

ATTACHMENT B

CONSTRUCTION-PROFESSIONAL SERVICES AGREEMENT

[PROJECT NAME/IDENTIFIER]

This Agreement is entered into between the City of Happy Valley, a municipal corporation of the State of Oregon (“City”), and [DESIGN PROFESSIONAL], a [ENTITY TYPE] of the state of [ENTITY STATE] (“Consultant”). This Agreement is made effective as of [DATE] (the “Effective Date”). This Agreement may refer to the City and Consultant individually as “Party” or jointly as “Parties.”

RECITALS

WHEREAS, the City requires the services of an Oregon licensed professional to provide construction related [architectural/engineering/photogrammetric mapping/transportation planning/land surveying] services for the [Project Name] project (the “Project”), including [brief description of services] (the “Services”); and

WHEREAS, the City [directly solicited/conducted an informal solicitation for/conducted a formal qualifications-based selection for] the Services, and Consultant responded by submitting a proposal for the Services dated [DATE] (the “Proposal”); and

WHEREAS, the City duly selected Consultant [, (which the City Council authorized on DATE) -or- (which was duly authorized pursuant to the City’s public contracting rules),] to provide the Services based on the information provided in the Proposal; and

WHEREAS, the City desires to contract with Consultant to provide the Services.

AGREEMENT

NOW THEREFORE, in consideration of the foregoing Recitals incorporated by this reference and the mutual promises contained in this Agreement, the City and Consultant agree as follows:

1. Term

The term of this Agreement shall be from the Effective Date until not later than [END DATE] unless amended or sooner terminated under the provisions of this Agreement. Passage of the Agreement’s term shall not extinguish, prejudice, or limit either party’s right to enforce this Agreement with respect to any default or defect in performance that has not been corrected.

2. Consultant’s Services

Consultant's Services and schedule for performance are set forth in **Exhibit A**. Any conflict between this Agreement and Consultant's Proposal shall be resolved first in favor of this Agreement. Consultant will use its best efforts and due diligence in its performance of the Services and will provide such personnel, materials, supplies, and equipment as are necessary to successfully provide the Services. Consultant will perform the Services consistent with the skill and knowledge possessed by well-informed members of its industry, trade or profession and will apply that skill and knowledge with care and diligence to perform the Services under this Agreement in a professional manner and in accordance with **[highest]** standards prevalent in Consultant's industry, trade or profession under similar conditions and circumstances ("Standard of Care"). All Consultant personnel and those of their subconsultants and subcontractors (collectively, "subcontractors"), if any, shall be properly trained and fully licensed to undertake any activities pursuant to this Agreement, and Consultant shall have all requisite permits, licenses and other authorizations necessary to provide the Services. Consultant's failure to adhere to the work schedule in **Exhibit A** is sufficient grounds for the City to terminate this Agreement for cause.

3. Consultant's Identification

Consultant shall furnish to the City Consultant's employer identification number, as designated by the Internal Revenue Service, or, if the Internal Revenue Service has designated no employer identification number, Consultant's Social Security number.

4. Compensation

Consultant's fee for completion of all Services will not exceed **[AMOUNT]**. Upon completion of any tasks, milestones or other deliverables described in **Exhibit A**, the City agrees to pay Consultant at the times and in the amount(s) set forth in this Agreement and in accordance with **Exhibit B**.

Consultant shall submit monthly requests for payment to the City for Services performed under this Agreement, and the invoices shall describe the Services performed, by whom it was performed, the number of hours worked, and itemize and explain all expenses for which reimbursement is being claimed. All expenses must be preapproved in writing by the City. Mileage will be reimbursed for only one vehicle and only at the current in effect IRS rate. Meals will be at the current in effect U.S. General Services Administration (GSA) per diem rate, and hotels and parking will be paid at actual amounts, not to exceed the GSA daily rate. No reimbursement will be made for any alcohol purchases or parking or traffic citations.

The City shall make payments for undisputed Services in a timely manner, within **sixty (60)** days of receipt of a request for payment. Requests for payment received from

the Consultant pursuant to this Agreement will be reviewed and approved by the City prior to payment.

The City shall not pay compensation for any portion of the Services not performed. Payment shall not be considered acceptance or approval of any Services or waiver of any design defects therein. The compensation contemplated in this Section shall constitute full and complete payment for said Services.

Consultant must promptly pay all sums due to subcontractors for services and reimbursable expenses after receiving payment for those services from the City.

5. Project Managers and Notice

The Parties designate the following individuals as their Project Manager, who are designated to send and receive any notices required under this Agreement.

City's Project Manager

[Name of Project Manager]
[Address of Project Manager]
[Address of Project Manager]
e:[Email of Project Manager]
p:[Phone of Project Manager]

Consultant's Project Manager

[Name of Project Manager]
[Address of Project Manager]
[Address of Project Manager]
e:[Email of Project Manager]
p:[Phone of Project Manager]

Each Party shall give the other written notice of any intended change of their Project Manager. Any change to Consultant's Project Manager must be approved by the City, such approval not to be unreasonably withheld.

[The Parties agree that the City relied on Consultant's provision of its project manager as a material inducement to enter into this Agreement. The Parties further agree that Consultant's change in project manager mid project include various project inefficiencies that will cause damages to the City but that are difficult to be determined. Therefore, Consultant agrees to pay the City, as a liquidated damage, [\$\$\$] for any such change.

