

REQUEST FOR BOARD ACTION

ITEM NO. 10.

DATE OF MEETING: May 4, 2009

REQUESTED BY: Michael G. Mack, Director, PCU

SHORT TITLE: Resolution Approving Professional Services Contract and Purchase Order for Pender County Water Treatment Plant Environmental Assessment Update.

BACKGROUND: Pender County is currently in the development stage to construct a water treatment facility to provide a safe and dependable source of drinking water for County residents. A review of current and future water demands has prompted the County to consider increasing the capacity of the facility from 2 MGD to 6 MGD. An Environmental Assessment (EA) for the proposed 2 MGD water treatment facility and high-service transmission main was conducted and a Finding of No Significant Impact (FONSI) was obtained in February 2008 by McKim & Creed. In order to increase the capacity of this facility to 6 MGD, the EA document must be updated to reflect the larger facility, service area, and water demands.

The scope of work includes the preparation of the EA as required by USDA Rural Development in accordance with the National Environmental Policy Act (NEPA) regulations; submittal of the EA to the USDA-RD and NC State Clearing House for review and comments; revisions to the document based on the review comments; and assisting the County in publishing Public Notices announcing the availability of the EA and the Finding of No Significant Impact (FONSI).

The recommended contract fee is \$15,250. Funds for the contract and fees are available in the Water Treatment Plant Project Fund (83-407490) and may be reimbursable by USDA-RD if the project is approved for 6 MGD.

SPECIFIC ACTION REQUESTED: To adopt a resolution approving the professional services contract for Pender County Water Treatment Plant Environmental Assessment for a 6 MGD water treatment facility to the firm of McKim & Creed in an amount not-to-exceed \$15,250.

COUNTY MANAGER'S RECOMMENDATION

Respectfully recommend approval.

JTB

Initial

RESOLUTION

NOW, THEREFORE BE IT RESOLVED by the Pender County Board of Commissioners that:

a professional services contract and purchase order for Pender County Water Treatment Plant Environmental Assessment for a 6 MGD water treatment facility be authorized with the firm of McKim & Creed in an amount not-to-exceed \$15,250; subject to the review and approval of the County Attorney. The County Manager is authorized to execute any/all documents necessary to implement this resolution.

Budget Account: Fund 83-407490

AMENDMENTS:

MOVED _____ SECONDED _____

APPROVED _____ DENIED _____ UNANIMOUS

YEA VOTES: Tate ___ Brown ___ Blanchard ___ Rivenbark ___ Williams ___

Jimmy T. Tate, Chairman 5/4/09
Date

ATTEST 5/4/09
Date



ENGINEERS

SURVEYORS

PLANNERS

March 31, 2009

PW090201

Mr. Michael Mack, Director
Pender County Utilities
Post Office Box 995
Burgaw, NC 28425

RE: Pender County US 421 Water Treatment Facility
Environmental Assessment Update for 6 MGD Capacity

Dear Mr. Mack:

We are pleased to present this proposal to provide professional services for the preparation of an update to the current *Environmental Assessment* for the proposed Pender County US 421 Water Treatment Facility. Our detailed proposal is as follows:

I. PROJECT UNDERSTANDING

Pender County is currently in the preliminary development stage to construct a water treatment facility to provide a safe and dependable source of drinking water for County residents. A review of current and future water demands has prompted the County to consider increasing the capacity of this facility from 2 MGD to 6 MGD. An *Environmental Assessment* (EA) for the proposed 2 MGD water treatment facility and high-service transmission main was conducted and a Finding of No Significant Impact (FONSI) was obtained in February 2008. In order to increase the capacity of this facility to 6 MGD, the EA document must be updated to reflect the larger facility, service area, and water demands. This Agreement encompasses professional services for the preparation of an EA for the referenced project. It will be completed in accordance with and shall adhere to current USDA Rural Development guidelines. The following project components will be included as part of this project:

6 MGD Water Treatment Plant Site – The plant will be located on Pender County property, north of BASF Industry on US 421 in southwest Pender County. The facility will be supplied raw water via the Lower Cape Fear Water and Sewer Authority's 48-inch raw water main located along the southern property line of the BASF facility.

