

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE PROFESSIONAL SERVICES AGREEMENTS FOR COASTAL ENGINEERING CONSULTANT SERVICES AND DECLARING AN EMERGENCY.

WHEREAS, that the City invited proposals from qualified firms for Coastal Engineering Consultant Services; and

WHEREAS, that the City Engineer and the Administration reviewed said proposals and recommended the firms of KS Associates, Inc. of Elyria, Ohio and Wade Trim of Cleveland, Ohio; and

WHEREAS, Council coming now to consider said proposals has determined the proposals submitted by the firms of KS Associates, Inc. of Elyria, Ohio and Wade Trim of Cleveland, Ohio to be the best responsive proposals and are acceptable to this Council.

NOW THEREFORE, BE IT ORDAINED BY THE COUNCIL OF  
THE CITY OF AVON LAKE, STATE OF OHIO:

Section No. 1: That the Mayor is hereby authorized and directed to enter into five-year agreements with KS Associates, Inc. of Elyria, Ohio and Wade Trim of Cleveland, Ohio, to provide the City with professional surveying, design and permitting services for various outfalls into Lake Erie. (Exhibit A & B)

Section No. 2: That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council and that all deliberations of this Council and any of its committees which resulted in such formal actions, were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

Section No. 3: That this Ordinance is hereby declared to be an emergency measure, the emergency being the necessity of obtaining coastal engineering and design services for various outfall locations, thus for the health, safety, and welfare of the citizens of Avon Lake. Therefore, this Ordinance shall take effect and be in full force immediately after its passage and approval by the Mayor.

1<sup>st</sup> reading: 1/23/2023

2<sup>nd</sup> reading:

3<sup>rd</sup> reading:

PASSED: 2/13/2023

/s/ Jennifer Fenderbosch

President Pro Tempore

POSTED: 2/17/2023

APPROVED: 2/14/2023

ATTEST: /s/ Valerie E. Rosmarin

Clerk of Council

/s/ Gregory J. Zilka

Mayor

# Master Consultant Agreement

This Master Consultant Agreement (the "Master Agreement") is entered into effective as of January 13, 2023 (the 'Effective Date') by and between KS Associates, Inc. ("Consultant") and The City of Avon Lake ("City") hereinafter referred to as the parties.

This Master Agreement establishes the general terms and conditions agreed by City and Consultant to govern a specific scope of services as described in a Project specific Work Authorizations. Separate Project specific Work Authorizations will be executed between City and the Consultant that establish Project specific scope of services, Project Schedule, Project Budget, Basic Compensation, Project address and other pertinent Project information as may be known to City. Project specific Work Authorizations upon execution by the parties shall become a part of this Master Agreement. Any Project specific Prime Agreement will be made a part of and will be attached to the Project Specific Work Authorizations. See attached Exhibit "A" for sample Work Authorization.

Now, therefore, in consideration of the mutual promises and conditions contained in this Master Agreement, the parties agree to be bound by the terms and conditions set forth herein:

## 1. Term of Master Agreement

1.1 The term of this Master Agreement ('Term') shall commence on the Effective Date and terminate at the option of City, with or without cause. In the event that the Consultant is terminated for convenience, the Consultant shall be, subject to Paragraph 3, compensated for services properly performed up through the date of termination.

1.2 Termination or suspension of the Consultant's Services (in whole or in part) shall not give rise to any claim against either City or the Client for damages on account of lost profits or other consequential loss or damages, if any. Payments due to Consultant for termination and suspension as provided under this Master Agreement shall be City's only obligation and liability to Consultant by reason of such termination or suspension. Consultant shall not be entitled to any additional amounts for anticipated profits or unperformed services. All amounts payable shall be subject to City's right to offset any amounts due and owing Consultant by the amounts of any damages incurred by City or its Client as a result of Consultant's breach of this Master Agreement, which offset shall not prejudice the rights of City to recover additional damages or to exercise any other remedy at law or in equity.

1.3 If, in the reasonable opinion of City, the Consultant (i) fails in any material respect to timely provide its Services, (ii) fails to comply with the provisions of this Master Agreement, (iii) makes a general assignment for the benefit of its creditors, (iv) has a receiver appointed, or (v) becomes insolvent, then, after serving seven(7) days written notice, unless the condition specified in such notice has been eliminated within such seven (7) days or, if the condition is not capable of being eliminated within such seven (7) day period, City, at its option, may, (a) take such steps as are necessary to overcome the condition, in which case the Consultant shall be liable to City for any cost thereof, or (b) partially or wholly terminate for default the Consultant's continued performance of its duties for the Project. In the event of termination for default, City may, at its option, use all of Consultant's instruments of service for completion of the Project, take assignment of any or all of the Consultant's agreements with any lower-tier third parties and/or have the remainder of the

Consultant's obligations completed by whatever means City deems expedient.

1.4 In the event of any termination of this Master Agreement for cause (or otherwise by reason of any breach, default, or violation of this Master Agreement by Consultant), Consultant shall remain liable for all damages sustained by City by reason of such default and termination and City shall have and retain all rights and remedies, whether at law or in equity. City's right to require strict performance of any and all obligations in this Master Agreement shall not be affected in any way by any previous waiver, forbearance, or course of dealing.

## 2. Consultant's Responsibilities

2.1 The Consultant is an independent Contractor, is responsible for methods and means used in performing the Consultant's services under this Master Agreement and is not an employee, agent, or partner of City. The Consultant will not be responsible for the acts or omissions of City.

2.2 If applicable, the Consultant will recommend to City that appropriate procedures, methods, tests, reports, investigations, and analyses be obtained for proper execution of the Consultant's services.

2.3 The Consultant shall use established and recognized formats for specifications. Specifications may will be a format agreed upon by City and the Consultant.

2.4 City may review the Consultant's work for compliance with the City's program and for overall coordination with City's services. The Consultant will actively execute their established Quality Assurance efforts including but not limited to within Phase and near end Phase interdisciplinary reviews, coordination, evaluations, and quality enhancements of all deliverables. This Quality Assurance effort will include an "internal" quality control review to be performed by the Consultant. City reserves its right, at any time, to give preliminary acceptance of the Consultant's services, prior to the Client's review. If the Consultant's internal quality control review is not reasonably acceptable and thereafter the Consultant is provided a reasonable opportunity to cure deficiencies in the internal quality control review, City reserves the right to perform a "Peer Review" of the deliverable, and back-charge the Consultant for such Peer Review. However, City's final acceptance of any portion of Consultant's services shall be contingent upon acceptance by the Client. City will endeavor to ensure that the Client's acceptance is not unreasonably withheld.

2.5 Any reference by the City to a particular means, technique or procedure will be solely to specify the desired end product or service, and shall not be followed, if it is improper or will not result in the desired end product or service.

2.6 The Consultant will be responsible for the cost of mandatory and customary contributions and benefits, such as employment taxes and other statutory benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions, taxes, and benefits now or hereafter in effect and payable by reason of or in connection with this Master Agreement.

2.7 The Consultant will be responsible for obtaining and maintaining in effect all applicable professional licenses, registrations, and permits (if applicable) necessary for the proper execution of its services hereunder at its sole cost.

## 2.8 Subcontracting & Assignment:

2.8.1. The Consultant shall not subcontract all or any part of its services under this Agreement without the prior written consent of City and any such subcontract shall not relieve Consultant from its obligations to City, or modify the obligations of City to Consultant including, without limitation, obligations for payment of compensation under this Agreement.

2.8.2. The Consultant agrees and understands that City has selected Consultant for its specialized expertise and acknowledges the creation of a relationship of trust and confidence arising out of such selection. Consultant shall not assign its duties and obligations under this Agreement under any circumstances.

2.8.3. Where applicable, the Consultant agrees and acknowledges that certain subconsultants to the Consultant are engaged for the purpose of providing additional niche services. The Consultant shall not, without the written consent of the City, replace any subcontracted entity, and specifically acknowledges its commitment to the City to maintain compliance with any relevant contracting goals communicated to the Consultant by the City, and to exercise best efforts to maintain such compliance.