-and/or-

KEY PERSONS. The Parties agree that the City relied on the special qualifications of each Key Person as a material inducement to enter into this Agreement. For purpose of this Agreement, "Key Person" means the persons identified in **Exhibit A** of this Agreement. The City is engaging the expertise, experience, judgment, and personal attention of such Key Persons under this Agreement. Neither Consultant nor any Key Person shall delegate performance of the duties and obligations of such Key Person under this Agreement to any other employee, agent or subcontractor of Consultant unless the City provides prior written consent to such delegation. Consultant shall not reassign or transfer

a Key Person to other duties or positions so that the Key Person is no longer available to provide the City with that Key Person's services unless the City provides prior written consent to the reassignment or transfer, or the reassignment or transfer is required based on the termination of employment, illness, death, disability or other similar cause. The Parties further agree that Consultant's change in Key Persons include various project inefficiencies that will cause damages to City but that are difficult to be determined. Therefore, Consultant agrees to pay City, as a liquidated damage, [\$\$\$] for any such change.]

Unless otherwise stated in the Agreement, all notices shall be made in writing and may be given by [personal delivery, first class mail, certified mail (return receipt requested), or email (read receipt requested)]. Mailed notices shall be deemed given upon deposit in the United States mail, postage prepaid. In all other instances, notices shall be deemed given at the time of actual delivery.

6. Project Information

Consultant agrees to promptly share all information related to the Services with the City and to fully cooperate with all corporations, firms, contractors, governmental entities, and persons involved in or associated with the Services. Consultant shall not provide any information, news, or press releases related to the Services to representatives of newspapers, magazines, television and radio stations, or any other news medium without the prior authorization of the City's Project Manager.

7. Duty to Inform

Consultant shall give prompt written notice to the City's Project Manager if, at any time during the performance of this Agreement, Consultant becomes aware of actual or potential problems, faults or defects in the Services, any nonconformity with the Agreement, or with any federal, state, or local law, rule, regulation, decree, or other mandate, or if Consultant has any objection to any decision or order made by the City. Any delay or failure on the part of the City to provide a written response to Consultant shall constitute neither agreement with nor acquiescence in Consultant's statement or claim and shall not constitute a waiver of any of City's rights.

8. Consultant is Independent Contractor

Consultant is an independent contractor for all purposes and shall be entitled to no compensation other than the compensation expressly provided by this Agreement. Consultant hereby expressly acknowledges and agrees that as an independent contractor, Consultant is not entitled to indemnification by the City or the provision of a defense by the City under the terms of ORS 30.285. This acknowledgment by Consultant shall not affect Consultant's independent ability (or the ability of Consultant's insurer) to assert that the monetary limitations found at ORS 30.272, the immunities listed at ORS 30.265 or

other limitations affecting the assertion of any claim under the terms of the Oregon Tort Claims Act (ORS 30.260 to ORS 30.300).

9. Consultant Representations and Warranties

Consultant represents and warrants to City that:

- i. Consultant has the power, authority, ability, skills, and capacity to enter into and perform this Agreement, and when executed and delivered this Agreement shall be a valid and binding obligation of Consultant enforceable in accordance with its terms.
- ii. The Consultant is validly organized and exists in good standing under the laws of the State of Oregon and the Consultant is duly qualified, registered or licensed to do business in good standing in the State of Oregon.
- iii. The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary action and do not and will not (a) require any further consent or approval of the board of directors or any shareholders of the Consultant or any other person which has not been obtained or (b) result in a breach of default under the certificate of incorporation or by-laws of the Consultant or any indenture or loan or credit agreement or other material agreement or instrument to which the Consultant is a party or by which the Consultant's properties and assets may be bound or affected. All such consents and approvals are in full force and effect.
- iv. Consultant is engaged as an independent contractor and will be responsible for any federal, state or local taxes applicable to any payments made under this Agreement.
- v. Consultant is not eligible for any federal social security, unemployment insurance, pension, PERS or workers' compensation benefits from compensation or payments paid to Consultant under this Agreement.
- vi. Consultant is not an employee of the City, any special district, local government, the federal government or the State of Oregon.
- vii. Consultant has complied and will continue to comply with all Oregon laws applicable to the performance of Consultant's obligations under this Agreement.
- viii. Consultant, and Consultant's employees and subcontractors, shall be qualified, professionally competent and duly licensed to perform the work and Services at all times during the term of this Agreement.
- ix. [The Consultant has inspected, or will inspect, the Project site and all of the surrounding locations to the extent necessary to perform the Services.]

x. Consultant has the skill and knowledge possessed by well-informed members of its industry, trade or profession, and will apply that skill and knowledge with care and diligence when performing the Services under this Agreement, and will do so in a professional manner and in accordance with standards prevalent in Consultant's industry, trade or profession under similar conditions and circumstances.

xi. Consultant has read, understands and agrees to be bound by each of the terms and conditions of this Agreement.

xii. Consultant prepared its Proposal for these Services independently from all other proposers, and without collusion, fraud or other dishonesty.

xiii. Any Goods / Items / Equipment / Components / Hardware / Software / Intellectual Property Rights, etc. delivered to or granted to the City under this Agreement, and Consultant's Services rendered in the performance of Consultant's obligations under this Agreement, are provided to the City free and clear of any and all restrictions on or conditions of use, transfer, modification, or assignment, and are free and clear of any and all liens, claims, mortgages, security interests, liabilities, charges, and encumbrances of any kind.

xiv. Upon City's request, Consultant shall provide City with evidence reasonably satisfactory to City confirming the foregoing representations and warranties. The representations and warranties set forth in this section are in addition to, and not in lieu of, any other representations and warranties that Consultant provides.

