

**REQUEST FOR BOARD ACTION**

**BOARD OF COMMISSIONERS OF HENDERSON COUNTY ACTING AS**

**CANE CREEK WATER AND SEWER DISTRICT BOARD OF DIRECTORS**

**MEETING DATE:** April 3, 2017

**SUBJECT:** CANE CREEK WATER & SEWER DISTRICT MINUTES

**PRESENTER:** Terry Wilson

**ATTACHMENTS:** YES  
1) December 5, 2016 draft minutes

**SUMMARY OF REQUEST:**

Staff request approval of minutes from a previous meeting of the Cane Creek Water & Sewer District.

**BOARD ACTION REQUESTED:**

Staff suggests approval of minutes.

**SUGGESTED MOTION:**

*I motion that the Board convene as Cane Creek Water & Sewer District Board.*

**SUGGESTED MOTION:**

*I motion that the Board approves the Cane Creek Water & Sewer District minutes of December 5, 2016 minutes.*

**SUGGESTED MOTION:**

**(ONLY NECESSARY IF GOING BACK INTO SESSION AS THE BOARD OF COMMISSIONERS)**

*I motion to adjourn as the Cane Creek Water & Sewer District Board and reconvene as the Henderson County Board of Commissioners.*



**DRAFT**

MINUTES

**STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON**

**CANE CREEK WATER & SEWER DISTRICT  
MONDAY, DECEMBER 5, 2016**

The Henderson County Board of Commissioners met for a regularly scheduled meeting at 5:30 p.m. in the Commissioners' Meeting Room of the Historic Courthouse on Main Street, Hendersonville.

Those present were: Commissioner Tommy Thompson, Commissioner Charlie Messer, Vice-Chairman Grady Hawkins, Chairman Mike Edney, Commissioner William Lapsley, County Manager Steve Wyatt, Assistant County Manager Amy Brantley, Attorney Russ Burrell and Clerk to the Board Teresa Wilson.

Also present were: Management Assistant Megan Powell, Director of Business and County Development John Mitchell, Finance Director J. Carey McLelland, IT Director Becky Snyder, Planner Kyle Guie, Planner Brian Burgess, Code Enforcement Director Toby Linville, DSS Director Jerrie McFalls, Senior Planner Autumn Radcliff, Environmental Programs Coordinator Rachel Kipar and PIO Kathy Finotti – videotaping, and Corporal Jonathan Tankersley, Deputy Michelle Hensley, and Deputy Ken McCraw as security.

**CALL TO ORDER/WELCOME**

Chairman Edney called the meeting to order and welcomed all in attendance.

*Commissioner Thompson made the motion for the Board to convene as Cane Creek Water & Sewer District Board. All voted in favor and the motion carried.*

**CONSENT AGENDA**

*Commissioner Thompson made the motion to approve the consent agenda as presented. All voted in favor and the motion carried.*

CONSENT AGENDA consisted of the following:

**MINUTES**

Draft minutes were presented for CCWSD Board review and approval of the following meeting(s):  
October 3, 2016

Motion:

*I move to approve the CCWSD minutes of October 3, 2016 as presented.*

**PROPOSED AGREEMENT WITH FLETCHER ACADEMY (FAI) MUD CREEK INTERCEPTOR PROJECT, PHASE 2**

On October 3, 2016, the Board directed staff to develop an agreement with Fletcher Academy Inc. ("FAI") based on their second proposal to contribute \$1,025,000 to the District's Mud Creek Interceptor Project, Phase 2 from Riverstone subdivision to Fletcher Academy. The Mud Creek Interceptor Project was first approved by the Board in FY2015 budget.

Staff has developed the attached, proposed agreement within the conditions directed from the Board. In addition, staff has incorporated the condition into the agreement that FAI's contribution will be presented to the District as a guaranteed irrevocable letter of credit at the beginning of the project. The letter of credit will carry the contribution through the time FAI is connected with sewer service. At the time of connection the letter of credit will terminate and the contribution payment will be paid to Cane Creek.

APPROVED:

The Fletcher Academy, Inc., Board of Directors has approved this agreement, notifying us of their final approval on November 29. Staff recommends approval of the agreement.

Motion:

*Acting as the Board of Directors of the Cane Creek Water and Sewer District, I move that the Board approves the agreement with Fletcher Academy, Inc. regarding their \$1,025,000 contribution to the District's Mud Creek Interceptor Project, Phase 2 from Riverstone subdivision to Fletcher Academy campus.*

**WGLA ENGINEERING AGREEMENT - MUD CREEK INTERCEPTOR PROJECT, PHASE 2**

As directed by the Board on January 15, 2015 with the selection of WGLA Engineering and with the approval of the contribution agreement with Fletcher Academy, Inc. (FAI), staff presents the attached engineering agreement for Board approval. The scope of this agreement is for the entire phase 2 project from Riverstone subdivision to FAI. Originally the scope of the project was from Riverstone to the Naples lift station. The scope expanded with the contribution from FAI to the project.

The proposed agreement with WGLA Engineering is for \$265,000 with a scope of services to include Surveying, Design, Permitting, Bidding, Construction Administration and Inspection and Record Drawings.

Motion:

*Acting as the Board of Directors of the Cane Creek Water and Sewer District, I move that the Board approve the engineering agreement with WGLA Engineering for the Mud Creek Interceptor Project, Phase 2 for \$265,000.*

*Commissioner Thompson made the motion to adjourn as the Cane Creek Water & Sewer District Board and the meeting was adjourned at 9:25 p.m. All voted in favor and the motion carried.*

Attest:

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Teresa L. Wilson, Clerk to the Board

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J. Michael Edney, Chairman

STATE OF NORTH CAROLINA

COUNTY OF HENDERSON

### MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT is made the 5<sup>th</sup> day of December, 2016, by and between Fletcher Academy, Inc., a North Carolina non-profit corporation (the "Academy"), The Layman Foundation of North Carolina, Inc., a North Carolina non-profit corporation (the "Foundation"), and the County of Henderson, a body corporate and politic of the State of North Carolina (the "County"); the Academy, Foundation, and County being sometimes hereinafter referred to collectively as the "Parties" and singularly as a "Party".

#### Background of the Agreement

1. The Academy operates various educational and related institutions on that certain parcel of property located within the Hoopers Creek Township, Henderson County, North Carolina (the "Property"), which Property is partially depicted on the Mud Creek Interceptor / Extension rendering attached hereto as Exhibit A (the "Plans"), which Property is owned by the Foundation.

2. The Academy and Foundation currently operate a private sewer system and package plant, and desire to close such plant and to connect to the sanitary sewer system operated by the County.

3. The County, through its Cane Creek Water and Sewer District ("CCWSD"), desires to extend its existing sanitary sewer system to the Property in connection with the Mud Creek Interceptor Project (the "Project") as shown on the Plans in order to provide such sewer system for the benefit of the Property.

4. The parties have agreed that the Academy contribute the sum of One Million Twenty Five Thousand and no/100s dollars (\$1,025,000.00) (the "Private Contribution") to the cost of construction of the Project, subject to the terms and conditions contained herein.

