or other information furnished

by Consultant at no cost to the Owner. The Owner's approval, acceptance, use of or payment for all or any part of Consultant services hereunder, including, without limitation, the Work Product or any portion thereof, or of the Project itself, shall in no way alter Consultant's obligations or the Owner's rights hereunder. If requested by Owner, Consultant shall review and take appropriate action on the contractor's submittals and application for payment (including, without limitation, certifying any amounts due the contractor based upon Consultant's visits to and observations at the site, and such certification shall constitute a representation to the Owner, based on Consultant's visits and observations at the site and on the data comprising the contractor's applications for payment, that, to the best of Consultant's knowledge, information and belief, the work has progressed to the point indicated and the quality of the work is in accordance with the Work Product. Consultant shall furnish to the contractor such additional details, interpretations, and clarifications as are customary during the Construction Phase of the Project. All changes, substitutions, and deviations from the Work Product shall be subject to Owner's approval.

- 8.16.5 Consultant shall review and approve or take other appropriate action upon contractor's submittals such as shop drawings, product data and samples for the purpose of checking such submittals for conformance with the design concept expressed in the requirements of the contract documents and Work Product. Consultant's action shall be taken with such reasonable promptness as to cause no delay in the contractor's work on in construction by the Owner's own forces (if any), while allowing sufficient time in Consultant's professional judgment to permit adequate review. Consultant's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by Consultant, of construction means, methods, techniques, sequences or procedures. Consultant's approval of a specific item shall not indicate approval of an assembly of which the item is a component. When professional certification of performance characteristics of materials, systems or equipment is required by the contract documents and Work Product, Consultant shall be entitled to rely upon such certification to establish that the materials, systems or equipment will meet the performance criteria required by the contract documents and Work Product.
- 8.16.6 At Owner's request, Consultant shall review or take other appropriate action on construction change orders and construction change directives. Consultant shall also issue necessary clarifications and interpretations (and report the same to Owner) of the contract documents and Work Product as appropriate to the orderly completion of the work. Such clarifications and interpretations will be consistent with the intent of and reasonably inferable from the contract documents and Work Product.
- 8.16.7 Based on Consultant's observations and on its review of applications for payment and accompanying supporting documentation from the contractor (if Owner has requested such review), Consultant shall, at Owner's request, determine the amounts that Consultant recommends the contractor be paid. Such recommendations of payment (if requested by Owner) will be in writing and will constitute Consultant's representation to Owner, based on such observations and review, that, to the best of Consultant's knowledge, information and belief, (i) the contractor's work has progressed to the point indicated, (ii) such work is generally in accordance with the contract documents and Work Product (subject to an evaluation of the work as a functioning whole upon substantial completion, to the results of any subsequent tests called for in the contract documents and Work Product and to any other qualifications stated in the recommendation) , and (iii) the conditions precedent to contractor's being entitled to such payment appear to have been fulfilled in so far as it is Consultant's responsibility to observe contractor's work . In the case of unit price work, Consultant's recommendations of payment will include final determinations of quantities and classifications of contractor's work , based on observations and measurements of quantities provided by the contractor with contractor's pay requests.
- 8.16.8 Consultant shall secure, review, and transmit to Owner all original documents Consultant receives from the contractor, including without limitation any required lien waivers, releases,

bonds, affidavits, certificates of inspection, tests and approvals, warranties and similar submittals, and deliver all keys, manuals, record drawings and maintenance books to Owner, as required by the contract documents which are to be assembled by contractor in order to obtain final payment.