10. Indemnity

i. Unless otherwise limited by ORS 30.140, Consultant shall indemnify and hold the City, its elected officials, officers, agents, volunteers, and employees harmless from and against any and all claims, actions, proceedings, judgments, losses, injuries, damages, costs, expenses, and liabilities, including court costs and attorney's fees (collectively, "Claims"), arising out of, or resulting directly or indirectly from, the professional negligent acts, errors or omissions of Consultant or its subcontractors, suppliers, agents or employees in performance of professional services under this Agreement. Where limited by ORS 30.140, Consultant's duty to defend the City against a claim for professional negligence and relating to the professional services provided by Consultant shall not arise until Consultant's liability or fault is determined by adjudication or alternative dispute resolution or otherwise resolved by settlement agreement, and such obligation shall not exceed the proportionate fault of Consultant.

ii. Consultant shall indemnify, defend, and hold the City, its elected officials, officers, agents, volunteers, and employees harmless from and against any and all Claims to the extent they arise out of, or result directly or indirectly from, all other acts or omissions of the Consultant, or any of its subcontractors, suppliers, agents or employees arising in connection with the performance of this Agreement that are not otherwise identified in Subsection (i) of this Section.

iii. The obligations of the indemnifications extended by the Consultant to the City shall survive the termination or expiration of this Agreement.

iv. Except to the extent that the death or bodily injury to persons or damage to property arises out of the fault of Consultant or Consultant's agents, representatives, or subcontractors, the indemnities in subsection (i) and (ii) do not require Consultant or Consultant's surety (if any) or insurer to indemnify the City, its elected officials, officers, agents, volunteers, or employees for damage arising out of the death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the City.

11. Insurance

Consultant and its subcontractors shall provide the following insurance coverages against any claims that may arise from or relate to the performance of the Services. Consultant and its subcontractors and subconsultants must maintain that insurance until all their obligations have been discharged, including any warranty periods under this Agreement. The City in no way warrants that the limits stated in this section are sufficient to protect the Consultant from the liabilities that might arise out of the performance of the work under this Agreement by Consultant, its agents, representatives, employees, subcontractors, and Consultant may purchase such additional insurance as they determine necessary.

i. Commercial General Liability Insurance:

- a. The policy must be in an occurrence form and include bodily injury, property damage, broad form contractual liability coverage in the following amounts:

General Aggregate	\$2,000,000
Products-Completed Operations Aggregate	\$2,000,000
Personal and Advertising Injury	\$2,000,000
Each Occurrence	\$2,000,000

- b. The policy shall be endorsed to name the City of Happy Valley and its elected and appointed officials, officers, agents, and employees as an additional insured with respect to liability for bodily injury, property damage, and personal and advertising injury with respect to premises, ongoing operations, products and completed operations, and liability assumed under an insured contract arising out of the activities performed by, or on behalf of, the Consultant related to this Agreement.
- c. The endorsement shall be indicated on the Certificate of Insurance, and there shall be no endorsement or modification which limits the scope of coverage or the policy limits available to the City as an additional insured.
- d. Consultant's insurance coverage must be primary insurance and non-contributory with respect to any insurance or self-insurance carried by the City.

ii. Automobile Insurance:

a. The policy shall cover bodily injury and property damage coverage for any owned, hired, and non-owned vehicles used in the performance of this Agreement. Automobile Liability coverage shall be written in an amount not less than \$1,000,000 combined single limit.

b. The policy shall be endorsed to include the City, its elected and appointed officials, officers, agents and employees as an additional insured with respect to liability arising out of the activities performed by, or on behalf of, Consultant relating to this Agreement.

c. The City shall be an additional insured to the full limits of liability purchased by the Consultant.

iii. Workers' Compensation Coverage: Consultant certifies that it has qualified for State of Oregon Workers' Compensation coverage for all Consultant's employees who are subject to Oregon's Workers' Compensation statute, either as a carrier-insured employer as provided by ORS 656.407 or as a self-insured employer. Consultant shall provide to City within ten (10) days after contract award and prior to commencing Services a certificate of insurance evidencing coverage of all subject workers under Oregon's Workers' Compensation statutes insured by an insurance company satisfactory to City, if any. The certificate and policy shall indicate that the policy shall not be terminated by the insurance carrier without thirty (30) days' advance written notice to City. A copy of the certificate of self-insurance issued by the State shall be provided to City if Consultant is self-insured. To the extent permitted by law, a waiver of subrogation in favor of the City shall be included in the policy.

iv. Professional Liability (Errors and Omissions Liability): Consultant shall provide City with evidence of professional errors and omissions liability insurance covering any damages caused by negligent acts, errors, or omissions related to the professional services and performance of duties and responsibilities under this Agreement, in an amount not less than \$2,000,000 combined single limit per occurrence. Consultant may opt to provide a claims-made policy with a combined single limit per claim of not less than \$2,000,000; but in doing so, Consultant warrants that any retroactive date under the policy precedes the effective date of this Agreement and that either continuous coverage will be maintained, or an extended reporting period will be exercised for a period of two years beginning at the time work under this Agreement is completed. Where any subcontractor provides professional services related to this Agreement, they must provide equivalent coverage.

v. Certificates: Consultant shall furnish the City with certificates evidencing the date, amount, and type of insurance required by this Agreement (ACCORD form or equivalent approved by the City). The certificates for each insurance policy are to be signed

by a person authorized by that insurer to bind coverage on its behalf. All policies will provide for not less than **thirty (30)** days' written notice to the City before they may be canceled. Such notice will be mailed and emailed to **[the City Project Manager/ Risk Department/Other contact at ADDRESS and EMAIL]** All certificates and any required endorsements are to be received and approved by the City before the work commences. Each insurance policy required by this Agreement must be in effect at or prior to the commencement of the work under this Agreement and remain in effect for the duration of the project. Failure to maintain the insurance policies as required by this Agreement or to provide evidence of renewal is a material breach of this Agreement.