2.8.4. City shall be the administrator of the professional services for the Project and shall facilitate the exchange of information among the City and Consultant for the Consultant to coordinate with their Subconsultants.

## 3. Payments on Account of Services

3.1. Consultant will submit invoices for the Consultant's services monthly, but in no event later than sixty (60) days after the last day of the month in which the Services were provided. Invoices submitted after sixty (60) days may not be paid. The Consultant shall prepare invoices in the format provided and/or approved by City. City will pay Consultant within ten (10) calendar days after receipt of invoice.

3.2. If Consultant fails to timely submit its final payment application within sixty (60) days after substantial completion of its Services, such failure shall constitute a waiver of Consultant's right to any additional payment for its Services. Such waiver shall be applicable any or other person claiming through, by or under the Consultant.

3.3. Records of the Consultant's payroll and benefit costs and reimbursable expenses pertaining to this Project will be kept on a generally recognized accounting basis and will be available to City at mutually convenient times.

## 4. Copyrights and Licenses

4.1. Infringement of Intellectual Property: The Consultant shall ensure that all of the reports, documents, plans, specifications, memoranda, or other information provided to City under this Agreement or created pursuant to this Agreement (the Consultant's Documents) are the works of independent authorship of the Consultant, and do not infringe upon or otherwise violate the rights of intellectual property of any other entity or individual.

4.2. Ownership of Documents: Unless provided otherwise under the Project Specific Work Authorization (including with reference to work product or documents generally, or with reference to the work product or documents of the City (which shall be deemed to include the work product or documents of the Consultant)), in which case such requirements shall govern, the Consultant's Documents provided to City or the Client under this Agreement are the instruments of service of the Consultant who shall retain all rights of intellectual property attaching thereto. Where Consultant retains rights of intellectual property, the Consultant shall grant an irrevocable and unlimited license to City to use such Documents for any purpose directly related to or arising out of the Prime Agreement. City agrees to indemnify and hold the Consultant harmless against any damages, liabilities, costs, or expenses to the extent the same are caused by the reuse of the Consultant's work product or documents by the City on any project other than the Project. Consultant shall retain copies of all such Documents for their records unless otherwise provided in the Project Specific Work Authorization

4.3. Delivery of Documents: The Consultant shall deliver all of its Documents, whether wholly or partially completed, to City upon written demand in whatever electronic or hard-copy format reasonably required by City, without additional cost to City. Such delivery shall be made notwithstanding any actual or alleged dispute between the Consultant and City.

4.4. Computer Aided Design: The Consultant understands and agrees that all plans for the Project generated by City shall be prepared using Revit Architecture or AutoCAD Civil 3D (three-dimensional Building Information Management programs). All plans prepared by the Consultant shall be prepared using the appropriate software so as to ensure that the plans prepared by the Consultant for This Portion of the Project are compatible in every respect with the plans prepared by City, and City may require, at its discretion, that the plans prepared by the Consultant be prepared using Revit or AutoCAD Civil 3D. City shall provide the Consultant with sufficient information necessary for the Consultant to ensure such compatibility. The Consultant shall also submit deliverables in a format as directed by City, if and to the extent required by the Project Specific Work Authorization, or at the written request of City. The Consultant shall maintain on file and make available to City design calculations for This Portion of the Project and shall furnish copies thereof to City on request.

## 5. Insurances

5.1. The Consultant will purchase and maintain for the below insurance coverages, at its own expense, that will provide protection from claims set forth herein, which may arise out of or from the Consultant's services under this Master Agreement and any Project specific Work Authorizations, whether such services are provided by the Consultant or by anyone directly or indirectly employed by them, or by anyone for whose acts the Consultant may be legally liable. The following insurance policy limits described below are intended to be minimum coverages acceptable unless more stringent requirements are specified in the Project Specific Work Authorization but will not limit the amount of recovery available to City. For each and every Project specific Work Authorizations Consultant shall name City and its client as Additional Insureds on the General Liability, and Automobile Liability Insurance Policies for an extended period of three (3) years beyond Substantial Completion of City's services.

- Workers' compensation per statute and employer's liability 1,000,000 for bodily injury per person/\$1,000,000 per accident and \$1,000,000 per disease.
- Automobile liability at \$1,000,000 for bodily injury per person/\$1,000,000 per occurrence and \$1,000,000 for property damage per occurrence.

- Commercial General Liability including liability assumed under insured agreements, with limits at \$2,000,000. Limits apply to Bodily Injury and Property Damage on a per occurrence; general aggregate, and products and completed operations aggregate basis.
- Professional Liability Errors and Omissions coverage with a limit of not less than \$5,000,000 per claim and in the aggregate. Such coverage will be maintained for a period of six (6) years beyond Substantial Completion of City's services, for each and every Project specific Work Authorizations. The coverage afforded under this coverage shall be excess of all other applicable valid and collectible professional liability and/or contractors pollution liability insurance, if applicable (including, but not limited to, any project specific professional liability and/or contractors pollution liability insurance).

5.2. All insurance coverage required hereunder, excepting Workers' compensation and Professional liability coverage, shall be primary and noncontributory to any insurance policy or self-insurance program maintained by City and/or its client, and applicable to the Services performed hereunder. Any deductibles required for all insurance coverage required hereunder shall be the sole responsibility of the Consultant

5.3. In the event Consultant, at any time, fails to maintain the insurance coverage required hereunder, City may, at its sole discretion, terminate this Master Agreement or may secure such coverage(s) on behalf of the Consultant and deduct premium costs from any amounts due or to become due to Consultant, provided however that City shall have no obligation to purchase such insurance, nor be responsible for the coverage purchased or the insurance provider(s) used, and purchase of such insurance shall in no way be construed as a waiver by City of any of its rights and remedies under this Master Agreement.

5.4. Consultant shall require all policies of insurance that are in any way related to the Services and that are secured and maintained by Consultant, subcontractors and/or consultants to include clauses providing that every underwriter shall waive all of its rights of recovery under subrogation against City and its client. Further, the Consultant waives all rights of recovery against City, the Client, and other Indemnified Parties to the extent any claim against such party is covered by the insurance required of the Consultant, under this Master Agreement.

5.5. The Consultant shall provide City with annual certified copies of Certificates of insurance evidencing the above required coverages. The Consultant acknowledges the receipt of such Certificates by City is a condition precedent to payment under this Master Agreement. Certificates of insurance must also be issued by the insurance company or by an agent or broker authorized to represent the company, and such certificates will contain provisions that at least thirty (30) days prior written notice will be given to City in the event of cancellation, or non-renewal of the insurance. Further, Consultant shall provide thirty (30) days prior written notice to City in the event of a reduction in insurance.

## 6. Miscellaneous Provisions

6.1. Consultant understands and agrees that its performance of its services under this Master Agreement entails the use of a variety of confidential and proprietary information. This information is closely held and normally not revealed or used except in certain business circumstances. Consultant agrees that during the term of this Master Agreement and for a period of three (3) years after expiration or early termination of this Master Agreement, Consultant shall hold confidential and neither use nor release proprietary information acquired while performing its services under this Master Agreement. It is agreed by the parties that the information that the Consultant agrees to hold confidential and not to use or release includes business information specific to City related to financial rates and other strategic information that

affects City's competitive position in the marketplace. Specific examples of such confidential information include, but are not limited to, the following:

- a) overhead, fringe benefits, and general and administrative rates
- b) labor rates
- c) billing rates
- d) fee percentages
- e) marketing strategy
- f) client lists
- g) business plans
- h) proposals (bid and planned)
- i) memoranda, reports, manuals, or other documents or discussing such information.

6.2. Notwithstanding anything herein to the contrary, the following shall not constitute confidential or proprietary information: (i) information that is generally known or is available in the public domain, without fault of Consultant, from and after the time such information becomes so known or available in the public domain, or (ii) information that is disclosed in any issued patent, publication or other source available to the public, from and after the time such information becomes available to the public in such form.