#### Agreement

Now, therefore, for and in consideration of the premises, the mutual covenants and conditions contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Obligations of the County:
  - a. The County will construct the Project, including, without limitation obtaining and providing through CCWSD design, permitting, right of way acquisition and construction of the Project substantially as depicted on the Plans, at the cost and expense of CCWSD. The County agrees to use its best efforts to complete the Project to the Point of Connection, such term being defined as the point where the Academy will connect to the new sewer line being constructed as part of the Project, which the Parties agree is the location where the existing private system

operated by the Academy currently discharges into the lagoon on the Property, on or before the 31<sup>st</sup>-day of December, 2019 (the "Project Completion Date").

- b. The County will use its best efforts to enter into contracts in connection with the construction of the Project not later than the 28<sup>th</sup> day of February, 2018 (the "Contract Deadline").
  - c. The County will use its best efforts to commence construction of the Project not later than the 30<sup>th</sup> day of April, 2018 (the "Project Commencement Date").
  - d. Nothing herein shall be construed to require any expenditure of any County funds other than those of CCWSD, its successors and assigns.
  - e. Upon the payment of the Private Contribution to the County the County shall cancel and forfeit the Letter of Credit described below.
2. Obligations of the Foundation:
- a. The Foundation agrees to grant such easements to the County for the construction, maintenance, and repair of the sewer lines and accessories as may be reasonably requested by the County in connection with construction of the Project.
  - b. The Foundation agrees to cooperate with the County as reasonably requested in the event the County seeks to obtain grant funding to further defray the cost of construction of the Project.
3. Obligations of Academy:
- a. The Academy shall connect all the structures operated by the Academy to the sewer line constructed by or for the County upon completion of the construction of the Project.
  - b. The Academy shall pay when billed not prior to the completion of the construction of the Project all applicable service, connection, availability or other fees lawfully imposed by the County.
  - c. The Academy shall pay and deliver, by not later than the date upon which the County executes the contract(s) for the construction of the Project (which date the parties stipulate will not be prior to January 31, 2018), the entire sum of the Private Contribution to Bank of North Carolina, or such other institution as the Parties may mutually agree, as escrow agent (the "Bank"), to hold with obligations as stated below:
    - i. The Private Contribution shall be placed in a segregated account. Any interest earned on the Private Contribution while maintained in such account shall accrue to the benefit of the Academy, and may be periodically withdrawn by the Academy.

- ii. Upon the deposit of the Private Contribution, the Bank shall execute a letter of credit in favor of the County and CCWSD (the "Letter of Credit"), securing payment of the Private Contribution upon completion of the Project as otherwise contemplated herein. The Letter of Credit may contain limitations on the payment of the Private Contribution not inconsistent with this Agreement. Specifically, and without limiting the generality of the foregoing, the Parties agree that the Letter of Credit shall provide that in the event the Project is not commenced by the Project Commencement Date or substantially complete as provided in Paragraph 3(c)(iii) below by the Project Completion Date, time being of the essence with respect to both dates, the Letter of Credit shall be cancelled and the Private Contribution returned to the Academy.
          - iii. At such time as the Project is substantially complete, substantial completion being defined as when sanitary sewer service is available to the Point of Connection and ready for connection and utilization by the Academy as reasonably determined and certified to the Parties by the Project engineers, the Private Contribution shall be paid to the County for benefit of CCWSD. In the event the Academy defaults in its payment of the Private Contribution, the County shall have all rights to receive payment directly from the Bank pursuant to the Letter of Credit.
  - d. The Academy agrees to cooperate with the County as reasonably requested in the event the County seeks to obtain grant funding to further defray the cost of construction of the Project.
  - e. The Academy agrees to cooperate with the Foundation in connection with the grant of easements as otherwise contemplated herein.
4. Termination. This Agreement may be terminated by the Academy or the Foundation at any time upon the County's failure to commence or complete construction of the Project as set forth herein, time being of the essence with respect to such dates, upon written notice of termination to the County. Upon such termination, the County shall immediately cancel and forfeit the Letter of Credit and authorize the release of the depository account in which the Private Contribution is held. With the exception of the return of the Private Contribution, upon such termination, the Parties shall have no further obligation to the other pursuant to this Agreement.
5. General.
- a. Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns. No Party shall assign this Agreement without the prior written consent of the other Parties, which will not be unreasonably withheld. Notwithstanding the above, it is contemplated that the CCWSD may be incorporated into the Metropolitan Sewerage District of Buncombe County ("MSD"), and the Parties agree to cooperate as needed to assist with the assignment of the County's obligations to the Foundation and Academy hereunder to MSD.



- b. **Governing Law; Venue.** The interpretation and construction of this Agreement, and all matters relating hereto (including, without limitation, the validity or enforcement of this Agreement), shall be governed by the laws of the State of North Carolina without regard to any conflicts or choice of law provisions of the State of North Carolina that would result in the application of the law of any other jurisdiction. The venue to enforce the Parties rights hereunder shall be the civil superior court for Henderson County, North Carolina.
- c. **Notices.** Unless otherwise provided herein, any notice, request, instruction or other document to be given hereunder by any party to any other party shall be in writing and shall be deemed to have been given upon personal delivery, if delivered by hand or courier, or upon the date of mailing if sent via certified mail, return receipt requested, or via prepaid overnight courier service, and in each case at the respective addresses or numbers set forth below or such other address or number as such party may have fixed by notice:

Fletcher Academy, Inc.  
Attn: President  
185 Fletcher Academy Drive  
Fletcher, NC 28732  
Fax: (828) 209-6719  
Email: [gcarlson@fletcheracademy.com](mailto:gcarlson@fletcheracademy.com)

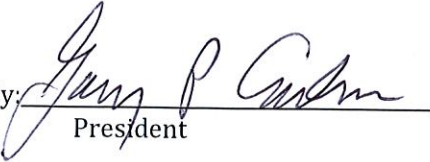
The Layman Foundation of North Carolina, Inc.  
Attn: President  
P.O. Box 481  
Collegedale, TN 37315  
Fax: N/A  
Email: Bert Coolidge – [Coolidge@southern.edu](mailto:Coolidge@southern.edu)

County of Henderson  
Attn: Chairman, Board of Commissioners  
1 Historic Courthouse Square, Suite 1  
Hendersonville, NC 28792  
Fax: (828) 697-4536  
Email: [rburrell@hendersoncountync.org](mailto:rburrell@hendersoncountync.org)

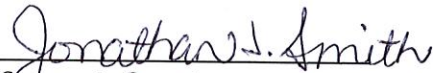
- d. **Entire Agreement.** This Agreement, including the other documents referred to herein and the Exhibits hereto which form a part hereof, contains the entire understanding of the Parties hereto with respect to the subject matter contained herein and therein. This Agreement supersedes all prior agreements and understandings between the Parties with respect to such subject matter.
- e. **Amendments.** This Agreement may not be amended, supplemented or modified orally, but only by an agreement in writing signed by each of the Parties hereto.
- f. **Counterparts.** This Agreement may be executed in two or more counterparts or by facsimile transmission, or by electronic delivery of pdf signatures, all of which taken together shall constitute one instrument.

IN WITNESS WHEREOF, the Parties have executed this Agreement by and through their duly authorized officers to be effective the day and year first written above.

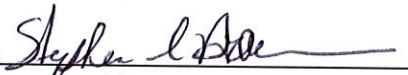
FLETCHER ACADEMY, INC.