vi. Primary Coverage: The coverage provided by insurance required under this Agreement shall be primary and noncontributory, and any other insurance carried by City shall be excess.

vii. Subcontractors: Consultant shall require the same insurance requirements from its subcontractors. Consultant's certificates shall include all subcontractors as additional insureds under its policies **-OR-** Consultant shall be responsible for ensuring and verifying that all subcontractors have valid and collectible insurance. At any time throughout the term of the Agreement, the City reserves the right to require proof from the Consultant that its subcontractors have insurance coverage. All subcontractors providing services included under this Agreement's Scope of Services are subject to the insurance coverages identified above and must include the City as an additional insured. In certain circumstances, the Consultant may, on behalf of its subcontractors, waive a specific type of coverage or limit of liability where appropriate to the type of work being performed under the subcontract. Consultant assumes liability for all subcontractors with respect to this Agreement.

viii. Acceptability of Insurers: Insurance is to be placed with insurers duly licensed or authorized to do business in the State of Oregon and with an "A.M. Best" rating of not less than **A- VI**. The City in no way warrants that the required minimum insurer rating is sufficient to protect Consultant from potential insurer insolvency.

ix. Umbrella Insurance. Consultant shall maintain umbrella coverage providing excess limits over the primary policies required by this Agreement in an amount not less than **five million dollars (\$5,000,000.00)**. The policy shall be endorsed to name the City and its elected and appointed officials, officers, agents, and employees as additional insured.

x. [Other Coverages?]

12. Work Product

All Work Product produced by Consultant is the exclusive property of the City. "Work Product" includes but is not limited to, technical drawings, prints, blueprints,

schematics, research, reports, computer programs, manuals, drawings, plans, recordings, photographs, artwork and any data or information in any form. Consultant and the City intend that such Work Product shall be deemed “work made for hire” of which the City shall be deemed the author. If for any reason, a Work Product is deemed not to be a “work made for hire,” upon payment for the Services, the Consultant irrevocably assigns and transfers to the City all right, title and interest in such Work Product, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Consultant shall obtain such interests and execute all documents necessary to fully vest such rights in the City. Consultant waives all rights relating to Work Product, including any rights arising under 17 USC 106A, or any other rights of authorship, identification or approval, restriction or limitation on use or subsequent modifications. If Consultant is an architect, the Work Product is the property of the Consultant, and by executed of this Agreement, Consultant grants the City an exclusive an irrevocable license to use that Work Product.

Notwithstanding the above, all pre-existing trademarks, service marks, patents, copyrights, trade secrets, and other proprietary rights of Consultant are and will remain the exclusive property of Consultant.

13. Public Records and Confidentiality.

i. Public Records Requests. Consultant acknowledges that the City is subject to the Oregon Public Records Act and federal law. Third persons may claim that the Consultant Confidential Information (as defined below) that Consultant submitted to the City hereunder may be, by virtue of its possession by the City, a public record and subject to disclosure pursuant to the Oregon Public Records Act. The City’s commitments to maintain certain information confidentially under this Agreement are all subject to the constraints of Oregon and federal laws. All information submitted by Consultant to the City is a public record and subject to disclosure pursuant to the Oregon Public Records Act, except such portions for which Consultant requests and meets an exemption from disclosure consistent with federal or Oregon law, in accordance with the process set forth in Section 13.iii. Within the limits and discretion allowed by those laws, the City will make a good faith effort to maintain the confidentiality of information.

ii. Public Records Retention. The City will retain one (1) copy of any public records for the express purposes of complying with State of Oregon public records and archiving laws.

iii. Confidentiality.

a. Consultant’s Confidential Information. During the term of this Agreement, Consultant may disclose to the City certain Consultant confidential

information pertaining to Consultant's business ("Consultant Confidential Information"). Consultant shall be required to mark Consultant Confidential Information CONFIDENTIAL with a restrictive legend or similar marking, together with a written statement describing the material which is requested to remain protected from disclosure and the justification for such request under Oregon public records laws. If Consultant Confidential Information is not clearly marked, or the Consultant Confidential Information cannot be marked with a restrictive legend or similar marking or is disclosed either orally or by visual presentation, Consultant shall identify the Consultant Confidential Information as confidential at the time of disclosure or within a reasonable time thereafter. This Agreement itself shall not be considered Consultant Confidential Information. Consultant Confidential Information does not include information that (1) is or becomes (other than by disclosure by City) publicly known; (2) is furnished by Consultant to others without restrictions similar to those imposed by this Agreement; (3) is rightfully in City's possession without the obligation of nondisclosure prior to the time of its disclosure under this Agreement; (4) is obtained from a source other than Consultant without the obligation of confidentiality, (5) is disclosed with the written consent of Consultant, or; (6) is independently developed by employees or agents of City who can be shown to have had no access to the Consultant Confidential Information. Subject to subsection (i) and (ii), the City shall: (1) limit disclosure of Consultant Confidential Information to those directors, elected and appointed officials, employees, contractors and agents of the City who need to know the Consultant Confidential Information in connection with the Services and who have been informed of confidentiality obligations at least as strict as those contained in this Agreement, and (2) exercise reasonable care to protect the confidentiality of the Consultant Confidential Information, at least to the same degree of care as the City employs with respect to protecting its own proprietary and confidential information.

- b. City's Confidential Information. Any and all information that the City provides to Consultant or its employees or agents in the performance of this Agreement that City designates as confidential (either on the document itself or through related correspondence), as well as all reports and other documents and materials that result from Consultant's use of such information and any other Work Product that City designates as confidential,

is deemed to be confidential information of City (“City Confidential Information”). City Confidential Information does not include information that (1) is or becomes (other than by disclosure by Consultant) publicly known; (2) is furnished by City to others without restrictions similar to those imposed by this Agreement; (3) is rightfully in Consultant’s possession without the obligation of nondisclosure prior to the time of its disclosure under this Agreement; (4) is obtained from a source other than City without the obligation of confidentiality, (5) is disclosed with the written consent of City, or; (6) is independently developed by employees or agents of Consultant who can be shown to have had no access to the Confidential Information.