243 North Front Street

Wilmington, NC 28401

910.343.1048

Fax 910.251.8282

www.mckimcreed.com

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70,000 Feet of 24-Inch Diameter Finished Water Transmission Main – The main will be routed along US 421 North, Montague Road, and NC 210 for connection to the existing 12-inch diameter water main on NC 210 in Rocky Point. This existing main is owned and maintained by the Rocky Point/Topsail Water and Sewer District.

II. PROJECT ASSUMPTIONS

It is noted that the Owner has obtained the following information regarding this project:

Wetlands delineation and survey for the proposed water treatment plant site
Threatened and Endangered Species Survey for the proposed water treatment plant site
Boundary surveys

McKim & Creed will incorporate this information as part of the EA document.

III. SCOPE OF SERVICES

McKim & Creed will provide the following services for the referenced project:

Environmental Assessment

Prepare the required Environmental Assessment for the proposed US 421 Water Treatment Facility and 20-Inch finished water transmission main as follows:

Prepare the document as per the guidelines of RUS Bulletin 1794A-602 as required by USDA Rural Development
Prepare the document to comply with National Environmental Policy Act (NEPA) regulations
Submit the Environmental Assessment to the USDA Rural Development for review and comments
Submit the Environmental Assessment to the NC State Clearing House for review and comments

Assist the County in publishing of Public Notices announcing the availability of the Environmental Assessment
Address public comments that are received from publishing the Environmental Assessment and make necessary revisions to the document
Address review comments that are received from USDA Rural Development and make necessary revisions to the document
Address review comments that are received from all agencies that report to the NC State Clearing House and make necessary revisions to the document
Resubmit final amended Environmental Assessment Document to USDA Rural Development and the NC State Clearing House
Assist the County in publishing public notice of a Finding of No Significant Impact (FONSI)

IV. OWNER RESPONSIBILITIES

Pender County will be responsible for the following:

Provide access to all County mapping, as-built documentation, soil surveys, demographic information, etc. for inclusion in the Environmental Assessment. Data shall be provided in electronic form if available.
Provide copies of all reports, surveys, and delineations.
Incur all costs associated with public notices of availability and publishing of the FONSI

V. ADDITIONAL SERVICES

The Engineering Services stated above do not include the costs of:

Biological surveys
Threatened and endangered species surveys
Detailed wetlands delineation, mapping, and Nationwide Permit submittals
Environmental Impact Statements
Preliminary Engineering Reports or Analysis

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Detailed Design
Bid & Award Services
Construction Administration or Construction Phase Services
Permit preparation or submittal
Geotechnical Investigations
Hydrogeological Investigations
Topographic surveys
Easement Surveys or fee simple Surveys
Legal advertisements
Court appearances for litigation, or preparation for the same

VI. BASIS FOR COMPENSATION

McKim & Creed will provide the services outlined in Section III of this proposal for the fixed fee price of \$15,250.

VII. SCHEDULE

We are prepared to begin work immediately upon Authorization to Proceed and will submit the EA document to USDA Rural Development and the NC State Clearing House within 60 days of Authorization to Proceed from the County.

GENERAL CONDITIONS

The following attachments will be deemed as part of this proposal and agreement:

1. McKim & Creed General Conditions

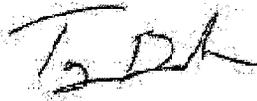
If acceptable, please initial the General Conditions, and sign and return one (1) copy of this document for our files. Our receipt of the executed copy of this proposal will serve as our Notice to Proceed. This proposal is valid for thirty (30) days from the date of the proposal. If the proposal is not accepted within thirty (30) days, we reserve the right to revise or withdraw the proposal entirely at our discretion.

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We appreciate the opportunity to provide professional engineering services for this project and look forward to our continuing our relationship with Pender County.

Sincerely,

MCKIM & CREED, PA



Tony Boahn, P.E.
Vice-President

ko/bc

Enclosure: McKim & Creed General Conditions

I hereby authorize McKim & Creed, PA to proceed with the work described above.