- 8.16.9 Promptly after notice from the contractor that the contractor considers the work ready for its intended use, Consultant, accompanied by Owner and the contractor, shall conduct a visit and observation to determine if the work is substantially complete. If after considering any objections of Owner, Consultant considers the work on the Project substantially complete, Consultant shall notify the Owner and contractor and shall issue a certificate of substantial completion to Owner and the contractor. Simultaneous with Consultant's determination that the Project is substantially complete and the issuance of a certificate of substantial completion, Consultant shall, jointly with the contractor, prepare for Owner a list of incomplete or unsatisfactory items and a schedule for their completion (the "punch list"). If requested by Owner, Consultant shall observe and monitor the correction and final completion of the work. Following issuance of a certificate of substantial completion of the work, if requested by Owner, Consultant shall evaluate the completion of the work of the contractor and make recommendations to Owner when the work is ready for final inspection. Promptly after notice from the contractor that the contractor considers the entire work finally complete and all items on the punch list completed, Consultant, accompanied by Owner and the contractor, shall conduct an inspection of the Project to determine if the work is finally complete.
- 8.16.10 When Consultant determines that work of the contractor has been finally completed, is acceptable, and is generally in accordance with the contract documents and Work Product, Consultant will recommend, in writing, final payment to the contractor. Accompanying the recommendation for final payment, Consultant shall also provide a notice that the work meets the intent of Consultant's design, is acceptable, and is generally in accordance with the contract documents and Work Product to the best of Consultant's knowledge, information, and belief and based on the extent of the Services provided by Consultant under this Agreement.
- 8.16.11 Consultant shall assemble and deliver to the Owner (i) one full size Mylar set and one full size black line set, (ii) one half size bond set, and (iii) a CD in AutoCAD format and PDF format, of reproducible Record Construction Drawings as prepared by Consultant showing changes in the construction work during the construction process, including the final location of all buried utilities, based on marked up prints and drawings and other data furnished by the contractor.
- 8.16.12 Consultant shall advise and consult with the Owner during construction until final payment to the contractor is made and during any maintenance bond period and warranty by the contractor for a Project.

8.17 HAZARDOUS WASTES

- 8.17.1 Owner represents to Consultant that, to its actual knowledge, no hazardous wastes (as hereinafter defined) are present at a Project site, except as may be specifically disclosed to Consultant or set forth in a Work Order. In the event hazardous wastes are known to Owner to be present, however, Owner represents that it shall disclose to Consultant the existence, including type, quantity and location, of such hazardous wastes. In the event Consultant or any other party encounters undisclosed hazardous wastes, Consultant shall have the obligation to notify Owner and, to the extent required by law or regulation, the appropriate governmental officials, and Consultant may, at its option and without liability for consequential or any other damages to Owner, suspend performance of professional services on that portion of a Project affected by such hazardous wastes. For purposes of this section, "hazardous wastes" has the same meaning as such term is defined in the Resource Conservation and Recovery Act or any applicable state law, rule or regulation then in effect.

8.18 CONSULTANT'S LIABILITY

- 8.18.1 Acceptance of the final plans, instruments of service, or other deliverable documents and products by Owner shall not constitute nor be deemed a release of the responsibility and liability of Consultant, its employees, associates, agents or sub-consultants for the accuracy and competency of their designs, working drawings, specifications or other documents and work ; nor shall such acceptance be deemed an assumption of responsibility by Owner for any defect in the designs, working drawings , specifications or other documents and work prepared by Consultant, its employees, associates, agents or sub-consultants.
- 8.18.2 If at any time during the term of this Agreement, Consultant shall fail to commence the Work in accordance with the provisions of this Agreement or any Work Order issued pursuant to this Agreement, or fail to diligently provide services in an efficient, timely and careful manner and in strict accordance with the provisions of this Agreement or any Work Order issued pursuant to this Agreement, or fail to use an adequate number of quality or quality of personnel to complete the Work or fail to perform any of its obligations under this Agreement, then Owner shall have the right, if Consultant shall not cure any such default after thirty (30) days written notice thereof, to terminate this Agreement. Any such act by Owner shall not be deemed a waiver of any other right or remedy of Owner. If, after exercising any such remedy due to Consultant's non-performance under this Agreement, the cost to Owner to complete the Work to be performed under this Agreement is in excess of that part of the Agreement sum which has not theretofore been paid to Consultant hereunder, Consultant shall be liable for and shall reimburse Owner for such excess.
- 8.18.3 Owner may deduct from any amounts due or to become due to Consultant any sum or sums owing by Consultant to Owner. In the event of any breach by Consultant of any provision of this Agreement or in the event of any claim against Owner arising out of Consultant's performance under this Agreement, Owner shall have the right to retain out of any payment due or to become due to Consultant an amount determined by Owner to be sufficient to protect Owner from any and all loss, damage or expense therefrom, until the breach or claim has been satisfactorily remedied or adjusted by Consultant.