- c. Consultant shall treat as confidential any City Confidential Information that has been made known or available to Consultant or that Consultant has received, learned, heard or observed; or to which Consultant has had access. Consultant shall use City Confidential Information exclusively for the City’s benefit in the performance of this Agreement. Except as may be expressly authorized in writing by the City, in no event shall Consultant publish, use, discuss or cause or permit to be disclosed to any other person such City Confidential Information. Consultant shall (1) limit disclosure of the City Confidential Information to those directors, officers, employees, subcontractors, and agents of Consultant who need to know the City Confidential Information in connection with the Services and who have agreed in writing to confidentiality obligations at least as strict as those contained in this Agreement, (2) exercise reasonable care to protect the confidentiality of the City Confidential Information, at least to the same degree of care as Consultant employs with respect to protecting its own proprietary and confidential information, and (3) return immediately to the City, upon its request, all materials containing City Confidential Information, in whatever form, that are in Consultant’s possession or custody or under its control. Consultant is expressly restricted from and shall not use the intellectual property rights of the City without the City’s prior written consent.
- d. Retroactivity. This Section shall apply to all City Confidential Information previously received, learned, observed, known by or made available to Consultant and related to this Agreement.

- e. Survival. Consultant's confidentiality obligations under this Agreement shall survive termination or expiration of this Agreement.
- f. Equitable Relief. Consultant acknowledges that unauthorized disclosure of City Confidential Information will result in irreparable harm to the City. The Parties agree that, notwithstanding any other section of this Agreement, in the event of a breach or a threatened breach of the Agreement's terms related to Confidential Information or intellectual property rights, the non-breaching Party shall be entitled to seek equitable relief to protect its interests, including but not limited to injunctive relief. Nothing stated herein shall be construed to limit any other remedies available to the Parties.
- g. Discovery of Documents. In the event a court of competent jurisdiction orders the release of Confidential Information submitted by one Party, the other Party will notify the Party whose Confidential Information is being requested to be disclosed of the request. The Party receiving the request shall allow the other Party to participate in the response at its own expense. Each Party will comply with any effective court order.

14. Errors

Consultant shall perform such additional work as may be necessary to correct errors in the work required under this Agreement without undue delays and without additional cost.

15. Changes in Work

Only the **City Manager or City's Project Manager** may authorize a change order or extra work. Failure of Consultant to secure written authorization for a change order or extra work shall constitute a waiver of all right to adjustment in the contract price or contract time due to such unauthorized change order or extra work, and Consultant thereafter shall be entitled to no compensation whatsoever for the performance of such work.

16. Early Termination of Agreement

i. The City may terminate this Agreement for convenience at any time for any reason deemed appropriate in its sole discretion. Termination is effective immediately upon notice of termination given by the City by certified mail.

ii. Either Party may terminate this Agreement in the event of a material breach by the other Party that is not cured. Unless otherwise set forth in the Agreement, before

termination is permitted, the Party seeking termination shall give the other Party written notice of the breach, its intent to terminate, and **thirty (30)** calendar days to cure the breach. If the breach is not cured within **30** days, the Party seeking termination may terminate immediately by giving written notice that the Agreement is terminated. The non-breaching Party shall provide the written notice of breach and the subsequent written notice of termination by certified mail. If there is an immediate risk of harm to life or property, the City may terminate the Agreement immediately and without regard to the 30 day notice provision.

iii. [OPTION 1]: City and Consultant agree that the City has entered into this Agreement due to the specific personal skills of Consultant. Accordingly, the City may immediately terminate this Agreement upon the occurrence of one or more of the following: (a) Consultant commences a voluntary case under title 11 of the United States Code or the corresponding provisions of any successor laws; (b) anyone commences an involuntary case against Consultant under title 11 of the United States Code or the corresponding provisions of any successor laws and either (i) the case is not dismissed by midnight at the end of the 60th day after commencement or (ii) the court before which the case is pending issues an order for relief or similar order approving the case; (c) a court of competent jurisdiction appoints, or the Consultant makes an assignment of all or substantially all of its assets to, a custodian (as that term is defined in title 11 of the United States Code or the corresponding provisions of any successor laws) for the Consultant or all or substantially all of its assets; or (d) Consultant fails generally to pay its debts as they become due (unless those debts are subject to a good-faith dispute as to liability or amount) or acknowledges in writing that it is unable to do so.

[OPTION 2]: Consultant shall promptly notify the City in writing upon the occurrence of any event that could reasonably be expected to result in a material adverse change in the financial condition, operations, or business prospects of the Consultant, including but not limited to insolvency, bankruptcy proceedings (whether voluntary or involuntary), appointment of a receiver, assignment for the benefit of creditors, or the commencement of any proceeding under any law relating to bankruptcy, insolvency, or the reorganization or relief of debtors.

In the event that the City determines, in its sole discretion, that Consultant's financial condition has materially deteriorated or that any such adverse event has occurred or is reasonably likely to occur, the City shall have the right to terminate this Agreement immediately upon written notice to Consultant, without penalty or further obligation.