PENDER COUNTY

By: _____

Date: _____

Title: _____

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(01/2009-1)

Billing and Payment. Invoices will be submitted by McKim & Creed, P.A. (the "Engineer") to the Client monthly for services performed and expenses incurred pursuant to this Agreement. Payment of each such invoice will be due upon receipt and considered past due if not paid within thirty-(30) days of the date of the invoice. Any retainers shall be credited on the final invoice.

a) **Interest.** A service charge will be added to delinquent accounts at 18 percent per annum (1.5 percent per month).

b) **Suspension of Services.** If the Client fails to make any payment due the Engineer for services and expenses within thirty (30) days of the invoice date on the project(s) covered by this agreement or any other project(s) being performed by Engineer for Client, the Engineer may suspend services under this Agreement until it has been paid in full for all past due amounts owed by Client for services and expenses. The Engineer shall have no liability whatsoever to the Client for any costs or damages occurring as a result of such suspension caused by any such breach of this Agreement by Client.

c) **Collection Costs.** In the event legal action is necessary to enforce the payment provisions of this Agreement, the Engineer shall be entitled to collect from the Client any judgment or settlement sums due, reasonable attorneys' fees, court costs and expenses incurred by the Engineer in connection therewith and, in addition, the reasonable value of the Engineer's time and expenses spent in connection with such collection action, computed at the Engineer's prevailing fee schedule and expense policies.

d) **Termination of Services.** The failure of the Client to make payment to the Engineer in accordance with the payment terms set forth herein shall constitute a material breach of this Agreement and shall entitle the Engineer, at its option, to terminate the Agreement. Any material breach of this Agreement by the Client shall, at the Engineer's option and in its sole discretion, constitute a breach of and default under any and/or all other agreements between the Client and Engineer.

Confidentiality. The Engineer agrees to keep confidential and not to disclose to any person or entity, other than the Engineer's employees, sub-consultants and the general contractor and subcontractors, if appropriate, any data and information not previously known to and generated by the Engineer or furnished to the Engineer and marked CONFIDENTIAL by the Client. These provisions shall not apply to information in whatever form that comes into the public domain, nor shall it restrict the Engineer from giving notices required by law or complying with an order to provide information or data when such order is issued by a court, administrative agency or other authority with proper jurisdiction, or if it is reasonably necessary for the Engineer to defend itself from any suit or claim.

The Client agrees that the technical methods, techniques and pricing information contained in any proposal submitted by the Engineer pertaining to this project or in this Agreement or any addendum thereto, are to be considered confidential and proprietary, and shall not be released or otherwise made available to any third party without the express written consent of the Engineer.

Consequential Damages. Notwithstanding any other provision of the Agreement, neither party shall be liable to the other for any

consequential damages incurred due to the fault of the other party, regardless of the nature of the fault or whether it was committed by the Client or the Engineer, their employees, agents, sub-consultants or subcontractors. Consequential damages include, but are not limited to, loss of use and lost profit.

Non-Contingency. The Client acknowledges and agrees that the payment for services rendered and expenses incurred by the Engineer pursuant to this Agreement is not subject to any contingency unless the same is expressly set forth in this Agreement. Payments to the Engineer shall not be withheld, postponed or made contingent on the financing, construction, completion or success of the project or upon receipt by the Client of offsetting reimbursement or credit from other parties causing Additional Services or expenses. No withholdings, deductions or offsets shall be made from the Engineer's compensation for any reason.

Opinions of Cost.

(a) Since the Engineer has no control over the cost of labor, materials, equipment or services furnished by others, or over methods of determining prices, or over competitive bidding or market conditions, any and all opinions as to costs rendered hereunder, including but not limited to opinions as to the costs of construction and materials, are estimates only and shall be made on the basis of its experience and qualifications and represent its best judgment as an experienced and qualified professional engineer, familiar with the construction industry; but the Engineer cannot and does not guarantee that proposals, bids or actual costs will not vary from opinions of probable cost prepared by it and the Engineer shall have no liability whatsoever if the actual cost differs from the Engineer's estimate. If at any time the Client wishes greater assurance as to the amount of any cost, Client shall employ an independent cost estimator to make such determination. Engineering services required to bring costs within any limitation established by the Client will be paid for as additional services hereunder by the Client.

Termination. The obligation to provide further services under this Agreement may be terminated by either party upon seven (7) days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party. In the event of any termination, the Engineer shall provide a final statement of charges due and will be paid for all services rendered to the date of termination, all expenses subject to reimbursement hereunder, and other reasonable expenses incurred by the Engineer as a result of such termination. In the event the Engineer's compensation under this Agreement is a fixed fee, upon such termination the amount payable to the Engineer for services rendered will be determined using a proportional amount of the total fee based on a ratio of the amount of the work done, as reasonably determined by the Engineer, to the total amount of work which was to have been performed, less prior partial payments, if any, which have been made.