## 7. Conflict of Interest.

7.1. Consultant affirms that it is not involved in any situation that might create or appear to create a conflict of interest with City during the term of this Master Agreement.

7.2. Consultant agrees that during the term of this Master Agreement, it will immediately report to its assigned supervisor any cash gifts, or any other personal favors offered or received by Consultant from any competitor or vendor of City.

7.3. Consultant further agrees to report immediately any circumstances or situations arising in the future that might involve it or appear to involve it in conflict of interest.

## 8. Binding Effect; Assignment.

8.1. This Master Agreement shall inure to the benefit and be binding upon both the Consultant and City, and their respective successors and assigns. The Consultant shall not assign any rights or duties under this Master Agreement without prior written consent of City.

## 9. Arbitration

9.1. Disputes involving City's client. All disputes or claims (as defined in the Project Specific Work Authorization) involving City's client, City, and the Consultant and all disputes directly between City's client and the Consultant shall be resolved in strict compliance with the disputes or claims provisions in the Project Specific Work Authorization, and also as modified by the following additional requirements as it relates to the Consultant. The initiation of claim and dispute resolution under the Project Specific Work Authorization shall stay dispute resolution under this Master Agreement on any claim or issue brought by the Consultant related to the dispute under the Project Specific Work Authorization.



9.1.1 For any request or claim by the Consultant seeking additional time or compensation that arises out of a Project Specific Work Authorization, and: (a) arises out of or is related to the acts or omissions of City's client or a party for whom City's client is responsible (other than City), (b) changes to or defects in the Project Specific Work Authorization, or (c) any other claim for which City's client may have responsibility (collectively "claims"), the Consultant agrees to be bound to City to the same extent that City is bound to its client, both by the terms of the Project Specific Work Authorization and by any and all decisions or determinations made thereunder by the party, board or court as authorized in the Project Specific Work Authorization for resolving claims. If the Project Specific Work Authorization contains a provision, identified as a "Disputes", "Claims" or "Claims Resolution" clause, which specifies a procedure for resolving such claims, then City agrees to invoke, at the Consultant's reasonable request, that Disputes, Claims or Claims Resolution clause on behalf of the Consultant, and will allow the Consultant to reasonably participate in and, to then extent allowed, to present its meritorious claims to City, provided that the Consultant cooperates fully with City in the presentation of the claims. The Consultant shall have full responsibility for the preparation and presentation of its claims, including giving City timely notice so that City may comply with the claim notification requirements of the Project specific Work Authorizations, and shall bear all expense related thereto, including attorney's fees. The Consultant agrees to be bound by any final determination rendered on its claims, whether pursuant to any such clause or otherwise, and the Consultant shall in no event be entitled to receive any greater amount from City than City is entitled to and actually does receive from its client on account of the Consultant's claims, less any markups or costs incurred by City and to which City is otherwise entitled, and the Consultant specifically agrees that it will accept such amount, if any, received by City from its client as full satisfaction and discharge of its claims. The Consultant agrees that it will not take any other action with respect to any such claims. If the Consultant is not diligent in the pursuit of its claims, or otherwise refuses to cooperate with City as provided in this Agreement, then in its sole discretion City may consider such claims to be waived by the Consultant or may prepare and present such claims on behalf of the Consultant.

9.1.2 The Consultant hereby agrees to defend and indemnify City and save City harmless from any and all liability arising out of or related to any certification of such claims furnished by the Consultant.

9.1.3 The Consultant shall be bound by City's determination, made in good faith, as to apportionment of any undifferentiated amounts received by City from its client on behalf of the Consultant and other claimants, including City, whose work is affected by any act or omission of City.

9.2. Disputes between City and the Consultant. All disputes solely between City and the Consultant that arise from or are related to a Project Specific Work Authorization or this Master Agreement, including the determination of the scope or applicability of the requirements in this Article 9, shall be finally resolved in accordance with the following process. Any dispute not resolved through direct discussions or mediation shall be finally resolved by way of binding arbitration.

9.2.1 The Parties to this Master Agreement intend, to the maximum extent feasible, to resolve all disputes at the Project specific Work Authorization's project level. Disputes not resolved at this project level shall be timely escalated to the Parties' senior management, senior management will then use good faith efforts to settle the dispute. If after a reasonable time the Parties' senior management are unable to resolve the dispute, the Parties shall mediate as set forth below. The inability of the senior executives to resolve the dispute is a condition precedent to mediation then arbitration.

9.2.2 Mediation is required and is a condition precedent to the pursuit of further dispute resolution proceedings: provided, however, the Parties may mutually agree to waive this mediation requirement. The Parties shall make every reasonable effort to conduct the mediation as soon as possible, but in any case not later than 90 calendar days after senior management first takes up efforts to resolve the dispute per the above. The Parties will mediate pursuant to the current version of the mediation rules of the Judicial Arbitration and Mediation Services (JAMS). The mediation will be self-administered. The Parties agree that they will participate in the mediation in good faith and that they will share equally in its costs. If the Parties are unable to agree upon a mediator within 10 days of a demand by either Party to mediate, then a mediator will be appointed from the JAMS panel of neutrals pursuant to the JAMS mediation rules.

9.2.3 Arbitration will be held in the city of City's regional office, which is located closest to the Project specific Work Authorization's project location. Arbitrations shall be non-administered and shall be conducted according to mutually acceptable rules and reasonable limitations on discovery; however, if the Parties cannot agree on such rules or if the Parties are unable to agree upon a tribunal within thirty (30) days following the notice to arbitrate, then the current Construction Industry Arbitration Rules of the American Arbitration Association (AAA) will govern and the tribunal shall be appointed as provided in the AAA Commercial Arbitration Rules. The Parties are unable to agree upon the scope of discovery, the tribunal shall impose such limitations on discovery as are reasonable to limit cost, time, burden on the Parties, and to focus on the issues in dispute. Arbitration will commence as soon as feasibly possible with the goal of commencing not later than 180 calendar days after the date the arbitration demand is served on the responding Party. The agreement to arbitrate, and any agreement to arbitrate with additional persons duly consented to by the Parties, is specifically enforceable under the prevailing arbitration laws in force in the jurisdiction where the arbitration is conducted. The decision and award of the tribunal will be final and conclusive, and the Parties agree to abide by all such decisions and awards. Judgment on decisions and awards may be entered by any court having jurisdiction

9.3. Each Party shall diligently continue to perform all of its obligations assumed under this Master Agreement and the Project specific Work Authorizations pending final resolution of any dispute or claim arising hereunder. The Consultant agrees that if during the pendency of the dispute resolution process arising from a Project specific Work Authorization, if City's client issues a written order to City directing City to perform disputed work and if the disputed work involves the afore mentioned Project specific Work Authorization, then, upon receiving a written notice from City to so perform, the Consultant shall undertake or continue to perform such disputed work. The Consultant's performance of such disputed work pursuant to written notice by City shall not in any way be construed as a waiver of the Consultant's dispute or claim rights under the afore mentioned Project specific Work Authorization.

9.4. Joinder, Coordination with Legal and Equitable Proceedings. The Consultant agrees to become a party to any other arbitration proceeding in which City and its client is bound to arbitrate with respect to a Project specific Work Authorization. A demand for arbitration may not be made after the date when the institution of legal or equitable proceedings would be barred by any applicable statute of limitation. A Party does not violate this Section 9.4 by filing suit in a court of competent jurisdiction if: (a) the Party files suit to prevent the running of the statute of limitations or to obtain the benefit of some provisional remedy such as attachment or injunctive relief, and (b) the Party commencing suit agrees to stay court proceedings pending arbitration under a claim arising out of a Project specific Work Authorization.