By:   
President

Attest:

  
Corporate Secretary

THE LAYMAN FOUNDATION OF NORTH CAROLINA, INC.

By:   
President


Attest:

  
Corporate Secretary

COUNTY OF HENDERSON

By:   
Chairman, Board of Commissioners

Attest:

  
Clerk to the Board of Commissioners



STANDARD FORM OF AGREEMENT  
BETWEEN OWNER AND ENGINEER  
FOR  
PROFESSIONAL SERVICES

THIS IS AN AGREEMENT effective as of November \_\_\_\_, 2016 between Henderson County("OWNER") and WGLA ENGINEERING, PLLC("ENGINEER").

OWNER intends to develop **engineering plans and documents for the Mud Creek Sewer Extension.**

OWNER and ENGINEER in consideration of their mutual covenants as set forth herein agree as follows:

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## **ARTICLE 1 - SERVICES OF ENGINEER**

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### **1.01 Scope**

A. ENGINEER shall provide the Basic and Additional Services set forth herein and in Exhibit A.

B. Upon this Agreement becoming effective, ENGINEER is authorized to begin Basic Services as set forth in Exhibit A.

C. If authorized by OWNER, ENGINEER shall furnish Resident Project Representative(s) with duties, responsibilities and limitations of authority as set forth in Exhibit D.

## **ARTICLE 2 - OWNER'S RESPONSIBILITIES**

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### **2.01 General**

A. OWNER shall have the responsibilities set forth herein and in Exhibit B.

## **ARTICLE 3 - TIMES FOR RENDERING SERVICES**

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### **3.01 General**

A. ENGINEER's services and compensation under this Agreement have been agreed to in anticipation of the orderly and continuous progress of the Project through completion. Unless specific periods of time or specific dates for providing services are specified in this Agreement, ENGINEER's obligation to render services hereunder will be for a period which may reasonably be required for the completion of said services.

B. If in this Agreement specific periods of time for rendering services are set forth or specific dates by which services are to be completed are provided, and if such periods of time or dates are changed through no fault of ENGINEER, the rates and amounts of compensation provided for herein shall be subject to equitable adjustment. If OWNER has requested changes in the scope, extent, or character of the Project, the time of performance of ENGINEER's services shall be adjusted equitably.

C. For purposes of this Agreement the term "day" means a calendar day of 24 hours.

### **3.02 Suspension**

A. If OWNER fails to give prompt written authorization to proceed with any phase of services after completion of the immediately preceding phase, or if ENGINEER's services are delayed through no fault of ENGINEER, ENGINEER may, after giving seven days written notice to OWNER, suspend services under this Agreement.

B. If ENGINEER's services are delayed or suspended in whole or in part by OWNER, or if ENGINEER's services are extended by Contractor's actions or inactions for more than 90 days through no fault of ENGINEER, ENGINEER shall be entitled to equitable adjustment of rates and amounts of compensation provided for elsewhere in this Agreement to reflect, reasonable costs incurred by ENGINEER in connection with, among other things, such delay or suspension and reactivation and the fact that the time for performance under this Agreement has been revised.

## **ARTICLE 4 - PAYMENTS TO ENGINEER**

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### **4.01 Methods of Payment for Services and Reimbursable Expenses of ENGINEER**

A. *For Basic Services.* OWNER shall pay ENGINEER for Basic Services performed or furnished under Exhibit A, Part 1, as set forth in Exhibit C.

B. *For Additional Services.* OWNER shall pay ENGINEER for Additional Services performed or furnished under Exhibit A, Part 2, as set forth in Exhibit C.

C. *For Reimbursable Expenses.* In addition to payments provided for in paragraphs 4.01.A and 4.01.B, OWNER shall pay ENGINEER for Reimbursable Expenses incurred by ENGINEER and ENGINEER's Consultants as set forth in Exhibit C.

### **4.02 Other Provisions Concerning Payments**

A. *Preparation of Invoices.* Invoices will be prepared in accordance with ENGINEER's standard invoicing practices and will be submitted to OWNER by ENGINEER, unless otherwise agreed. The amount billed in each invoice will be calculated as set forth in Exhibit C.

B. *Payment of Invoices.* Invoices are due and payable within 30 days of receipt. If OWNER fails to make any payment due ENGINEER for services and expenses within 30 days after receipt of ENGINEER's invoice therefor, the amounts due ENGINEER will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day. In

addition, ENGINEER may, after giving seven days written notice to OWNER, suspend services under this Agreement until ENGINEER has been paid in full all amounts due for services, expenses, and other related charges. Payments will be credited first to interest and then to principal.

C. *Disputed Invoices.* In the event of a disputed or contested invoice, only that portion so contested may be withheld from payment, and the undisputed portion will be paid.

D. *Payments Upon Termination.*

1. In the event of any termination under paragraph 6.06, ENGINEER will be entitled to invoice OWNER and will be paid in accordance with Exhibit C for all services performed or furnished and all Reimbursable Expenses incurred through the effective date of termination.

2. In the event of termination by OWNER for convenience or by ENGINEER for cause, ENGINEER, in addition to invoicing for those items identified in subparagraph 4.02.D.1, shall be entitled to invoice OWNER and shall be paid a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with ENGINEER's Consultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.

E. *Records of ENGINEER's Costs.* Records of ENGINEER's costs pertinent to ENGINEER's compensation under this Agreement shall be kept in accordance with generally accepted accounting practices. To the extent necessary to verify ENGINEER's charges and upon OWNER's timely request, copies of such records will be made available to OWNER at cost.

F. *Legislative Actions.* In the event of legislative actions after the Effective Date of the Agreement by any level of government that impose taxes, fees, or costs on ENGINEER's services or other costs in connection with this Project or compensation therefor, such new taxes, fees, or costs shall be invoiced to and paid by OWNER as a Reimbursable Expense to which a Factor of 1.0 shall be applied. Should such taxes, fees, or costs be imposed, they shall be in addition to ENGINEER's estimated total compensation.

## ARTICLE 5 - OPINIONS OF COST

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### 5.01 Opinions of Probable Construction Cost

A. ENGINEER's opinions of probable Construction Cost provided for herein are to be made on the basis of ENGINEER's experience and qualifications and represent ENGINEER's best judgment as an experienced and qualified professional generally familiar with the industry. However, since ENGINEER has no control over the cost of labor, materials, equipment, or services furnished by others, or over the Contractor's methods of determining prices, or over competitive bidding or market conditions, ENGINEER cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by ENGINEER. If OWNER wishes greater assurance as to probable Construction Cost, OWNER shall employ an independent cost estimator as provided in Exhibit B.

### 5.02 Designing to Construction Cost Limit

A. If a Construction Cost limit is established between OWNER and ENGINEER, such Construction Cost limit and a statement of ENGINEER's rights and responsibilities with respect thereto will be specifically set forth in Exhibit F, "Construction Cost Limit," to this Agreement.

### 5.03 Opinions of Total Project Costs

A. ENGINEER assumes no responsibility for the accuracy of opinions of Total Project Costs.

## ARTICLE 6 - GENERAL CONSIDERATIONS

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### 6.01 Standards of Performance

A. The standard of care for all professional engineering and related services performed or furnished by ENGINEER under this Agreement will be the care and skill ordinarily used by members of ENGINEER's profession practicing under similar circumstances at the same time and in the same locality. ENGINEER makes no warranties, express or implied, under this Agreement or otherwise, in connection with ENGINEER's services.