Reuse of Documents. All documents, including but not limited to drawings and specifications, prepared by the Engineer pursuant to this Agreement are related exclusively to the services described herein. They are not intended or represented to be suitable for reuse by the Client or others on extensions of this project or on any other

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project. Any reuse without written verification or adaptation by the Engineer for specific purposes intended will be at the Client's sole risk and without liability or legal exposure to the Engineer; and the Client releases and shall indemnify and hold the Engineer harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting there from. Any such verification or adaptation will entitle the Engineer to further compensation at rates to be agreed upon by the Client and the Engineer.

Liability. The Engineer is protected by Workmen's Compensation Insurance (and/or employer's liability insurance), professional liability insurance, and by public liability insurance for bodily injury and property damage and will furnish certificates of insurance upon request. The Engineer agrees to compensate the Client for loss, damage, injury or liability arising directly and exclusively from the negligent acts or omissions of the Engineer, its employees, agent, subcontractors and their employees and agents but only to the extent that the same is actually covered and paid under the foregoing policies of insurance. If the Client requires increased insurance coverage, the Engineer will, if specifically directed by the Client, take out additional insurance, if obtainable, at the Client's expense.

Limitation of Liability. In performing its professional services hereunder, the Engineer will use that degree of care and skill ordinarily exercised, under similar circumstances, by reputable members of its profession practicing in the same or similar locality. No other warranty, express or implied, is made or intended by the Engineer's undertaking herein or its performance of services hereunder. THE CLIENT UNDERSTANDS AND AGREES THAT THE ENGINEER HAS NOT MADE AND IS NOT MAKING ANY PROMISE, WARRANTY OR REPRESENTATION EXCEPT THE WARRANTIES EXPRESSLY MADE HEREIN, AND THE ENGINEER EXPRESSLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER IMPLIED WARRANTIES. Under no circumstances shall the Engineer be liable for extra costs or other consequences due to changed conditions or for costs related to the failure of the contractor or material men to install work in accordance with the plans and specifications. The Engineer shall not be liable for errors in judgment or for any loss or damage, which occurs for any reason beyond the control of the Engineer. No action may be instituted hereunder more than one year after the cause of action accrued or should have been discovered by reasonable diligence. The provisions of this paragraph and the previous paragraph (Liability) shall survive the termination of this Agreement.

Limitation of Liability for Construction Staking. It is agreed that, in accordance with and subject to the provisions of the foregoing paragraphs (Liability), (Limitation of Liability) and this paragraph, any claim for damages, cost of defense, or expenses which the Client or any third party may assert against the Engineer on account of or related to construction staking shall be limited to \$_____ which amount shall be less than \$50,000, or the amount of the Engineer's fee for this project, whichever is greater. The limitation of liability for construction staking is a specifically bargained-for provision of this agreement, reflected in Engineer's fee.

Client initials

Controlling Law. This Agreement is to be governed by the law of the State of North Carolina. The parties agree that any suit or action related to this Agreement shall be instituted and prosecuted in the courts of the County of New Hanover, State of North Carolina, and each party waives any right or defense relating to such jurisdiction or venue.

Binding Effect. This Agreement shall bind, and the benefits thereof shall inure to the respective parties hereto, their legal representatives, executors, administrators, successors and permitted assigns.

Merger; Amendment. This Agreement constitutes the entire agreement between the Engineer and the Client with respect to its subject matter, and all negotiations and oral understandings between the parties are merged herein. This Agreement can be supplemented and/or amended only by a written document executed by both the Engineer and the Client.

Ownership of Instruments of Service. All reports, plans, specifications, field data, notes and other documents, including all documents on electronic media, prepared by the Engineer as instruments of service shall remain the property of the Engineer. The Engineer shall retain all common law, statutory and other reserved rights, including the copyright thereto.

Photographs. Photographs of any completed project embodying the services of the Engineer provided hereunder may be made by the Engineer and shall be considered as its property, and may be used by it for publication.

Assignment. Neither party to this Agreement shall transfer, sublet or assign any rights under or interest in this Agreement, including but not limited to fees that are due or fees that may be due, without the prior written consent of the other party.