17. Remedies and Payment on Early Termination

- i. If the City terminates pursuant to Section 16(i), the City shall pay Consultant for Services performed in accordance with the Agreement prior to the termination date. No other costs or loss of anticipated profits shall be paid.
- ii. If the City terminates pursuant to Section 16(ii) or 16(iii), the City is entitled all remedies available at law or equity. In addition, Consultant shall pay the City all damages, costs, and sums incurred by the City as a result of the breach.
- iii. If the Consultant justifiably terminates the Agreement pursuant to 16(ii), Consultant's only remedy is payment for Services performed prior to the termination. No other costs or loss of anticipated profits shall be paid.
- iv. If the City's termination under Section 16(ii) was wrongful, the termination shall be automatically converted to one for convenience, and Consultant shall be paid as if the Agreement was terminated under Section 16(i).
- v. In the event of early termination, Consultant's Work Product before the date of termination becomes property of the City.

18. Compliance with Applicable Law

Consultant shall comply with all federal, state and local laws, regulations, executive orders and ordinances applicable to this Agreement. Without limiting the generality of the foregoing, Consultant expressly agrees to comply with the following laws, regulations and executive orders to the extent they are applicable to the Agreement: (i) Titles VI and VII of the Civil Rights Act of 1964, as amended; (ii) Sections 503 and 504 of the Rehabilitation Act of 1973, as amended; (iii) the Americans with Disabilities Act of 1990, as amended; (iv) Executive Order 11246, as amended; (v) the Health Insurance Portability and Accountability Act of 1996; (vi) the Age Discrimination in Employment Act of 1967, as amended, and the Age Discrimination Act of 1975, as amended; (vii) the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; (viii) ORS Chapter 659, as amended; (ix) all regulations and administrative rules established pursuant to the foregoing laws; and (x) all other applicable requirements of federal, state and municipal civil rights and rehabilitation statutes, rules and regulations. These laws, regulations and executive orders are incorporated by reference herein to the extent that they are applicable to the Agreement and required by law to be so incorporated.

Certain Oregon laws apply to all public contracts in Oregon. The City's performance under the Agreement is conditioned upon Consultant's compliance with the applicable

provisions in **Attachment – Statutorily Required Public Contract Provisions**, which are incorporated herein by this reference.

19. Records and Audits

i. **Records Retention.** Consultant shall maintain current financial records in accordance with Generally Accepted Accounting Principles (GAAP). Consultant agrees to maintain and retain and retain all financial records, supporting documents, statistical records and all other records pertinent to this Agreement during the term of this Agreement and for a minimum of **six (6) years** after the expiration or termination date of this Agreement, for a minimum of **six (6) years** after all other pending matters in connection with this Agreement are closed, whichever is longer.

ii. **City Audits.** The City, either directly or through a designated representative, may conduct financial and performance audits of the billings and Services at any time in the course of the Agreement and during the records retention period listed above. Audits shall be conducted in accordance with generally accepted auditing standards as promulgated in Government Auditing Standards by the Comptroller General of the United States Government Accountability Office.

iii. **Access to Records.** The City may examine, audit and copy Consultant's books, documents, papers, and records relating to this Agreement at any time during the records retention period listed above upon reasonable notice. Copies of applicable records shall be made available upon request. Access to said documents shall be granted within **seven (7)** days written notice, or such other earlier time as is reasonable under the circumstances.

20. Law of Oregon

This Agreement is governed by the laws of the State of Oregon without reference to its conflict of laws provisions that might otherwise require the application of the law of any other jurisdiction. Any action or suits involving any question arising under this Agreement shall be brought in the appropriate court of Clackamas County, Oregon.

21. Mediation, Trial By Jury, Attorneys' Fees

i. Should any dispute arise between the Parties to this Agreement it is agreed that such dispute will be submitted to a mediator prior to any litigation or arbitration, and the Parties hereby expressly agree that no claim or dispute arising under the terms of this Agreement shall be resolved other than first through mediation and only in the event said mediation efforts fail, through litigation or arbitration. By mutual agreement, the Parties may waive mediation and proceed with litigation or arbitration. The waiver shall be in writing and signed by an authorized representative of each Party.

ii. The Parties shall exercise good faith efforts to select a mediator who shall be compensated equally by both Parties. Mediation will be conducted in Happy Valley, Oregon, unless both Parties agree in writing otherwise. Both Parties agree to exercise good faith efforts to resolve disputes covered by this section through this mediation process. If a Party requests mediation and the other party fails to respond within **ten (10) days**, or if the Parties fail to agree on a mediator within **ten (10) days**, a mediator shall be appointed **by the presiding judge of the Clackamas County Circuit Court** upon the request of either Party.

iii. **[OPTION 1: Any disputes or claims arising under or as a result of this Agreement that are not resolved by mediation shall be tried to the court without a jury.**
-OR-

OPTION 2: Any disputes or claims arising under or as a result of this Agreement shall be resolved through binding arbitration through the American Arbitration Association using the Construction Industry rules, unless the Parties otherwise agree in writing. A demand for arbitration shall be made in writing, delivered to the other Party, and filed with the person or entity administering the arbitration. The Party filing a notice of demand for arbitration must assert in the demand all claims then known to that Party on which arbitration is permitted to be demanded. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Either Party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s). Either Party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.]

iv. In any mediation, arbitration, or litigation arising under this Agreement, **each Party shall bear its own fees and costs, including attorney fees.**

v. Any legal proceeding of any nature whatsoever brought by the Consultant against the City that asserts a breach of contract, a declaratory judgment proceeding, or any other legal or equitable claim related to, or arising from, the Services performed under this Agreement shall be brought within one (1) year of the date that final payment is made to the Consultant, regardless of whether the Consultant is aware of the legal claim it might have during that time. If the legal proceeding is not brought within that one (1) year period,

the Consultant expressly waives any and all claims that are in any way related to the Agreement. For purposes of this subsection, final payment is considered to be made when the City sends a check to the Consultant that contains the undisputed balance that is due for all Services performed prior to the expiration or termination of the Agreement. The subsequent payment of minor amounts to Consultant that constitute less than 2% of the total cost of Services performed, or the payment of claims made pursuant to section 17, shall not affect the date when final payment is considered to have been made.