9.5. The prevailing Party shall be entitled to reasonable attorney's fees and costs. In any dispute arising under a Project specific Work Authorization or this Master Agreement, the following shall apply in the

determination of which Party is the prevailing Party. If a Party claiming a right to payment of an amount in dispute is awarded all or substantially all of such disputed amount, then such claiming Party shall be the prevailing Party. If a Party defending against such claim is found to be not liable to pay all or substantially all of the disputed amounts claimed by the claiming Party, then the Party so defending against such claim shall be the Prevailing Party. If both Parties prevail with respect to different claims by each of them, then the Party who is prevailing with respect to the substantially greater monetary sum shall be deemed the prevailing Party; otherwise if both Parties prevail with respect to monetary sums on different claims, neither of which have sums substantially greater than the other, the tribunal having jurisdiction over the controversy, claims or actions shall, in rendering the award, determine in its discretion whether and to what extent either Party should be entitled to recover any portion of its attorney fees.

#### 10. Governing Law; Jurisdiction and Venue

10.1. Subject to a Project specific Work Authorization, the laws of the state where City is located shall govern this Master Agreement. Each party consents to this exclusive jurisdiction, agrees to accept services of process by mail, and waives all jurisdictional and venue defenses otherwise available to it.

#### 11. Other Projects.

11.1. In the event that the Consultant fails to perform in accordance with this Master Agreement or any other agreements that Consultant may have with City now or in the future, Consultant agrees that City may, in its reasonable discretion, withhold all or a portion of Consultant's payment under Paragraph 3, to the extent necessary to protect City from damage or liability.

#### 12. Severability.

12.1. If any terms hereof or the application thereof to any person or circumstance shall be determined to be null and void, ineffectual, invalid, or unenforceable by any competent tribunal, the remaining terms hereof or the application of such term to persons or circumstances other than to those which were determined to be invalid or unenforceable shall not be affected thereby and shall continue in full force and effect.

#### 13. Waivers.

13.1. The waiver by either party of a breach by the other party of any provision of this Master Agreement shall not operate or be construed as a waiver of any subsequent breach.

#### 14. Notices.

14.1. Any notice required to be given or made to a party hereunder must be in writing and delivered in person or sent by certified, United States first class mail, return receipt requested, or by email if City is exercising its right to terminate, pursuant to Section 1.1.

#### 15. Amendment.

15.1. No waiver, modification, or amendment of any of the terms of this Master Agreement shall be effective unless made in writing and signed by the party to be charged.

16. Defense and Indemnity obligations.

16.1. Defense: The Consultant acknowledges and agrees that it shall take on (financially and with reference to engagement of counsel, collection of relevant information, preparation of any materials or documents, and in participation in any settlement amount) the responsibility of defending in its own name and on its own behalf against and resolving any claims which arise from the Consultant's work for This Portion of the Project, including where the allegations of damage, breach, or default arising from the acts or omissions of the Consultant. Further, the parties' mutual intent is that neither party shall be responsible for defending against or resolving any claims, or redressing any damages to the extent that they arise out of the acts, errors, or omissions of the other party

16.2. Indemnification – Absence of Client Indemnity:

16.2.1. Where and to the extent that the City is not obligated to indemnify, hold harmless and/or defend the Client under the terms of the Project Specific Work Authorization, the following indemnity shall apply;

16.2.2. For claims unrelated to Consultant's performance of professional services and to the fullest extent permitted by law, Consultant shall indemnify, defend, and hold City, its employees, agents and officials (the "Indemnitees") harmless from and against the tort liability of the Consultant, (including liability for claims, suits, actions, expenses or costs of any kind, whether actual, alleged or threatened, attorney's fees incurred by City, court costs, interest, or defense costs including expert witness fees), where such liability arises out of, in whole or in part, the performance of this Agreement by Consultant (or any individual or entity for whom Consultant shall bear legal liability for the acts or omissions thereof) and which results in bodily injury to any individual or entity (including the employees or officers of Consultant) or property damage of any kind, nature or description.

16.2.3. In addition to the foregoing, Consultant shall indemnify and hold harmless the Indemnitees from and against any and all claims, causes of action, losses, liabilities, damages, costs and expenses, (including reasonable attorney's fees and costs) arising out of the negligence or willful misconduct of Consultant (or any individual or entity for whom Consultant shall bear legal liability for the acts or omissions thereof) in the performance of professional services pursuant to this Master Agreement.

17. Publication.

17.1. Notwithstanding anything to the contrary, the Consultant shall not publish any aspects of the Project, in any manner, including but not limited to marketing materials or websites, without the express written authorization of City. The obligations of this Section shall survive the termination of this Master Agreement and the completion of the Services.

18. Foreign Corrupt Practices Act (FCPA)

18.1. Both parties acknowledge that City has entered this Master Agreement with Consultant based upon City's reasonable belief that Consultant shall not violate the United States Foreign Corrupt Practices Act ("FCPA"). Subject to FCPA, the Consultant warrants that none of its employees, officers, or principals is an official or representative of any government or is a candidate for such position. In conformity with the FCPA and City's established corporate policies regarding foreign business practices, Consultant further

represents and warrants that it and its employees, agents, and representatives shall not directly or indirectly make any offer, payment, promise to pay, or authorize the giving of anything of value for the purpose of influencing an act or decision of an official of any foreign government or candidate for such an office, including a decision not to act, or inducing such a person to use his influence to affect any government act or decision of a foreign government in connection with City's or Client's business. City may automatically terminate this Master Agreement for cause if it reasonably believes that Consultant has violated the FCPA. The parties agree to comply with the applicable provisions of National Security Presidential Directive/NSPD-22, the applicable provisions of 22 U.S.C. 7104, as amended by the Trafficking Victims Protection Reauthorization Act of 2003 (Pub. L. 108-193) and the Trafficking Victims Protection Reauthorization Act of 2005 (Public Law 109-164), and all applicable implementing regulations with regard to the U.S. Government's "zero tolerance" policy against human trafficking.

18.2. Consultant warrants and represents the following are true statements and will remain true during performance of the Services: (i) Consultant is authorized and duly qualified to perform the Services required in this Master Agreement; (ii) none of Consultant's personnel are foreign or domestic government employees, officials or other representatives; (iii) no money paid or thing of value given to Consultant by City will be paid, given or otherwise transferred directly or indirectly to any foreign or domestic government employee, official or other representative; (iv) Consultant is not in material violation of any laws, rules, or regulations which apply to the conduct of its business; (v) there has never been any citation, fine, or penalty imposed, asserted, or threatened against Consultant under any foreign, federal, state, local, or other law or regulation relating to employment, immigration, foreign or domestic corrupt practices or the avoidance of bribery and; (vi) Consultant is aware of no current circumstances likely to result in the imposition or assertion of any such a citation, fine, or penalty. Consultant will promptly notify City, in writing, if circumstances arise that would cause any of the foregoing statement to become false at any time during performance of the Services.

## 19. Prohibition Against Discrimination.

19.1. To Title VII of the Civil Rights Act of 1974 prohibits discrimination in employment. Recognizing its legal as well as social obligations to afford equal opportunities, City maintains an affirmative action plan to further its policy. It is the declared policy of City to afford equal opportunity in employment to individuals without regard to race, religion, political ideology, color, national origin and ancestry, disability, medical condition, veteran status, marital status, affectional or sexual orientation, gender identity or expression or age in accordance with applicable federal, state, and local law.

## 20. Prohibition Against Human Trafficking.

20.1. Both parties acknowledge that City has entered this Agreement with Consultant based upon the Consultant's representation and the Consultant's warranty that it has not engaged in any practices involving the use of child labor, forced labor, the exploitation of vulnerable people, human trafficking, or any other activities in violation of the anti-slavery laws.

## 21. Consequential Damages.

21.1. To the extent consequential damages are waived in the Project Specific Work Authorization, then neither party shall be liable to the other for loss of profits or revenue; loss of use or opportunity; loss of

good will; cost of substitute facilities, goods, or services; cost of capital; or for any special, consequential, indirect, punitive, or exemplary damages.