Archiving of Project Documentation. Engineer shall maintain copies of printed project documentation for a period of three years from substantial completion of Engineer's services. Engineer shall maintain copies of all electronic media related to the project for a period of one year from substantial completion of Engineer's services. Requests for reproduction of project documentation after these periods have expired will be considered additional services and will be invoiced at the Engineer's prevailing hourly rates at the time of the request, plus expenses.

Betterment. If, due to the Engineer's error, any required item or component of the project is omitted from the Engineer's construction documents, the Engineer shall not be responsible for paying the cost to add such item or component to the extent that such item or component would have been otherwise necessary to the project or otherwise adds value or betterment to the project. In no event will the Engineer be responsible for any cost or expense that provides betterment, upgrade or enhancement of the project.

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Electronic Files. Because data stored on electronic media can deteriorate undetected or be modified without the Engineer's knowledge, the Client agrees that it will accept responsibility for the completeness, correctness, or readability of any electronic media delivered to the Client after an acceptance period of 30 days after delivery of the electronic files, and that upon the expiration of this acceptance period, Client will release, indemnify and save harmless the Engineer from any and all claims, losses, costs, damages, awards or judgments arising from use of the electronic media files or output generated from them. The Engineer agrees that it is responsible only for the printed and sealed drawings and documents, and if there is a conflict between these printed documents and the electronic media, the sealed documents will govern. Engineer makes no warranties, express or implied, under this agreement or otherwise, in connection with the Engineer's delivery of electronic files.

Certifications, Guarantees and Warranties. The Engineer shall not be required to sign any documents, no matter by whom they may be requested, that would result in the Engineer's having to certify, guarantee or warrant the existence of conditions, which the Engineer cannot ascertain. The Client also agrees that it has no right to make the resolution of any dispute with the Engineer or the payment of any amounts due to the Engineer in any way contingent upon the Engineer's signing any such certification.

Corporate Protection. It is intended by the parties to this Agreement that the Engineer's services in connection with the project shall not subject the Engineer's individual employees, officers or directors to any personal legal exposure for the risks associated with this project. Therefore, and notwithstanding anything to the contrary contained herein, the Client agrees that as the Client's sole and exclusive remedy, any claim, demand or suit shall be directed and/or asserted only against the Engineer, a North Carolina corporation, and not against any of the Engineer's employees, shareholders, officers or directors.

Extension of Protection. The Client agrees to extend any and all liability limitations and indemnification's provided by the Client to the Engineer to those individuals and entities the Engineer retains for performance of the services under this Agreement, including but not limited to the Engineer's officers and employees and their heirs and assigns, as well as the Engineer's sub-consultants and their officers, employees, heirs and assigns.

Job-Site Safety. Neither the professional activities of the Engineer, nor the presence of the Engineer or its employees and sub-consultants at a construction site, shall relieve the General Contractor and any other entity of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending or coordinating all portions of the Work of construction in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. The Engineer and its personnel have no authority to exercise any control over any construction contractor or other entity or their employees in connection with their work or any health or safety precautions. The Client agrees that the General Contractor is solely responsible for job-site safety, and warrants that this intent shall be made evident in the Client's agreement with the General Contractor. The Client also agrees that the Client, the Engineer and the Engineer's consultants shall be indemnified and shall be made additional insured under the General Contractor's general liability insurance policy.

Scope of Services. Services not set forth as Basic Services or Additional Services and listed in this Agreement are excluded from the scope of the Engineer's services and the Engineer assumes no responsibility to perform such services.

Severability and Survival. Any provision of this Agreement later held to be unenforceable for any reason shall be deemed void, and all remaining provisions shall continue in full force and effect. All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating responsibility or liability between the Client and the Engineer shall survive the completion of the services hereunder and the termination of this Agreement.

Shop Drawing Review. If included in the scope of services to be provided, the Engineer shall review and approve Contractor submittals, such as shop drawings, product data, samples and other data, as required by the Engineer, but only for the limited purpose of checking for conformance with the design concept and the information expressed in the contract documents. This review shall not include review of the accuracy or completeness of details, such as quantities, dimensions, weights or gauges, fabrication processes, construction means or methods, coordination of the work with other trades or construction safety precautions, all of which are the sole responsibility of the Contractor. The Engineer's review shall be conducted with reasonable promptness while allowing sufficient time in the Engineer's judgment to permit adequate review. Review of a specific item shall not indicate that the Engineer has reviewed the entire assembly of which the item is a component. The Engineer shall not be responsible for any deviations from the contract documents not brought to the attention of the Engineer in writing by the Contractor and approved by the Engineer. The Engineer shall not be required to review partial submissions or those for which submissions of correlated items have not been received.