B. ENGINEER shall be responsible for the technical accuracy of its services and documents resulting therefrom, and OWNER shall not be responsible for discovering deficiencies therein. ENGINEER shall correct such deficiencies without additional compensation except to the extent such action is directly attributable to deficiencies in OWNER-furnished information.

C. ENGINEER shall perform or furnish professional engineering and related services in all phases of the Project

to which this Agreement applies. ENGINEER shall serve as OWNER's prime professional for the Project. ENGINEER may employ such ENGINEER's Consultants as ENGINEER deems necessary to assist in the performance or furnishing of the services. ENGINEER shall not be required to employ any ENGINEER's Consultant unacceptable to ENGINEER.

D. ENGINEER and OWNER shall comply with applicable Laws or Regulations and OWNER-mandated standards. This Agreement is based on these requirements as of its Effective Date. Changes to these requirements after the Effective Date of this Agreement may be the basis for modifications to OWNER's responsibilities or to ENGINEER's scope of services, times of performance, or compensation.

E. OWNER shall be responsible for, and ENGINEER may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by OWNER to ENGINEER pursuant to this Agreement. ENGINEER may use such requirements, reports, data, and information in performing or furnishing services under this Agreement.

F. OWNER shall make decisions and carry out its other responsibilities in a timely manner and shall bear all costs incident thereto so as not to delay the services of ENGINEER.

G. Prior to the commencement of the Construction Phase, OWNER shall notify ENGINEER of any variations from the language indicated in Exhibit E, "Notice of Acceptability of Work," or of any other notice or certification that ENGINEER will be requested to provide to OWNER or third parties in connection with the Project. OWNER and ENGINEER shall reach agreement on the terms of any such requested notice or certification, and OWNER shall authorize such Additional Services as are necessary to enable ENGINEER to provide the notices or certifications requested.

H. ENGINEER shall not be required to sign any documents, no matter by whom requested, that would result in the ENGINEER's having to certify, guarantee or warrant the existence of conditions whose existence the ENGINEER cannot ascertain. OWNER agrees not to make resolution of any dispute with the ENGINEER or payment of any amount due to the ENGINEER in any way contingent upon the ENGINEER's signing any such certification.

I. During the Construction Phase, ENGINEER shall not supervise, direct, or have control over Contractor's work, nor shall ENGINEER have authority over or responsibility for the means, methods, techniques,

sequences, or procedures of construction selected by Contractor, for safety precautions and programs incident to the Contractor's work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work.

J. ENGINEER neither guarantees the performance of any Contractor nor assumes responsibility for any Contractor's failure to furnish and perform the Work in accordance with the Contract Documents.

K. ENGINEER shall not be responsible for the acts or omissions of any Contractor(s), subcontractor or supplier, or of any of the Contractor's agents or employees or any other persons (except ENGINEER's own employees) at the Site or otherwise furnishing or performing any of the Contractor's work; or for any decision made on interpretations or clarifications of the Contract Documents given by OWNER without consultation and advice of ENGINEER.

L. The General Conditions for any construction contract documents prepared hereunder are to be the "Standard General Conditions of the Construction Contract" as prepared by the Engineers Joint Contract Documents Committee (Document No. 1910-8, 1996 Edition) unless both parties mutually agree to use other General Conditions as specifically referenced in Exhibit J.

## **6.02 Authorized Project Representatives**

A. Contemporaneous with the execution of this Agreement, ENGINEER and OWNER shall designate specific individuals to act as ENGINEER's and OWNER's representatives with respect to the services to be performed or furnished by ENGINEER and responsibilities of OWNER under this Agreement. Such individuals shall have authority to transmit instructions, receive information, and render decisions relative to the Project on behalf of each respective party.

## **6.03 Design without Construction Phase Services**

A. Should OWNER provide Construction Phase services with either OWNER's representatives or a third party, ENGINEER's Basic Services under this Agreement will be considered to be completed upon completion of the Final Design Phase or Bidding or Negotiating Phase as outlined in Exhibit A.

B. It is understood and agreed that if ENGINEER's Basic Services under this Agreement do not include Project observation, or review of the Contractor's performance, or any other Construction Phase services, and that such services will be provided by OWNER, then OWNER



assumes all responsibility for interpretation of the Contract Documents and for construction observation or review and waives any claims against the ENGINEER that may be in any way connected thereto.

#### 6.04 Use of Documents

A. All Documents are instruments of service in respect to this Project, and ENGINEER shall retain an ownership and property interest therein (including the right of reuse at the discretion of the ENGINEER) whether or not the Project is completed.

B. Copies of OWNER-furnished data that may be relied upon by ENGINEER are limited to the printed copies (also known as hard copies) that are delivered to the ENGINEER pursuant to Exhibit B. Files in electronic media format of text, data, graphics, or of other types that are furnished by OWNER to ENGINEER are only for convenience of ENGINEER. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.

C. Copies of Documents that may be relied upon by OWNER are limited to the printed copies (also known as hard copies) that are signed or sealed by the ENGINEER. Files in electronic media format of text, data, graphics, or of other types that are furnished by ENGINEER to OWNER are only for convenience of OWNER. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.

D. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files. ENGINEER shall not be responsible to maintain documents stored in electronic media format after acceptance by OWNER.

E. When transferring documents in electronic media format, ENGINEER makes no representations as to long term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by ENGINEER at the beginning of this Project.

F. OWNER may make and retain copies of Documents for information and reference in connection with use on the Project by OWNER. Such Documents are not intended or represented to be suitable for reuse by OWNER or others

on extensions of the Project or on any other project. Any such reuse or modification without written verification or adaptation by ENGINEER, as appropriate for the specific purpose intended, will be at OWNER's sole risk and without liability or legal exposure to ENGINEER or to ENGINEER's Consultants. OWNER shall indemnify and hold harmless ENGINEER and ENGINEER's Consultants from all claims, damages, losses, and expenses, including attorneys' fees arising out of or resulting therefrom.

G. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.

H. Any verification or adaptation of the Documents for extensions of the Project or for any other project will entitle ENGINEER to further compensation at rates to be agreed upon by OWNER and ENGINEER.

#### 6.05 Insurance

A. ENGINEER shall procure and maintain insurance as set forth in Exhibit G, "Insurance."

B. OWNER shall procure and maintain insurance as set forth in Exhibit G, "Insurance." OWNER shall cause ENGINEER and ENGINEER's Consultants to be listed as additional insureds on any general liability or property insurance policies carried by OWNER which are applicable to the Project.

C. OWNER shall require Contractor to purchase and maintain general liability and other insurance as specified in the Contract Documents and to cause ENGINEER and ENGINEER's Consultants to be listed as additional insureds with respect to such liability and other insurance purchased and maintained by Contractor for the Project

D. OWNER and ENGINEER shall each deliver to the other certificates of insurance evidencing the coverages indicated in Exhibit G. Such certificates shall be furnished prior to commencement of ENGINEER's services and at renewals thereafter during the life of the Agreement.

E. All policies of property insurance shall contain provisions to the effect that ENGINEER's and ENGINEER's Consultants' interests are covered and that in the event of payment of any loss or damage the insurers will have no rights of recovery against any of the insureds or additional insureds thereunder.