22. Warranty.

22.1. SUBJECT TO THE PROJECT SPECIFIC WORK AUTHORIZATION, NEITHER PARTY WARRANTIES NOR GUARANTEES THEIR SERVICES AND EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES OR WARRANTIES IMPOSED BY LAW, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

23. Entire Master Agreement.

23.1. This Master Agreement and any associated Work Authorizations contains the entire understanding between and among the parties concerning the matters herein and supersedes any prior understandings and agreements between and among them respecting the subject matter of this Master Agreement and may be amended only by written instrument signed by both City and Consultant.

IN WITNESS WHEREOF, the undersigned have duly executed this Master Agreement the day and year first above written.

\_\_\_\_\_  
Consultant Signature

\_\_\_\_\_  
City Signature

\_\_\_\_\_  
Consultant – Title  
(Printed name and title)

\_\_\_\_\_  
City Representative - Title  
(Printed name and title)

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## Master Consultant Agreement

This Master Consultant Agreement (the "Master Agreement") is entered into effective as of January 13, 2023 (the 'Effective Date') by and between Wade Trim ("Consultant") and The City of Avon Lake ("City") hereinafter referred to as the parties.

This Master Agreement establishes the general terms and conditions agreed by City and Consultant to govern a specific scope of services as described in a Project specific Work Authorizations. Separate Project specific Work Authorizations will be executed between City and the Consultant that establish Project specific scope of services, Project Schedule, Project Budget, Basic Compensation, Project address and other pertinent Project information as may be known to City. Project specific Work Authorizations upon execution by the parties shall become a part of this Master Agreement. Any Project specific Prime Agreement will be made a part of and will be attached to the Project Specific Work Authorizations. See attached Exhibit "A" for sample Work Authorization.

Now, therefore, in consideration of the mutual promises and conditions contained in this Master Agreement, the parties agree to be bound by the terms and conditions set forth herein:

### 1. Term of Master Agreement

1.1 The term of this Master Agreement ('Term') shall commence on the Effective Date and terminate at the option of City, with or without cause. In the event that the Consultant is terminated for convenience, the Consultant shall be, subject to Paragraph 3, compensated for services properly performed up through the date of termination.

1.2 Termination or suspension of the Consultant's Services (in whole or in part) shall not give rise to any claim against either City or the Client for damages on account of lost profits or other consequential loss or damages, if any. Payments due to Consultant for termination and suspension as provided under this Master Agreement shall be City's only obligation and liability to Consultant by reason of such termination or suspension. Consultant shall not be entitled to any additional amounts for anticipated profits or unperformed services. All amounts payable shall be subject to City's right to offset any amounts due and owing Consultant by the amounts of any damages incurred by City or its Client as a result of Consultant's breach of this Master Agreement, which offset shall not prejudice the rights of City to recover additional damages or to exercise any other remedy at law or in equity.

1.3 If, in the reasonable opinion of City, the Consultant (i) fails in any material respect to timely provide its Services, (ii) fails to comply with the provisions of this Master Agreement, (iii) makes a general assignment for the benefit of its creditors, (iv) has a receiver appointed, or (v) becomes insolvent, then, after serving seven(7) days written notice, unless the condition specified in such notice has been eliminated within such seven (7) days or, if the condition is not capable of being eliminated within such seven (7) day period, City, at its option, may, (a) take such steps as are necessary to overcome the condition, in which case the Consultant shall be liable to City for any cost thereof, or (b) partially or wholly terminate for default the Consultant's continued performance of its duties for the Project. In the event of termination for default, City may, at its option, use all of Consultant's instruments of service for completion of the Project, take assignment of any or all of the Consultant's agreements with any lower-tier third parties and/or have the remainder of the

Consultant's obligations completed by whatever means City deems expedient.

1.4 In the event of any termination of this Master Agreement for cause (or otherwise by reason of any breach, default, or violation of this Master Agreement by Consultant), Consultant shall remain liable for all damages sustained by City by reason of such default and termination and City shall have and retain all rights and remedies, whether at law or in equity. City's right to require strict performance of any and all obligations in this Master Agreement shall not be affected in any way by any previous waiver, forbearance or course of dealing.

## 2. Consultant's Responsibilities

2.1 The Consultant is an independent Contractor, is responsible for methods and means used in performing the Consultant's services under this Master Agreement and is not an employee, agent or partner of City. The Consultant will not be responsible for the acts or omissions of City.

2.2 If applicable, the Consultant will recommend to City that appropriate procedures, methods, tests, reports, investigations, and analyses be obtained for proper execution of the Consultant's services.

2.3 The Consultant shall use established and recognized formats for specifications. Specifications may will be a format agreed upon by City and the Consultant.

2.4 City may review the Consultant's work for compliance with the City's program and for overall coordination with City's services. The Consultant will actively execute their established Quality Assurance efforts including but not limited to within Phase and near end Phase interdisciplinary reviews, coordination, evaluations and quality enhancements of all deliverables. This Quality Assurance effort will include an "internal" quality control review to be performed by the Consultant. City reserves its right, at any time, to give preliminary acceptance of the Consultant's services, prior to the Client's review. If the Consultant's internal quality control review is not reasonably acceptable and thereafter the Consultant is provided a reasonable opportunity to cure deficiencies in the internal quality control review, City reserves the right to perform a "Peer Review" of the deliverable, and back-charge the Consultant for such Peer Review. However, City's final acceptance of any portion of Consultant's services shall be contingent upon acceptance by the Client. City will endeavor to ensure that the Client's acceptance is not unreasonably withheld.

2.5 Any reference by the City to a particular means, technique or procedure will be solely to specify the desired end product or service, and shall not be followed, if it is improper or will not result in the desired end product or service.

2.6 The Consultant will be responsible for the cost of mandatory and customary contributions and benefits, such as employment taxes and other statutory benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions, taxes, and benefits now or hereafter in effect and payable by reason of or in connection with this Master Agreement.

2.7 The Consultant will be responsible for obtaining and maintaining in effect all applicable professional licenses, registrations, and permits (if applicable) necessary for the proper execution of its services hereunder at its sole cost.



## 2.8 Subcontracting & Assignment:

2.8.1. The Consultant shall not subcontract all or any part of its services under this Agreement without the prior written consent of City and any such subcontract shall not relieve Consultant from its obligations to City, or modify the obligations of City to Consultant including, without limitation, obligations for payment of compensation under this Agreement.

2.8.2. The Consultant agrees and understands that City has selected Consultant for its specialized expertise and acknowledges the creation of a relationship of trust and confidence arising out of such selection. Consultant shall not assign its duties and obligations under this Agreement under any circumstances.

2.8.3. Where applicable, the Consultant agrees and acknowledges that certain subconsultants to the Consultant are engaged for the purpose of providing additional niche services. The Consultant shall not, without the written consent of the City, replace any subcontracted entity, and specifically acknowledges its commitment to the City to maintain compliance with any relevant contracting goals communicated to the Consultant by the City, and to exercise best efforts to maintain such compliance.

2.8.4. City shall be the administrator of the professional services for the Project and shall facilitate the exchange of information among the City and Consultant for the Consultant to coordinate with their Subconsultants.

## 3. Payments on Account of Services

3.1. Consultant will submit invoices for the Consultant's services monthly, but in no event later than sixty (60) days after the last day of the month in which the Services were provided. Invoices submitted after sixty (60) days may not be paid. The Consultant shall prepare invoices in the format provided and/or approved by City. City will pay Consultant within ten (10) calendar days after receipt of invoice.

3.2. If Consultant fails to timely submit its final payment application within sixty (60) days after substantial completion of its Services, such failure shall constitute a waiver of Consultant's right to any additional payment for its Services. Such waiver shall be applicable any or other person claiming through, by or under the Consultant.

3.3. Records of the Consultant's payroll and benefit costs and reimbursable expenses pertaining to this Project will be kept on a generally recognized accounting basis and will be available to City at mutually convenient times.