Specification of Materials. The Client understands and agrees that products or building materials, which are permissible under current building codes or ordinances, may, at some future date, be banned or limited in use in the construction industry because of presently unknown hazardous characteristics. The Client agrees that if the Client directs the Engineer to specify any product or material, after the Engineer has informed the Client that such product or material may not be suitable or may embody characteristics that are suspected of causing or may cause the product or material to be considered a hazardous substance in the future, the Client waives all claims as a result thereof against the Engineer. The Client further agrees that if any product or material specified for this project by the Engineer shall, at any future date be suspected or discovered to be a health or safety hazard, the Client hereby releases the Engineer from any and all liabilities and waives all claims against the Engineer relating thereto.

Standard of Care. Services provided by the Engineer under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances in the same geographic area.

Suspension of Services. If the project is suspended for more than thirty-(30) calendar days in the aggregate, the Engineer shall be compensated for services performed and charges incurred prior to such suspension and, upon resumption of services, the Engineer shall be entitled to an

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equitable adjustment in fees to accommodate the resulting demobilization and re-mobilization costs. In addition, there shall be an equitable adjustment in the project schedule based on the delay caused by the suspension. If the project is suspended for more than ninety-(90) calendar days in the aggregate, the Engineer may, at its option, terminate this Agreement upon giving notice in writing to the Client.

Unauthorized Changes to Documents. In the event the Client consents to, allows, authorizes or approves of changes to any plans, specifications, construction documents or electronic media, and these changes are not approved in writing by the Engineer, the Client recognizes that such changes and the results thereof are not the responsibility of the Engineer. Therefore, the Client releases the Engineer from any liability arising from the construction, use or result of such changes. In addition, the Client agrees, to the fullest extent permitted by law, to indemnify and hold the Engineer harmless from any damage, liability or cost (including reasonable attorneys' fees and costs of defense) arising from such changes.

Compensation for Additional Services. The undertaking of the Engineer to perform professional services under this Agreement extends only to those services specifically described herein. If upon the request of the Client, the Engineer agrees to perform additional services hereunder, the Client and the Engineer shall negotiate and agree upon an additional fee to be paid to the Engineer for completion of the agreed upon Additional Services. The Engineer will be under no obligation to begin or complete requested Additional Services until the additional fee has been negotiated and agreed upon in writing by the Client and the Engineer.

Hourly Billing Rates. All services to be billed on an hourly basis under this agreement will be billed using the Engineer's prevailing billing rate schedule at the time services are provided. If a specific rate schedule is to be used for this Agreement, it shall expire no later than one year from the date of this Agreement and will be replaced with the prevailing rate schedule in effect at that time.

Priority over Form Agreements. The parties agree that the provisions of this Agreement shall control and govern over any Work Orders, Purchase Orders or other documents, which the Client may issue to Engineer in regard to the project(s) which is (are) the subject of this Agreement. The Client may issue such documents to Engineer for its convenience for accounting or other purposes, but any such Orders will not alter the terms of this Agreement, regardless of any contrary language appearing therein.

Indemnity. The Client shall and hereby agrees to indemnify and hold harmless the Engineer from and against all losses, costs, damages, expenses and liability of whatever nature, including but not limited to reasonable attorney's fees, litigation and court costs, expert witness fees and expenses, amounts paid in settlement, amounts paid to discharge judgments, penalties, punitive damages, and interest, directly or indirectly resulting from, arising out of or related to one or more Claims, as hereinafter defined. The word "Claims" as used herein shall mean all claims (whether valid or not), lawsuits, causes of action, liens, investigations, administrative proceedings, and other legal actions and proceedings of whatsoever nature that directly or indirectly result from, arise out of or relate to this Agreement, the project which is the subject of this Agreement, and/or any other matter

or transaction contemplated hereunder, including without limitation, any failure by the Client to adhere to or comply with any drawing, design, plans, specifications, recommendation or advice given or furnished by the Engineer to the Client; provided however, that the foregoing shall not apply to any claim resulting primarily from the negligence of the Engineer.