F. At any time, OWNER may request that ENGINEER, at OWNER's sole expense, provide additional insurance coverage, increased limits, or revised deductibles that are more protective than those specified in Exhibit G. If so requested by OWNER, with the concurrence of

ENGINEER, and if commercially available, ENGINEER shall obtain and shall require ENGINEER's Consultants to obtain such additional insurance coverage, different limits, or revised deductibles for such periods of time as requested by OWNER, and Exhibit G will be supplemented to incorporate these requirements.

#### 6.06 Termination

A. The obligation to provide further services under this Agreement may be terminated:

1. *For cause,*

a. By either party upon 30 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.

b. By ENGINEER:

1) upon seven days written notice if ENGINEER believes that ENGINEER is being requested by OWNER to furnish or perform services contrary to ENGINEER's responsibilities as a licensed professional; or

2) upon seven days written notice if the ENGINEER's services for the Project are delayed or suspended for more than 90 days for reasons beyond ENGINEER's control.

3) ENGINEER shall have no liability to OWNER on account of such termination.

c. Notwithstanding the foregoing, this Agreement will not terminate as a result of such substantial failure if the party receiving such notice begins, within seven days of receipt of such notice, to correct its failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt thereof; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, 60 days after the date of receipt of the notice.

2. *For convenience,*

a. By OWNER effective upon the receipt of notice by ENGINEER.

B. The terminating party under paragraphs 6.06.A.1 or 6.06.A.2 may set the effective date of termination at a time up to 30 days later than otherwise provided to allow ENGINEER to demobilize personnel and equipment from the Site, to complete tasks whose value would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Project materials in orderly files.

#### 6.07 Controlling Law

A. This Agreement is to be governed by the law of the state in which the Project is located.

#### 6.08 Successors, Assigns, and Beneficiaries

A. OWNER and ENGINEER each is hereby bound and the partners, successors, executors, administrators and legal representatives of OWNER and ENGINEER (and to the extent permitted by paragraph 6.08.B the assigns of OWNER and ENGINEER) are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements and obligations of this Agreement.

B. Neither OWNER nor ENGINEER may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in this Agreement without the written consent of the other, except to the extent that any assignment, subletting, or transfer is mandated or restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.

C. Unless expressly provided otherwise in this Agreement:

1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by OWNER or ENGINEER to any Contractor, Contractor's subcontractor, supplier, other individual or entity, or to any surety for or employee of any of them.

2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of OWNER and ENGINEER and not for the benefit of any other party. The OWNER agrees that the substance of the provisions of this paragraph 6.08.C shall appear in the Contract Documents.

## 6.09 Dispute Resolution

A. OWNER and ENGINEER agree to negotiate all disputes between them in good faith for a period of 30 days from the date of notice prior to exercising their rights under Exhibit H or other provisions of this Agreement, or under law. In the absence of such an agreement, the parties may exercise their rights under law.

B. If and to the extent that OWNER and ENGINEER have agreed on a method and procedure for resolving disputes between them arising out of or relating to this Agreement, such dispute resolution method and procedure is set forth in Exhibit H, "Dispute Resolution."

## 6.10 Hazardous Environmental Condition

A. OWNER represents to Engineer that to the best of its knowledge a Hazardous Environmental Condition does not exist.

B. OWNER has disclosed to the best of its knowledge to ENGINEER the existence of all Asbestos, PCB's, Petroleum, Hazardous Waste, or Radioactive Material located at or near the Site, including type, quantity and location.

C. If a Hazardous Environmental Condition is encountered or alleged, ENGINEER shall have the obligation to notify OWNER and, to the extent of applicable Laws and Regulations, appropriate governmental officials.

D. It is acknowledged by both parties that ENGINEER's scope of services does not include any services related to a Hazardous Environmental Condition. In the event ENGINEER or any other party encounters a Hazardous Environmental Condition, ENGINEER may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Project affected thereby until OWNER: (i) retains appropriate specialist consultant(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the Hazardous Environmental Condition; and (ii) warrants that the Site is in full compliance with applicable Laws and Regulations.

E. OWNER acknowledges that ENGINEER is performing professional services for OWNER and that ENGINEER is not and shall not be required to become an "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or

near the Site in connection with ENGINEER's activities under this Agreement.

F. If ENGINEER's services under this Agreement cannot be performed because of a Hazardous Environmental Condition, the existence of the condition shall justify ENGINEER's terminating this Agreement for cause on 30 days notice.

## 6.11 Allocation of Risks

### A. Indemnification

1. To the fullest extent permitted by law, ENGINEER shall indemnify and hold harmless OWNER, OWNER's officers, directors, partners, and employees from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of ENGINEER or ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants in the performance and furnishing of ENGINEER's services under this Agreement.

2. To the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER, ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of OWNER or OWNER's officers, directors, partners, employees, and OWNER's consultants with respect to this Agreement or the Project.

3. To the fullest extent permitted by law, ENGINEER's total liability to OWNER and anyone claiming by, through, or under OWNER for any cost, loss, or damages caused in part by the negligence of ENGINEER and in part by the negligence of OWNER or any other negligent entity or individual, shall not exceed the percentage share that ENGINEER's negligence bears to the total negligence of OWNER, ENGINEER, and all other negligent entities and individuals.

4. In addition to the indemnity provided under paragraph 6.11.A.2 of this Agreement, and to the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER and its

officers, directors, partners, employees, and ENGINEER's Consultants from and against all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused by, arising out of or resulting from a Hazardous Environmental Condition, provided that (i) any such cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than completed Work), including the loss of use resulting therefrom, and (ii) nothing in this paragraph 6.11.A.4. shall obligate OWNER to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.

5. The indemnification provision of paragraph 6.11.A.1 is subject to and limited by the provisions agreed to by OWNER and ENGINEER in Exhibit I, "Allocation of Risks," if any.

#### 6.12 Notices

A. Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address on the signature page and given personally, or by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.

#### 6.13 Survival

A. All express representations, indemnifications, or limitations of liability included in this Agreement will survive its completion or termination for any reason.

#### 6.14 Severability

A. Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and ENGINEER, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

#### 6.15 Waiver

A. Non-enforcement of any provision by either party shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.

#### 6.16 Headings

A. The headings used in this Agreement are for general reference only and do not have special significance.

### ARTICLE 7 - DEFINITIONS

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#### 7.01 Defined Terms

A. Wherever used in this Agreement (including the Exhibits hereto) and printed with initial or all capital letters, the terms listed below have the meanings indicated, which are applicable to both the singular and plural thereof:

1. *Addenda*--Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Documents.

2. *Additional Services*--The services to be performed for or furnished to OWNER by ENGINEER in accordance with Exhibit A, Part 2 of this Agreement.

3. *Agreement*--This "Standard Form of Agreement between OWNER and ENGINEER for Professional Services," including those Exhibits listed in Article 8 hereof.

4. *Application for Payment*--The form acceptable to ENGINEER which is to be used by Contractor in requesting progress or final payments for the completion of its Work and which is to be accompanied by such supporting documentation as is required by the Contract Documents.

5. *Asbestos*--Any material that contains more than one percent asbestos and is friable or is releasing asbestos fibers into the air above current action levels established by the United States Occupational Safety and Health Administration.