## 4. Copyrights and Licenses

4.1. Infringement of Intellectual Property: The Consultant shall ensure that all of the reports, documents, plans, specifications, memoranda, or other information provided to City under this Agreement or created pursuant to this Agreement (the Consultant's Documents) are the works of independent authorship of the Consultant, and do not infringe upon or otherwise violate the rights of intellectual property of any other entity or individual.

4.2. Ownership of Documents: Unless provided otherwise under the Project Specific Work Authorization (including with reference to work product or documents generally, or with reference to the work product or documents of the City (which shall be deemed to include the work product or documents of the Consultant)), in which case such requirements shall govern, the Consultant's Documents provided to City or the Client under this Agreement are the instruments of service of the Consultant who shall retain all rights of intellectual property attaching thereto. Where Consultant retains rights of intellectual property, the Consultant shall grant an irrevocable and unlimited license to City to use such Documents for any purpose directly related to or arising out of the Prime Agreement. City agrees to indemnify and hold the Consultant harmless against any damages, liabilities, costs, or expenses to the extent the same are caused by the reuse of the Consultant's work product or documents by the City on any project other than the Project. Consultant shall retain copies of all such Documents for their records unless otherwise provided in the Project Specific Work Authorization

4.3. Delivery of Documents: The Consultant shall deliver all of its Documents, whether wholly or partially completed, to City upon written demand in whatever electronic or hard-copy format reasonably required by City, without additional cost to City. Such delivery shall be made notwithstanding any actual or alleged dispute between the Consultant and City.

4.4. Computer Aided Design: The Consultant understands and agrees that all plans for the Project generated by City shall be prepared using Revit Architecture or AutoCAD Civil 3D (three-dimensional Building Information Management programs). All plans prepared by the Consultant shall be prepared using the appropriate software so as to ensure that the plans prepared by the Consultant for This Portion of the Project are compatible in every respect with the plans prepared by City, and City may require, at its discretion, that the plans prepared by the Consultant be prepared using Revit or AutoCAD Civil 3D. City shall provide the Consultant with sufficient information necessary for the Consultant to ensure such compatibility. The Consultant shall also submit deliverables in a format as directed by City, if and to the extent required by the Project Specific Work Authorization, or at the written request of City. The Consultant shall maintain on file and make available to City design calculations for This Portion of the Project and shall furnish copies thereof to City on request.

## 5. Insurances

5.1. The Consultant will purchase and maintain for the below insurance coverages, at its own expense, that will provide protection from claims set forth herein, which may arise out of or from the Consultant's services under this Master Agreement and any Project specific Work Authorizations, whether such services are provided by the Consultant or by anyone directly or indirectly employed by them, or by anyone for whose acts the Consultant may be legally liable. The following insurance policy limits described below are intended to be minimum coverages acceptable unless more stringent requirements are specified in the Project Specific Work Authorization but will not limit the amount of recovery available to City. For each and every Project specific Work Authorizations Consultant shall name City and its client as Additional Insureds on the General Liability, and Automobile Liability Insurance Policies for an extended period of three (3) years beyond Substantial Completion of City's services.

- Workers' compensation per statute and employer's liability 1,000,000 for bodily injury per person/\$1,000,000 per accident and \$1,000,000 per disease.
- Automobile liability at \$1,000,000 for bodily injury per person/\$1,000,000 per occurrence and \$1,000,000 for property damage per occurrence.

- Commercial General Liability including liability assumed under insured agreements, with limits at \$2,000,000. Limits apply to Bodily Injury and Property Damage on a per occurrence; general aggregate, and products and completed operations aggregate basis.
- Professional Liability Errors and Omissions coverage with a limit of not less than \$5,000,000 per claim and in the aggregate. Such coverage will be maintained for a period of six (6) years beyond Substantial Completion of City's services, for each and every Project specific Work Authorizations. The coverage afforded under this coverage shall be excess of all other applicable valid and collectible professional liability and/or contractors pollution liability insurance, if applicable (including, but not limited to, any project specific professional liability and/or contractors pollution liability insurance).

5.2. All insurance coverage required hereunder, excepting Workers' compensation and Professional liability coverage, shall be primary and noncontributory to any insurance policy or self-insurance program maintained by City and/or its client, and applicable to the Services performed hereunder. Any deductibles required for all insurance coverage required hereunder shall be the sole responsibility of the Consultant

5.3. In the event Consultant, at any time, fails to maintain the insurance coverage required hereunder, City may, at its sole discretion, terminate this Master Agreement or may secure such coverage(s) on behalf of the Consultant and deduct premium costs from any amounts due or to become due to Consultant, provided however that City shall have no obligation to purchase such insurance, nor be responsible for the coverage purchased or the insurance provider(s) used, and purchase of such insurance shall in no way be construed as a waiver by City of any of its rights and remedies under this Master Agreement.

5.4. Consultant shall require all policies of insurance that are in any way related to the Services and that are secured and maintained by Consultant, subcontractors and/or consultants to include clauses providing that every underwriter shall waive all of its rights of recovery under subrogation against City and its client. Further, the Consultant waives all rights of recovery against City, the Client, and other Indemnified Parties to the extent any claim against such party is covered by the insurance required of the Consultant, under this Master Agreement.

5.5. The Consultant shall provide City with annual certified copies of Certificates of insurance evidencing the above required coverages. The Consultant acknowledges the receipt of such Certificates by City is a condition precedent to payment under this Master Agreement. Certificates of insurance must also be issued by the insurance company or by an agent or broker authorized to represent the company, and such certificates will contain provisions that at least thirty (30) days prior written notice will be given to City in the event of cancellation, or non-renewal of the insurance. Further, Consultant shall provide thirty (30) days prior written notice to City in the event of a reduction in insurance.

## 6. Miscellaneous Provisions

6.1. Consultant understands and agrees that its performance of its services under this Master Agreement entails the use of a variety of confidential and proprietary information. This information is closely held and normally not revealed or used except in certain business circumstances. Consultant agrees that during the term of this Master Agreement and for a period of three (3) years after expiration or early termination of this Master Agreement, Consultant shall hold confidential and neither use nor release proprietary information acquired while performing its services under this Master Agreement. It is agreed by the parties that the information that the Consultant agrees to hold confidential and not to use or release includes business information specific to City related to financial rates and other strategic information that

affects City's competitive position in the marketplace. Specific examples of such confidential information include, but are not limited to, the following:

- a) overhead, fringe benefits, and general and administrative rates
- b) labor rates
- c) billing rates
- d) fee percentages
- e) marketing strategy
- f) client lists
- g) business plans
- h) proposals (bid and planned)
- i) memoranda, reports, manuals, or other documents or discussing such information.

6.2. Notwithstanding anything herein to the contrary, the following shall not constitute confidential or proprietary information: (i) information that is generally known or is available in the public domain, without fault of Consultant, from and after the time such information becomes so known or available in the public domain, or (ii) information that is disclosed in any issued patent, publication or other source available to the public, from and after the time such information becomes available to the public in such form.

## 7. Conflict of Interest.

7.1. Consultant affirms that it is not involved in any situation that might create or appear to create a conflict of interest with City during the term of this Master Agreement.

7.2. Consultant agrees that during the term of this Master Agreement, it will immediately report to its assigned supervisor any cash gifts, or any other personal favors offered or received by Consultant from any competitor or vendor of City.

7.3. Consultant further agrees to report immediately any circumstances or situations arising in the future that might involve it or appear to involve it in conflict of interest.

## 8. Binding Effect; Assignment.

8.1. This Master Agreement shall inure to the benefit and be binding upon both the Consultant and City, and their respective successors and assigns. The Consultant shall not assign any rights or duties under this Master Agreement without prior written consent of City.