8.19 DISPUTE RESOLUTION

- 8.19.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to any legal action. The Owner and Consultant shall endeavor to resolve claims, disputes and other matters in question between them first, informally and, second, by mediation. A request for mediation shall be made in writing and delivered to the other Party to this Agreement. The Parties shall have fifteen (15) days after receipt of a request for mediation to agree on a mediator. If the Parties are unable to agree on a mediator within fifteen (15) days, each Party shall have an additional five (5) days to designate a mediator. The two mediators so designated shall then designate a third unbiased mediator who shall be the mediator to conduct the mediation. The decision of the mediator shall be non-binding. The Parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof. If the Parties do not resolve a dispute through mediation pursuant to this section, then the Parties may pursue litigation in a court of competent jurisdiction as the agreed upon method of binding dispute resolution.

ARTICLE 9. DEFINITIONS; MISCELLANEOUS

9.1 DIRECT EXPENSES

- 9.1.1 Direct Expenses shall mean those out-of-pocket reasonable costs or expenses directly and necessarily incurred by Consultant, including its employees, for Professional Services including, but not limited to, transportation costs, including current rates for Consultant's vehicles; meals and lodging (however, in order to be reimbursed, any costs associated with

out-of-town travel shall receive the prior approval of Owner), laboratory tests and analysis; and special Owner-requested and Project-related insurance, not including the insurance described in Section 4-4 . Direct Expenses shall not include payroll costs and compensation , capital expenses, overhead , or costs incurred as a result of the application of Section 4-3 or Section 6 of this Agreement or otherwise as a result of the negligent act, error or omission or willful misconduct of Consultant or Consultant's Personnel. Reimbursement for Direct Expenses shall be on the basis of actual charges when furnished by commercial sources and, when furnished by Consultant, on the basis of current rates specified in the applicable Work Order, and all reimbursement for Direct Expenses shall be subject to Owner's approval and determination of reasonableness.

9.2 OTHER DEFINITIONS

9.2.1 Whenever used in this Agreement, the terms: (a) "including" shall mean "including without limitation," (b) "Party" shall mean Owner or Consultant, (c) "Parties" shall mean Owner and Consultant, collectively, (d) "Project" shall mean the project for which a Work Order has been issued in accordance with Article 1, and (e) "Work Product" shall mean the Consultant's instruments of professional services.

9.3 MISCELLANEOUS

9.3.1 All exhibits to this Agreement are incorporated herein by reference for all purposes wherever reference is made to the same. Any of the representations, warranties, covenants, and obligations of the Parties, as well as any rights and benefits of the Parties, pertaining to a period of time following the termination or expiration of this Agreement shall survive termination or expiration. This Agreement and the Work Orders issued pursuant to this Agreement, and any Exhibits attached to this Agreement , constitute the entire Agreement, supersede all prior written or oral understandings, and may only be changed, amended or altered by a written amendment to this Agreement executed by both Parties.

ARTICLE 10 SIGNATURES

10.1 The undersigned officers and/or agents of the Parties hereto are the properly authorized persons, and have the necessary authority, to execute this Agreement on behalf of the Parties hereto, and each Party hereby certifies to the other that any necessary motions, resolutions or other act extending such authority have been duly passed and are now in full force and effect.

INWITNESS HEREOF, the Parties execute below:

TOWN OF LITTLE ELM

CONSULTANT

Matt Mueller, Town Manager

Date

Date

Town Contact

Consultant Contact

Exhibit A: Insurance Requirements