6. *Basic Services*--The services to be performed for or furnished to OWNER by ENGINEER in accordance with Exhibit A, Part 1, of this Agreement.

7. *Bid*--The offer or proposal of the bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

8. *Bidding Documents*--The advertisement or invitation to Bid, instructions to bidders, the Bid form and attachments, the Bid bond, if any, the proposed Contract Documents, and all Addenda, if any.

9. *Change Order*--A document recommended by ENGINEER, which is signed by Contractor and OWNER to authorize an addition, deletion or revision in the Work, or an adjustment in the Contract Price or the Contract Times, issued on or after the Effective Date of the Construction Agreement.

10. *Construction Agreement*--The written instrument which is evidence of the agreement, contained in the Contract Documents, between OWNER and Contractor covering the Work.

11. *Construction Contract*--The entire and integrated written agreement between the OWNER and Contractor concerning the Work.

12. *Construction Cost*--The cost to OWNER of those portions of the entire Project designed or specified by ENGINEER. Construction Cost does not include costs of services of ENGINEER or other design professionals and consultants, cost of land, rights-of-way, or compensation for damages to properties, or OWNER's costs for legal, accounting, insurance counseling or auditing services, or interest and financing charges incurred in connection with the Project, or the cost of other services to be provided by others to OWNER pursuant to Exhibit B of this Agreement. Construction Cost is one of the items comprising Total Project Costs.

13. *Contract Documents*--Documents that establish the rights and obligations of the parties engaged in construction and include the Construction Agreement between OWNER and Contractor, Addenda (which pertain to the Contract Documents), Contractor's Bid (including documentation accompanying the Bid and any post-Bid documentation submitted prior to the notice of award) when attached as an exhibit to the Construction Agreement, the notice to proceed, the bonds, appropriate certifications, the General Conditions, the Supplementary Conditions, the Specifications and the Drawings as the same are more specifically identified in the Construction Agreement, together with all Written Amendments, Change Orders, Work Change Directives, Field Orders, and ENGINEER's written interpretations and clarifications issued on or after the Effective Date of the Construction Agreement. Approved Shop Drawings and the reports and drawings of subsurface and physical conditions are not Contract Documents.

14. *Contract Price*--The moneys payable by OWNER to Contractor for completion of the Work in

accordance with the Contract Documents and as stated in the Construction Agreement.

15. *Contract Times*--The numbers of days or the dates stated in the Construction Agreement to: (i) achieve Substantial Completion, and (ii) complete the Work so that it is ready for final payment as evidenced by ENGINEER's written recommendation of final payment.

16. *Contractor*--An individual or entity with whom OWNER enters into a Construction Agreement.

17. *Correction Period*--The time after Substantial Completion during which Contractor must correct, at no cost to OWNER, any Defective Work, normally one year after the date of Substantial Completion or such longer period of time as may be prescribed by Laws or Regulations or by the terms of any applicable special guarantee or specific provision of the Contract Documents.

18. *Defective*--An adjective which, when modifying the word Work, refers to Work that is unsatisfactory, faulty, or deficient, in that it does not conform to the Contract Documents, or does not meet the requirements of any inspection, reference standard, test, or approval referred to in the Contract Documents, or has been damaged prior to ENGINEER's recommendation of final payment.

19. *Documents*--Data, reports, Drawings, Specifications, Record Drawings, and other deliverables, whether in printed or electronic media format, provided or furnished in appropriate phases by ENGINEER to OWNER pursuant to this Agreement.

20. *Drawings*--That part of the Contract Documents prepared or approved by ENGINEER which graphically shows the scope, extent, and character of the Work to be performed by Contractor. Shop Drawings are not Drawings as so defined.

21. *Effective Date of the Construction Agreement*--The date indicated in the Construction Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Construction Agreement is signed and delivered by the last of the two parties to sign and deliver.

22. *Effective Date of the Agreement*--The date indicated in this Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Agreement is signed and delivered by the last of the two parties to sign and deliver.



23. *ENGINEER's Consultants*--Individuals or entities having a contract with ENGINEER to furnish services with respect to this Project as ENGINEER's independent professional associates, consultants, subcontractors, or vendors. The term ENGINEER includes ENGINEER's Consultants.

24. *Field Order*--A written order issued by ENGINEER which directs minor changes in the Work but which does not involve a change in the Contract Price or the Contract Times.

25. *General Conditions*--That part of the Contract Documents which sets forth terms, conditions, and procedures that govern the Work to be performed or furnished by Contractor with respect to the Project.

26. *Hazardous Environmental Condition*--The presence at the Site of Asbestos, PCB's, Petroleum, Hazardous Waste, or Radioactive Materials in such quantities or circumstances that may present a substantial danger to persons or property exposed thereto in connection with the Work.

27. *Hazardous Waste*--The term Hazardous Waste shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (42 USC Section 6903) as amended from time to time.

28. *Laws and Regulations; Laws or Regulations*--Any and all applicable laws, rules, regulations, ordinances, codes, standards, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.

29. *PCB's*--Polychlorinated biphenyls.

30. *Petroleum*--Petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute), such as oil, petroleum, fuel oil, oil sludge, oil refuse, gasoline, kerosene, and oil mixed with other non-Hazardous Waste and crude oils.

31. *Radioactive Materials*--Source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (42 USC Section 2011 et seq.) as amended from time to time.

32. *Record Drawings*--The Drawings as issued for construction on which the ENGINEER, upon completion of the Work, has shown changes due to Addenda or Change Orders and other information

which ENGINEER considers significant based on record documents furnished by Contractor to ENGINEER and which were annotated by Contractor to show changes made during construction.

33. *Reimbursable Expenses*--The expenses incurred directly by ENGINEER in connection with the performing or furnishing of Basic and Additional Services for the Project for which OWNER shall pay ENGINEER as indicated in Exhibit C.

34. *Resident Project Representative*--The authorized representative of ENGINEER, if any, assigned to assist ENGINEER at the Site during the Construction Phase. The Resident Project Representative will be ENGINEER's agent or employee and under ENGINEER's supervision. As used herein, the term Resident Project Representative includes any assistants of Resident Project Representative agreed to by OWNER. The duties and responsibilities of the Resident Project Representative are as set forth in Exhibit D.

35. *Samples*--Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.

36. *Shop Drawings*--All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for Contractor and submitted by Contractor to ENGINEER to illustrate some portion of the Work.

37. *Site*--Lands or areas indicated in the Contract Documents as being furnished by OWNER upon which the Work is to be performed, rights-of-way and easements for access thereto, and such other lands furnished by OWNER which are designated for use of Contractor.

38. *Specifications*--That part of the Contract Documents consisting of written technical descriptions of materials, equipment, systems, standards, and workmanship as applied to the Work and certain administrative details applicable thereto.

39. *Substantial Completion*--The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of ENGINEER, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The

terms "substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion thereof.

40. Supplementary Conditions--That part of the Contract Documents which amends or supplements the General Conditions.

41. Total Project Costs--The sum of the Construction Cost, allowances for contingencies, the total costs of services of ENGINEER or other design professionals and consultants, cost of land, rights-of-way, or compensation for damages to properties, or OWNER's costs for legal, accounting, insurance counseling or auditing services, or interest and financing charges incurred in connection with the Project, or the cost of other services to be provided by others to OWNER pursuant to Exhibit B of this Agreement.