## 9. Arbitration

9.1. Disputes involving City's client. All disputes or claims (as defined in the Project Specific Work Authorization) involving City's client, City, and the Consultant and all disputes directly between City's client and the Consultant shall be resolved in strict compliance with the disputes or claims provisions in the Project Specific Work Authorization, and also as modified by the following additional requirements as it relates to the Consultant. The initiation of claim and dispute resolution under the Project Specific Work Authorization shall stay dispute resolution under this Master Agreement on any claim or issue brought by the Consultant related to the dispute under the Project Specific Work Authorization.

9.1.1 For any request or claim by the Consultant seeking additional time or compensation that arises out of a Project Specific Work Authorization, and: (a) arises out of or is related to the acts or omissions of City's client or a party for whom City's client is responsible (other than City), (b) changes to or defects in the Project Specific Work Authorization, or (c) any other claim for which City's client may have responsibility (collectively "claims"), the Consultant agrees to be bound to City to the same extent that City is bound to its client, both by the terms of the Project Specific Work Authorization and by any and all decisions or determinations made thereunder by the party, board or court as authorized in the Project Specific Work Authorization for resolving claims. If the Project Specific Work Authorization contains a provision, identified as a "Disputes", "Claims" or "Claims Resolution" clause, which specifies a procedure for resolving such claims, then City agrees to invoke, at the Consultant's reasonable request, that Disputes, Claims or Claims Resolution clause on behalf of the Consultant, and will allow the Consultant to reasonably participate in and, to then extent allowed, to present its meritorious claims to City, provided that the Consultant cooperates fully with City in the presentation of the claims. The Consultant shall have full responsibility for the preparation and presentation of its claims, including giving City timely notice so that City may comply with the claim notification requirements of the Project specific Work Authorizations, and shall bear all expense related thereto, including attorney's fees. The Consultant agrees to be bound by any final determination rendered on its claims, whether pursuant to any such clause or otherwise, and the Consultant shall in no event be entitled to receive any greater amount from City than City is entitled to and actually does receive from its client on account of the Consultant's claims, less any markups or costs incurred by City and to which City is otherwise entitled, and the Consultant specifically agrees that it will accept such amount, if any, received by City from its client as full satisfaction and discharge of its claims. The Consultant agrees that it will not take any other action with respect to any such claims. If the Consultant is not diligent in the pursuit of its claims, or otherwise refuses to cooperate with City as provided in this Agreement, then in its sole discretion City may consider such claims to be waived by the Consultant or may prepare and present such claims on behalf of the Consultant.

9.1.2 The Consultant hereby agrees to defend and indemnify City and save City harmless from any and all liability arising out of or related to any certification of such claims furnished by the Consultant.

9.1.3 The Consultant shall be bound by City's determination, made in good faith, as to apportionment of any undifferentiated amounts received by City from its client on behalf of the Consultant and other claimants, including City, whose work is affected by any act or omission of City.

9.2. Disputes between City and the Consultant. All disputes solely between City and the Consultant that arise from or are related to a Project Specific Work Authorization or this Master Agreement, including the determination of the scope or applicability of the requirements in this Article 9, shall be finally resolved in accordance with the following process. Any dispute not resolved through direct discussions or mediation shall be finally resolved by way of binding arbitration.

9.2.1 The Parties to this Master Agreement intend, to the maximum extent feasible, to resolve all disputes at the Project specific Work Authorization's project level. Disputes not resolved at this project level shall be timely escalated to the Parties' senior management, senior management will then use good faith efforts to settle the dispute. If after a reasonable time the Parties' senior management are unable to resolve the dispute, the Parties shall mediate as set forth below. The inability of the senior executives to resolve the dispute is a condition precedent to mediation then arbitration.

9.2.2 Mediation is required and is a condition precedent to the pursuit of further dispute resolution proceedings: provided, however, the Parties may mutually agree to waive this mediation requirement. The Parties shall make every reasonable effort to conduct the mediation as soon as possible, but in any case not later than 90 calendar days after senior management first takes up efforts to resolve the dispute per the above. The Parties will mediate pursuant to the current version of the mediation rules of the Judicial Arbitration and Mediation Services (JAMS). The mediation will be self-administered. The Parties agree that they will participate in the mediation in good faith and that they will share equally in its costs. If the Parties are unable to agree upon a mediator within 10 days of a demand by either Party to mediate, then a mediator will be appointed from the JAMS panel of neutrals pursuant to the JAMS mediation rules.

9.2.3 Arbitration will be held in the city of City's regional office, which is located closest to the Project specific Work Authorization's project location. Arbitrations shall be non-administered and shall be conducted according to mutually acceptable rules and reasonable limitations on discovery; however, if the Parties cannot agree on such rules or if the Parties are unable to agree upon a tribunal within thirty (30) days following the notice to arbitrate, then the current Construction Industry Arbitration Rules of the American Arbitration Association (AAA) will govern and the tribunal shall be appointed as provided in the AAA Commercial Arbitration Rules. The Parties are unable to agree upon the scope of discovery, the tribunal shall impose such limitations on discovery as are reasonable to limit cost, time, burden on the Parties, and to focus on the issues in dispute. Arbitration will commence as soon as feasibly possible with the goal of commencing not later than 180 calendar days after the date the arbitration demand is served on the responding Party. The agreement to arbitrate, and any agreement to arbitrate with additional persons duly consented to by the Parties, is specifically enforceable under the prevailing arbitration laws in force in the jurisdiction where the arbitration is conducted. The decision and award of the tribunal will be final and conclusive, and the Parties agree to abide by all such decisions and awards. Judgment on decisions and awards may be entered by any court having jurisdiction

9.3. Each Party shall diligently continue to perform all of its obligations assumed under this Master Agreement and the Project specific Work Authorizations pending final resolution of any dispute or claim arising hereunder. The Consultant agrees that if during the pendency of the dispute resolution process arising from a Project specific Work Authorization, if City's client issues a written order to City directing City to perform disputed work and if the disputed work involves the afore mentioned Project specific Work Authorization, then, upon receiving a written notice from City to so perform, the Consultant shall undertake or continue to perform such disputed work. The Consultant's performance of such disputed work pursuant to written notice by City shall not in any way be construed as a waiver of the Consultant's dispute or claim rights under the afore mentioned Project specific Work Authorization.

9.4. Joinder, Coordination with Legal and Equitable Proceedings. The Consultant agrees to become a party to any other arbitration proceeding in which City and its client is bound to arbitrate with respect to a Project specific Work Authorization. A demand for arbitration may not be made after the date when the institution of legal or equitable proceedings would be barred by any applicable statute of limitation. A Party does not violate this Section 9.4 by filing suit in a court of competent jurisdiction if: (a) the Party files suit to prevent the running of the statute of limitations or to obtain the benefit of some provisional remedy such as attachment or injunctive relief, and (b) the Party commencing suit agrees to stay court proceedings pending arbitration under a claim arising out of a Project specific Work Authorization.

9.5. The prevailing Party shall be entitled to reasonable attorney's fees and costs. In any dispute arising under a Project specific Work Authorization or this Master Agreement, the following shall apply in the

determination of which Party is the prevailing Party. If a Party claiming a right to payment of an amount in dispute is awarded all or substantially all of such disputed amount, then such claiming Party shall be the prevailing Party. If a Party defending against such claim is found to be not liable to pay all or substantially all of the disputed amounts claimed by the claiming Party, then the Party so defending against such claim shall be the Prevailing Party. If both Parties prevail with respect to different claims by each of them, then the Party who is prevailing with respect to the substantially greater monetary sum shall be deemed the prevailing Party; otherwise if both Parties prevail with respect to monetary sums on different claims, neither of which have sums substantially greater than the other, the tribunal having jurisdiction over the controversy, claims or actions shall, in rendering the award, determine in its discretion whether and to what extent either Party should be entitled to recover any portion of its attorney fees.

#### 10. Governing Law; Jurisdiction and Venue

10.1. Subject to a Project specific Work Authorization, the laws of the state where City is located shall govern this Master Agreement. Each party consents to this exclusive jurisdiction, agrees to accept services of process by mail, and waives all jurisdictional and venue defenses otherwise available to it.