Paragraph Headings. The paragraph headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

Third Parties. Nothing in this Agreement shall be construed as giving any person, firm, corporation or other entity other than the parties to this Agreement and their respective successors and permitted assigns, any right, remedy or claim under or in respect of this Agreement or any of its provisions.

Default. The Client shall be in default under this Agreement if (i) it fails to pay in full any invoice from the Engineer on the due date or fails to make any other payment due to the Engineer under this Agreement, (ii) it fails to observe or perform any other term, condition or covenant under this Agreement, (iii) it breaches any warranty or representation made under this Agreement, (iv) it dissolves, terminates or liquidates its business, or its business fails or its legal existence is terminated or suspended, (v) any voluntary or involuntary bankruptcy, reorganization, insolvency, receivership, or other similar proceeding is commenced by or against the Client, or (vi) it becomes insolvent, makes an assignment for the benefit of creditors, or conveys substantially all of its assets.

Design without Construction Phase Services. If the services to be provided by Engineer hereunder do not include construction observation and/or construction administration services, or if such services are included in Engineers contracted services and Client later decides to perform these services itself or decides to retain other consultants or individuals to perform these services, Engineer assumes no responsibility for interpretations of the Engineer's services or for any construction observation, construction administration and/or supervision performed by Client or other parties and Client waives any and all claims against Engineer for any losses, claims, costs or damages of any kind whatsoever that may be in any way connected thereto.

In addition Client agrees, to the fullest extent permitted by law, to indemnify and hold Engineer harmless from any loss, claim, damage or cost, including reasonable attorneys' fees and costs of defense, arising or resulting from the performance of construction observation, construction administration and/or supervision by Client, its employees, agents or consultants, and including any and all claims arising from the modification or adjustment of, or any clarifications or interpretations of, the Engineer's Work by others.

Unless, in the Engineer's sole opinion, appropriate levels of construction observation and construction administration services are contracted for and performed by Engineer, Engineer will not be responsible to provide any engineering or other certifications related to the construction or installation of any improvements.

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Reliance on Data Provided by Others. Engineer shall be entitled to reasonably rely on the accuracy of information provided to it by Client or any of Client's other consultants or sub-consultants. Engineer shall not be responsible to review extensively the information provided to insure the accuracy thereof. Client agrees to not hold Engineer responsible for errors or omissions in Engineer's work that are directly attributable to errors or incorrect data provided to Engineer by Client or Client's other consultants. Client further acknowledges that any redesign or corrective efforts required by Engineer resulting from incorrect information provided by Client or Client's other consultants will be paid for by the Client as additional services.

Engineer Retaining Consultants. In the event that Engineer is required by Client to retain other Consultants to perform necessary services related to the project, the Client agrees to defend, indemnify and hold the Engineer harmless from and against all claims, losses, liabilities and damages arising out of the performance of services by such Consultants. In the event that Client suffers any financial loss or expense resulting from or alleged to result from the performance or the failed performance of any Consultant retained by Engineer, the Client agrees to pursue recovery of and assert any claims based upon its losses, expenses and/or damages solely and directly against those Consultants. The Client agrees to waive any claims, losses, liabilities or damages against Engineer arising out of the performance of such Consultants. In consideration of such indemnity and waiver, the Engineer agrees to assign its rights and/or claims against those Consultants pursuant to the Consultants' agreements with the Engineer to the Owner.

Credit and Financial Obligations. Prior to commencement of the work, Engineer may require that Client provide reasonable credit information and other documentation to confirm that the Client has made financial arrangements to fulfill the Client's payment obligations under this Agreement. Engineer may also require such information at any time during the performance of Engineer's services should the Client fail to make payments per this Agreement, a change in the scope materially changes the contract sum, or Engineer identifies in writing a reasonable concern regarding the Client's ability to make payment when payment is due. The Client may be required to furnish this information prior to further commencement or continuation of services by Engineer and Engineer shall not be responsible for the cost of any delay occurring as a result of such a request.

Markup on Expenses. Unless specified otherwise in our proposal, all sub consultant costs and other project related costs incurred by Engineer will be billed with a 15% markup. Company vehicle mileage and internal reproduction costs will be billed at the Engineer's prevailing rate for those items. Personal vehicle mileage costs incurred on the project by employees of Engineer will be billed at the prevailing IRS mileage rate in effect at the time of travel.