42. Work--The entire completed construction or the various separately identifiable parts thereof required to be provided under the Contract Documents with respect to this Project. Work includes and is the result of performing or furnishing labor, services, and documentation necessary to produce such construction and furnishing, installing, and incorporating all materials and all equipment into such construction, all as required by the Contract Documents.

43. *Work Change Directive*--A written directive to Contractor issued on or after the Effective Date of the Construction Agreement and signed by OWNER upon recommendation of the ENGINEER, ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed or to emergencies. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the change directed or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Times.

44. *Written Amendment*--A written amendment of the Contract Documents signed by OWNER and Contractor on or after the Effective Date of the Construction Agreement and normally dealing with the non-engineering or non-technical rather than strictly construction-related aspects of the Contract Documents.

## ARTICLE 8 - EXHIBITS AND SPECIAL PROVISIONS

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### 8.01 Exhibits Included

A. Exhibit A, "ENGINEER's Services," consisting of 4 pages.

B. Exhibit B, "OWNER's Responsibilities," consisting of 2 pages.

C. Exhibit C, "Payments to Engineer for Services and Reimbursable Expenses," consisting of 5 pages.

D. Exhibit E, "Notice of Acceptability of Work," consisting of 2 pages.

E. Exhibit G, "Insurance," consisting of 2 pages.

F. Exhibit H, "Dispute Resolution," consisting of 1 page.

G. Exhibit I, "Allocation of Risks," consisting of 1 page.

### 8.02 Total Agreement

A. This Agreement (consisting of pages 1 to 12 inclusive, together with the Exhibits identified above) constitutes the entire agreement between OWNER and ENGINEER and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a duly executed written instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the Effective Date of which is indicated on page 1.

OWNER:  
Henderson County

ENGINEER:  
WGLA ENGINEERING, PLLC.

By:

By: 

Title:

Title: William R. Buie, P.E.; Member/Manager

Date Signed:

Date Signed November, 2016

Address for giving notices:

Address for giving notices:

214 N. King Street

Hendersonville, NC 29872

Designated Representative (paragraph 6.02.A):

Designated Representative (paragraph 6.02.A):

William R. Buie, P.E.

Title:

Title: Project Engineer

Phone Number:

Phone Number: 828-687-7177

Facsimile Number:

Facsimile Number: 828-687-7178

E-Mail Address:

E-Mail Address: wbuie@wglac.com

This is EXHIBIT A, consisting of 6 pages, referred to in and part of the Agreement between OWNER and ENGINEER for Professional Services dated \_\_\_\_\_

Initial:

OWNER \_\_\_\_\_  
ENGINEER W83

### ENGINEER's Services

Article 1 of the Agreement is amended and supplemented to include the following agreement of the parties. ENGINEER shall provide Basic and Additional Services as set forth below.

#### **PART 1 -- BASIC SERVICES**

This agreement shall be for pre-construction services including the surveying, design, permitting and bidding assistance for the Mill Pond Creek Pump Station and Interceptor. Following is the scope of work associated with the pre-construction services:

#### **Review and Confirmation of Preliminary Routing**

During this phase of the project WGLA Engineering, PLLC (WGLA) will work with officials from the District, to confirm the routing for the proposed Interceptor and spur collector lines. WGLA will prepare an updated schematic layout for the route of the sewer line along with a listing of property owners who may need to dedicate an easement. With this information, WGLA will coordinate a meeting with the District to discuss meeting with property owners and acquisition of easements. WGLA will attend meetings with District and the property owners to discuss the easements necessary and will make adjustments to the routing based on comments from property owners.

#### **Project Survey**

Once the sewer routing has been finalized, a field survey will begin. This field survey will be necessary to create detailed design plans for routing of the sewer lines. The surveys will also be necessary for preparation of survey easement plats for the sewer line routing.

Concurrently with the route survey, Clearwater Environmental will be conducting a stream and wetland delineation of the route to evaluate any impacts. Based on the preliminary route, one or more creek crossings may be necessary. Clearwater will confirm the existence of all streams along the route. A copy of their delineation will be provided to the District.

#### **Preliminary Design**

The approval of all stream and/or wetland impacts will be critical for the project schedule. WGLA will work closely with Clearwater Environmental to prepare a submittal package to the US Army Corps of Engineers and NC DEQ for all stream and wetland impacts. The preliminary routing information should be sufficient for submittal of this permit. Early submittal of this permit will be important to beginning construction as quickly as possible.

Once the project survey has been completed, WGLA will begin preparation of the sewer line plan and profile plans for the gravity sewer line. WGLA will meet regularly with the District staff to discuss the preliminary design and to discuss specific design decisions. When the preliminary plans have been completed, WGLA will meet with the District to review the plans in detail. WGLA will also prepare an

updated construction cost estimate based on the preliminary plans. Finally, WGLA will provide a detailed listing of all permits that will be necessary for the project and the approximate timeline for those agency reviews.

#### **Easement Acquisition Assistance**

Based on the possible sewer route previously identified, utility easements will be necessary for all or a portion of the sewer line route. Once the preliminary design has been completed and approved by the Owner, Hill & Associates Surveyors will prepare easement maps for sewer routing. WGLA will be available to meet with the County and/or property owners to discuss the sewer routing and answer questions as necessary.

#### **Preparation of Final Plans and Engineering Specifications**

After Henderson County and the Cane Creek Sewer District have reviewed the preliminary design for the project, WGLA will begin preparation of the detailed plans and specifications. These plans will include construction details, stream crossing details as well as details for all roadway crossings. The specifications will provide detailed construction guidelines for a contractor to follow during installation of the sewer line.

#### **Submittal to Regulatory Agencies**

Upon completion of the final plans and engineering specifications, WGLA will coordinate submittal of the project to all necessary regulatory agencies for their approval of the project. Based on our review, we anticipate the following permits will be required:

- Sewer Line Extension – NC DEQ
- Sedimentation and Erosion Control Permit – NCDDEQ
- Stream and/or Wetland Crossings – US Army Corps of Engineers and NCDEQ
- Roadway Encroachments – NC Department of Transportation (local approval)
- Railroad Encroachments - WATCO

WGLA will coordinate the preparation of all permit forms and signatures necessary and will work closely with the regulatory agencies to answer questions or comments they may have.

#### **Grant Submittal Assistance**

WGLA will assist the County with preparation of grant applications and supporting documents for the Mud Creek Sewer Extension. This will include assistance in the preparation of application to the NC Clean Water Management Trust Fund and other possible funding sources identified for the project.

#### **Design Approval & Bidding**

Once the final design has been approved by all the regulatory agencies, WGLA will incorporate all permit comments and complete a bid package for release to contractors. Due to the project schedule, WGLA will be working on the detailed bid package concurrently with permit reviews so that the project can be advertised for bids very quickly following approval of the permit agencies.

During the course of the bidding process, WGLA will conduct a prebid meeting with potential bidders to answer questions about the project. WGLA will also coordinate any project addenda that may be



necessary to clarify contractor questions. Finally, WGLA will participate in the bid opening process by attending the bid opening, reviewing the bids, providing a bid tabulation summary, and offering a recommendation of award to the District.