#### 11. Other Projects.

11.1. In the event that the Consultant fails to perform in accordance with this Master Agreement or any other agreements that Consultant may have with City now or in the future, Consultant agrees that City may, in its reasonable discretion, withhold all or a portion of Consultant's payment under Paragraph 3, to the extent necessary to protect City from damage or liability.

#### 12. Severability.

12.1. If any terms hereof or the application thereof to any person or circumstance shall be determined to be null and void, ineffectual, invalid, or unenforceable by any competent tribunal, the remaining terms hereof or the application of such term to persons or circumstances other than to those which were determined to be invalid or unenforceable shall not be affected thereby and shall continue in full force and effect.

#### 13. Waivers.

13.1. The waiver by either party of a breach by the other party of any provision of this Master Agreement shall not operate or be construed as a waiver of any subsequent breach.

#### 14. Notices.

14.1. Any notice required to be given or made to a party hereunder must be in writing and delivered in person or sent by certified, United States first class mail, return receipt requested, or by email if City is exercising its right to terminate, pursuant to Section 1.1.

#### 15. Amendment.

15.1. No waiver, modification, or amendment of any of the terms of this Master Agreement shall be effective unless made in writing and signed by the party to be charged.

16. Defense and Indemnity obligations.

16.1. Defense: The Consultant acknowledges and agrees that it shall take on (financially and with reference to engagement of counsel, collection of relevant information, preparation of any materials or documents, and in participation in any settlement amount) the responsibility of defending in its own name and on its own behalf against and resolving any claims which arise from the Consultant's work for This Portion of the Project, including where the allegations of damage, breach, or default arising from the acts or omissions of the Consultant. Further, the parties' mutual intent is that neither party shall be responsible for defending against or resolving any claims, or redressing any damages to the extent that they arise out of the acts, errors, or omissions of the other party

16.2. Indemnification – Absence of Client Indemnity:

16.2.1. Where and to the extent that the City is not obligated to indemnify, hold harmless and/or defend the Client under the terms of the Project Specific Work Authorization, the following indemnity shall apply;

16.2.2. For claims unrelated to Consultant's performance of professional services and to the fullest extent permitted by law, Consultant shall indemnify, defend, and hold City, its employees, agents and officials (the "Indemnitees") harmless from and against the tort liability of the Consultant, (including liability for claims, suits, actions, expenses or costs of any kind, whether actual, alleged or threatened, attorney's fees incurred by City, court costs, interest, or defense costs including expert witness fees), where such liability arises out of, in whole or in part, the performance of this Agreement by Consultant (or any individual or entity for whom Consultant shall bear legal liability for the acts or omissions thereof) and which results in bodily injury to any individual or entity (including the employees or officers of Consultant) or property damage of any kind, nature or description.

16.2.3. In addition to the foregoing, Consultant shall indemnify and hold harmless the Indemnitees from and against any and all claims, causes of action, losses, liabilities, damages, costs and expenses, (including reasonable attorney's fees and costs) arising out of the negligence or willful misconduct of Consultant (or any individual or entity for whom Consultant shall bear legal liability for the acts or omissions thereof) in the performance of professional services pursuant to this Master Agreement.

17. Publication.

17.1. Notwithstanding anything to the contrary, the Consultant shall not publish any aspects of the Project, in any manner, including but not limited to marketing materials or websites, without the express written authorization of City. The obligations of this Section shall survive the termination of this Master Agreement and the completion of the Services.

18. Foreign Corrupt Practices Act (FCPA)

18.1. Both parties acknowledge that City has entered this Master Agreement with Consultant based upon City's reasonable belief that Consultant shall not violate the United States Foreign Corrupt Practices Act ("FCPA"). Subject to FCPA, the Consultant warrants that none of its employees, officers, or principals is an official or representative of any government or is a candidate for such position. In conformity with the FCPA and City's established corporate policies regarding foreign business practices, Consultant further



represents and warrants that it and its employees, agents, and representatives shall not directly or indirectly make any offer, payment, promise to pay, or authorize the giving of anything of value for the purpose of influencing an act or decision of an official of any foreign government or candidate for such an office, including a decision not to act, or inducing such a person to use his influence to affect any government act or decision of a foreign government in connection with City's or Client's business. City may automatically terminate this Master Agreement for cause if it reasonably believes that Consultant has violated the FCPA. The parties agree to comply with the applicable provisions of National Security Presidential Directive/NSPD-22, the applicable provisions of 22 U.S.C. 7104, as amended by the Trafficking Victims Protection Reauthorization Act of 2003 (Pub. L. 108-193) and the Trafficking Victims Protection Reauthorization Act of 2005 (Public Law 109-164), and all applicable implementing regulations with regard to the U.S. Government's "zero tolerance" policy against human trafficking.

18.2. Consultant warrants and represents the following are true statements and will remain true during performance of the Services: (i) Consultant is authorized and duly qualified to perform the Services required in this Master Agreement; (ii) none of Consultant's personnel are foreign or domestic government employees, officials or other representatives; (iii) no money paid or thing of value given to Consultant by City will be paid, given or otherwise transferred directly or indirectly to any foreign or domestic government employee, official or other representative; (iv) Consultant is not in material violation of any laws, rules, or regulations which apply to the conduct of its business; (v) there has never been any citation, fine, or penalty imposed, asserted, or threatened against Consultant under any foreign, federal, state, local, or other law or regulation relating to employment, immigration, foreign or domestic corrupt practices or the avoidance of bribery and; (vi) Consultant is aware of no current circumstances likely to result in the imposition or assertion of any such a citation, fine, or penalty. Consultant will promptly notify City, in writing, if circumstances arise that would cause any of the foregoing statement to become false at any time during performance of the Services.

## 19. Prohibition Against Discrimination.

19.1. To Title VII of the Civil Rights Act of 1974 prohibits discrimination in employment. Recognizing its legal as well as social obligations to afford equal opportunities, City maintains an affirmative action plan to further its policy. It is the declared policy of City to afford equal opportunity in employment to individuals without regard to race, religion, political ideology, color, national origin and ancestry, disability, medical condition, veteran status, marital status, affectional or sexual orientation, gender identity or expression or age in accordance with applicable federal, state, and local law.

## 20. Prohibition Against Human Trafficking.

20.1. Both parties acknowledge that City has entered this Agreement with Consultant based upon the Consultant's representation and the Consultant's warranty that it has not engaged in any practices involving the use of child labor, forced labor, the exploitation of vulnerable people, human trafficking, or any other activities in violation of the anti-slavery laws.

## 21. Consequential Damages.

21.1. To the extent consequential damages are waived in the Project Specific Work Authorization, then neither party shall be liable to the other for loss of profits or revenue; loss of use or opportunity; loss of

good will; cost of substitute facilities, goods, or services; cost of capital; or for any special, consequential, indirect, punitive, or exemplary damages.

22. Warranty.

22.1. SUBJECT TO THE PROJECT SPECIFIC WORK AUTHORIZATION, NEITHER PARTY WARRANTIES NOR GUARANTEES THEIR SERVICES AND EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES OR WARRANTIES IMPOSED BY LAW, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

23. Entire Master Agreement.

23.1. This Master Agreement and any associated Work Authorizations contains the entire understanding between and among the parties concerning the matters herein and supersedes any prior understandings and agreements between and among them respecting the subject matter of this Master Agreement and may be amended only by written instrument signed by both City and Consultant.

IN WITNESS WHEREOF, the undersigned have duly executed this Master Agreement the day and year first above written.

\_\_\_\_\_  
Consultant Signature

\_\_\_\_\_  
City Signature

\_\_\_\_\_  
Consultant – Title  
(Printed name and title)

\_\_\_\_\_  
City Representative - Title  
(Printed name and title)

Date: \_\_\_\_\_

Date: \_\_\_\_\_