22. Conflict of Interest

Consultant hereby certifies that it is not a City official/employee or a business with which a City official/employee is associated, and that to the best of its knowledge, Consultant, its employee(s), officer(s) or its director(s) is not a City official/employee or a relative of any City official/employee who: (1) has responsibility in making decisions or ability to influence decision-making on the Agreement or project to which this Agreement pertains; (2) has or will participate in evaluation or management of the Agreement; or (3) has or will have financial benefits in the Agreement. Consultant understands that should it elect to employ any former City official/employee during the term of the Agreement, then that former City official/employee must comply with applicable government ethics and conflicts of interest provisions in ORS Chapter 244, including but not limited to ORS 244.040(5) and ORS 244.047, and any provisions of the City's Charter, Code, ordinances, or administrative rules.

23. Subcontractors

The Consultant is solely and exclusively responsible to the City for the performance of the Services, notwithstanding any subcontracts that it enters into for the performance of the Services. Consultant shall provide a list of all subcontractors with which Consultant intends to utilize in providing Services. This list shall include such information on their relevant qualifications as may be requested by City. City reserves the right to review and reject the Consultant's use of subcontractors where City has a reasonable objection. Consultant shall obtain City's written consent prior to entering into any subcontracts for any of the Services required by the Agreement.

24. General Provisions

i. Successors and Assigns: Each party binds itself, and any partner, successor, executor, administrator or assign to this Agreement.

ii. Assignment: Consultant shall not assign, sublet or transfer any interest in or duty under this Agreement without the written consent of the City and no assignment shall be of any force or effect whatsoever unless and until the City has so consented. For purposes of this Section, the acquisition, merger, consolidation or change in control of Consultant or

any assignment by operation of law shall be considered an assignment of this Agreement that requires the City's prior written consent. If City agrees to assignment of tasks to a subcontractor, Consultant shall be fully responsible for the acts or omissions of any subcontractors and of all persons employed by them, and neither the approval by City of any subcontractor nor anything contained in this Agreement shall be deemed to create any contractual relation between them and City.

iii. Severability: In the event any provision or portion of this Agreement is held to be unenforceable or invalid by any court of competent jurisdiction, the validity of the remaining terms and provisions shall not be affected to the extent that it did not materially affect the intent of the Parties when they entered into the Agreement.

iv. No Third-Party Beneficiaries: Consultant and City are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly or indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

v. Non-Discrimination: Each Party agrees not to discriminate on the basis of age, citizenship status, color, familial status, gender identity or expression, marital status, mental disability, national origin, physical disability, race, religion, religious observance, sex, sexual orientation, and source or level of income in the performance of this Agreement.

vi. Exclusivity: This is not an exclusive contract, and the City retains the right to contract with other entities or contractors for the same or similar goods or services as provided under this Agreement in the City's sole discretion.

vii. Amendments: Any modification of the provisions of this Agreement shall be reduced to writing and signed by the Parties. Consultant acknowledges that authority for amendments may be subject to the City's ordinance process.

viii. Integration: This Agreement and attached Exhibits and Attachments constitutes the entire Agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified in this Agreement regarding this Agreement.

ix. No Waiver: No waiver, consent, modification, or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties. Such waiver, consent, modification, or change if made, shall be effective only in specific instances and for the specific purpose given.

x. Order of Precedence: Should there be any conflict between the terms of this Agreement and the Consultant's proposed contract terms, scope of work, or any other document provided by the Consultant, this Agreement shall control, and nothing in this

Agreement shall be considered as an acceptance of any conflicting terms in the Consultant's Proposal.

xi. Survival: All provisions in this Agreement, which by their nature should remain in effect beyond termination or expiration of this Agreement, will survive until fulfilled.

xii. Counterparts; Electronic Signatures: The Agreement may be executed in any number of counterparts, each of which so executed shall be deemed to be an original and such counterparts shall together constitute but one and the same Agreement. The City and Consultant may conduct this transaction, including any amendments, by electronic means, including the use of electronic signatures.

xiii. Independent Legal Review: The Parties, by the signature of their authorized representatives, acknowledge that they have read this Agreement, have performed an independent legal review, understand it, and agree to be bound by its terms and conditions.

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SIGNATURE PAGE

IN WITNESS HEREOF, the Parties hereby cause this Agreement to be executed.

[DESIGN PROFESSIONAL]

CITY OF HAPPY VALLEY

Authorized Signature

[City Authorized Signer]

Printed Name and Title

Printed Name and Title

Date

Date

Attachment - Statutorily Required Public Contract Provisions

Consultant shall observe all applicable state and local laws pertaining to public contracts. Pursuant to ORS Chapters 279A, 279B and 279C, which require every public contract to contain certain provisions, and other state law, the following provisions shall be a part of this contract, as applicable. All defined terms in this Attachment shall be interpreted in accordance with solicitation or Agreement and the relevant statutory provision. For professional services contracts, Contractor shall be read to mean Consultant, and Subcontractor shall be read to mean subcontractor or subconsultant.

1. ORS 279A.110 (Non-discrimination Certification): Contractor shall certify that Contractor has not discriminated and will not discriminate against a Subcontractor in the awarding of a subcontract because the Subcontractor is a disadvantaged, minority owned, woman owned, veteran owned, or emerging small business enterprise (certified under ORS 200.055.), or a business that is owned or controlled by, or employs a disabled veteran (as defined in ORS 408.225).
2. Pursuant to ORS 279B.220 or 279C.505, as applicable, Contractor shall make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract; shall pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract; not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished, and; pay to the Department of Revenue all sums withheld from employees under ORS 316.167.
3. Pursuant to ORS 279B.225, every public contract for lawn and landscape maintenance shall contain a condition requiring the contractor to salvage, recycle, compost or mulch yard waste material at an approved site, if feasible and cost-effective.
4. Pursuant to ORS 279B.230(1) or 279C.530(1), as applicable, Contractor shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to the employees of such contractor, of all sums which the contractor agrees to pay for such services and all monies and sums which the contractor collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.
5. Pursuant to ORS 279B.230(2) or 279C.530.(2), as applicable, in every public contract, all subject employers working under the contract are either employers that will comply

with ORS 656.017 or employers that are exempt under ORS 656.126.

6. Pursuant to ORS 279B.235(1) and 279B.020 and ORS 279C.520 and 279C.540 (Hours of Labor, Holidays, and Overtime): Except as otherwise provided in an applicable collective bargaining agreement with a labor organization, Contractor shall not employ and shall require that its Subcontractors not employ any person to perform construction work for more than ten hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it, and in such cases, except in cases of Contracts for personal services as defined in ORS 279A.055, the laborer shall be paid at least time and a half pay:
 - i. For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; and
 - ii. For all overtime in excess of ten hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
 - iii. For work performed on Saturday and on any legal holiday specified in any applicable collective bargaining agreement or ORS 279C.540(1)(b).
 - iv. The requirement to pay at least time and a half for all overtime worked in excess of 40 hours in any one week shall not apply to individuals who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. Section 201 to 209 from receiving overtime.
 - v. Contractor shall and shall require its Subcontractors to give notice in writing to their employees who work under this contract, either at the time of hire or before commencement of Work or Services under the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.
7. Environmental Laws. Contractor shall comply with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15).
8. Oregon Tax Law Compliance: Contractor must, throughout the duration of this contract and any extensions, comply with all tax laws of this state and all applicable tax laws of any political subdivision of this state. Contractor (to the best of Contractor's knowledge, after due inquiry), for a period of no fewer than six calendar years preceding the date of this contract, represents and warrants that it has faithfully has complied with, and will continue to comply with during the term of this contract: (A) all tax laws of this state, including but not limited to ORS 305.620 and ORS chapters 316, 317, and 318; (B) any tax provisions imposed by a political subdivision of this state that applied to Contractor, to Contractor's property, operations, receipts, or income, or to Contractor's performance of or compensation for any work performed by Contractor; (C) any tax provisions imposed by a political subdivision of this state that applied to

Contractor, or to goods, services, or property, whether tangible or intangible, provided by Contractor; and (D) any rules, regulations, charter provisions, or ordinances that implemented or enforced any of the foregoing tax laws or provisions. Failure to comply with this section is a default for which the City may terminate the Agreement and seek damages and other relief available under the terms of the Agreement or under applicable law.

9. Foreign Contractor. If Contractor is not domiciled in or registered to do business in the state of Oregon, Contractor shall promptly provide to the Oregon Department of Revenue and the Secretary of State Corporation Division all information required by those agencies relative to this Agreement. Contractor shall demonstrate its legal capacity to perform these services in the state of Oregon prior to entering into this Agreement.
10. Assignment or Transfer Restricted. Unless otherwise provided in the Agreement, the Contractor shall not assign, sell, dispose of, or transfer rights, or delegate duties under the Agreement, either in whole or in part, without the Contracting Agency's prior Written consent. Unless otherwise agreed by the Contracting Agency in writing, such consent shall not relieve the Contractor of any obligations under the Agreement. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the contract. If the Contracting Agency consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to the Contracting Agency for complete performance of the contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Contracting Agency otherwise agrees in Writing.

EXHIBIT A

SCOPE OF WORK

[[This can be specifically drafted, text pulled from the RFP, or the City can incorporate terms from a Proposal. It should also include the Consultant's schedule for performing the work.]]

SUMMARY

[Summary of the City's needs and the background for the project.]

DESCRIPTION OF SERVICES

Consultant shall provide the following Services:

[More particularized description of the Services.]

TASKS AND DELIVERABLES

The individual deliverables are described in more detail below:

1.1 Task 1: [Specific tasks. E.g., Consultant to develop preliminary design documents.]

1.1.1 Deliverable 1: [What do you want? E.g. A preliminary design report]

1.1.1.1 Acceptance Criteria: [How do you want it presented? E.g. Describing the project fundamentals, in electronic .pdf format, font size 13, etc.]

1.1.2 Deliverable 2:

1.1.2.1 Acceptance Criteria:

1.1.3 Deliverable 3:

1.1.3.1 Acceptance Criteria:

1.2 Task 2:

1.2.1 Deliverable 1:

1.2.1.1 Acceptance Criteria:

1.2.2 Deliverable 2:

1.2.2.1 Acceptance Criteria:

1.2.3 Deliverable 3:

1.2.3.1 Acceptance Criteria:

1.3 Task 3:

1.3.1 Deliverable 1:

1.3.1.1 Acceptance Criteria:

1.3.2 Deliverable 2:

1.3.2.1 Acceptance Criteria:

1.3.3 Deliverable 3:

1.3.3.1 Acceptance Criteria:

KEY PERSONS

SERVICES SCHEDULE

The detailed schedule for the Services is shown below (or as another Schedule A-X to this Exhibit B) –OR –

The Services shall be completed no later than [insert CALENDAR DATE].

EXHIBIT B

[[This can include a City's payment terms, restrictions on reimbursable costs, etc. It should also attach the Consultant's Fee Proposal and hourly rates.]]