## **PART 2 -- ADDITIONAL SERVICES**

### *A2.01 Additional Services Requiring OWNER's Authorization in Advance*

A. If authorized in writing by OWNER, ENGINEER shall furnish or obtain from others Additional Services of the types listed below. These services will be paid for by OWNER as indicated in Article 4 of the Agreement.

1. Not Applicable
2. Services to make measured drawings of or to investigate existing conditions or facilities, or to verify the accuracy of drawings or other information furnished by OWNER.
3. Services resulting from significant changes in the scope, extent, or character of the portions of the Project designed or specified by ENGINEER or its design requirements including, but not limited to, changes in size, complexity, OWNER's schedule, character of construction, or method of financing; and revising previously accepted studies, reports, Drawings, Specifications, or Contract Documents when such revisions are required by changes in Laws and Regulations enacted subsequent to the Effective Date of this Agreement or are due to any other causes beyond ENGINEER's control.
4. Services resulting from OWNER's request to evaluate additional Study and Report Phase alternative solutions beyond those identified in paragraph A1.01.A.4.
5. Services required as a result of OWNER's providing incomplete or incorrect Project information with respect to Exhibit B.
6. Furnishing services of ENGINEER's Consultants for other than Basic Services.
7. Preparing for, coordinating with, participating in and responding to structured independent review processes, including, but not limited to, construction management, cost estimating, project peer review, value engineering, and constructibility review requested by OWNER; and performing or furnishing services required to revise studies, reports, Drawings, Specifications, or other Bidding Documents as a result of such review processes.
8. Preparing additional Bidding Documents or Contract Documents for alternate bids or prices requested by OWNER for the Work or a portion thereof.
9. Determining the acceptability of substitute materials and equipment proposed during the Bidding or Negotiating Phase when substitution prior to the award of contracts is allowed by the Bidding Documents.
10. Providing Construction Phase services beyond the Contract Times set forth in Exhibit C.
11. Providing assistance in resolving any Hazardous Environmental Condition in compliance with current Laws and Regulations.
12. Preparing and furnishing to OWNER Record Drawings showing appropriate record information based on Project annotated record documents received from Contractor.
13. Preparation of operation and maintenance manuals.

14. Preparing to serve or serving as a consultant or witness for OWNER in any litigation, arbitration or other dispute resolution process related to the Project.

15. Providing more extensive services required to enable ENGINEER to issue notices or certifications requested by OWNER under paragraph 6.01.G of the Agreement.

16. Preparation of an Environmental Assessment or other environmental documents that might be required by any grant funding sources for the approval of this project.

17. Other services performed or furnished by ENGINEER not otherwise provided for in this Agreement.

#### *A2.02 Required Additional Services*

A. ENGINEER shall perform or furnish, without requesting or receiving specific advance authorization from OWNER, the Additional Services of the types listed below. ENGINEER shall advise OWNER in writing promptly after starting any such Additional Services.

1. Services in connection with Work Change Directives and Change Orders to reflect changes requested by OWNER so as to make the compensation commensurate with the extent of the Additional Services rendered.

2. Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitute materials or equipment other than "or-equal" items; and services after the award of the Construction Agreement in evaluating and determining the acceptability of a substitution which is found to be inappropriate for the Project or an excessive number of substitutions.

3. Services resulting from significant delays, changes, or price increases occurring as a direct or indirect result of materials, equipment, or energy shortages.

4. Additional or extended services during construction made necessary by (1) emergencies or acts of God endangering the Work, (2) an occurrence of a Hazardous Environmental Condition, (3) Work damaged by fire or other cause during construction, (4) a significant amount of defective, neglected, or delayed work by Contractor, (5) acceleration of the progress schedule involving services beyond normal working hours, or (6) default by Contractor.

5. Services (other than Basic Services during the Post-Construction Phase) in connection with any partial utilization of any part of the Work by OWNER prior to Substantial Completion.

6. Evaluating an unreasonable claim or an excessive number of claims submitted by Contractor or others in connection with the Work.

SUGGESTED FORMAT  
(for use with 1910-1, 1996 Edition)

This is **EXHIBIT B**, consisting of   2   pages, referred to in  
and part of the **Agreement between OWNER and**  
**ENGINEER for Professional Services** dated  
\_\_\_\_\_.

Initial:  
OWNER \_\_\_\_\_  
ENGINEER WEB

**OWNER's Responsibilities**

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Article 2 of the Agreement is amended and supplemented to include the following agreement of the parties.

B2.01 In addition to other responsibilities of OWNER as set forth in this Agreement, OWNER shall:

A. Provide ENGINEER with all criteria and full information as to OWNER's requirements for the Project, including design objectives and constraints, space, capacity and performance requirements, flexibility, and expandability, and any budgetary limitations; and furnish copies of all design and construction standards which OWNER will require to be included in the Drawings and Specifications; and furnish copies of OWNER's standard forms, conditions, and related documents for ENGINEER to include in the Bidding Documents, when applicable.

B. Furnish to ENGINEER any other available information pertinent to the Project including reports and data relative to previous designs, or investigation at or adjacent to the Site.

C. Following ENGINEER's assessment of initially-available Project information and data and upon ENGINEER's request, furnish or otherwise make available such additional Project related information and data as is reasonably required to enable ENGINEER to complete its Basic and Additional Services. Such additional information or data would generally include the following:

1. Property descriptions.
2. Zoning, deed, and other land use restrictions.
3. Property, boundary, easement, right-of-way, and other special surveys or data, including establishing relevant reference points in a CAD format.
4. Explorations and tests of subsurface conditions at or contiguous to the Site, drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site, or hydrographic surveys, with appropriate professional interpretation thereof.
5. Environmental assessments, audits, investigations and impact statements, and other relevant environmental or cultural studies as to the Project, the Site, and adjacent areas.
6. Data or consultations as required for the Project but not otherwise identified in the Agreement or the Exhibits thereto.

D. Give prompt written notice to ENGINEER whenever OWNER observes or otherwise becomes aware of a Hazardous Environmental Condition or of any other development that affects the scope or time of performance of ENGINEER's services, or any defect or nonconformance in ENGINEER's services or in the work of any Contractor.

E. Authorize ENGINEER to provide Additional Services as set forth in Part 2 of Exhibit A of the Agreement as required.

F. Arrange for safe access to and make all provisions for ENGINEER to enter upon public and private property as required for ENGINEER to perform services under the Agreement.

G. Examine all alternate solutions, studies, reports, sketches, Drawings, Specifications, proposals, and other documents presented by ENGINEER (including obtaining advice of an attorney, insurance counselor, and other advisors or consultants as OWNER deems appropriate with respect to such examination) and render in writing timely decisions pertaining thereto.

H. Provide reviews, approvals, and permits from all governmental authorities having jurisdiction to approve all phases of the Project designed or specified by ENGINEER and such reviews, approvals, and consents from others as may be necessary for completion of each phase of the Project.

I. Provide, as required for the Project:

1. Legal services with regard to issues pertaining to the Project as OWNER requires, Contractor raises, or ENGINEER reasonably requests.

2. Such auditing services as OWNER requires to ascertain how or for what purpose Contractor has used the moneys paid.

J. Advise ENGINEER of the identity and scope of services of any independent consultants employed by OWNER to perform or furnish services in regard to the Project, including, but not limited to, cost estimating, project peer review, value engineering, and constructibility review.

K. Furnish to ENGINEER data as to OWNER's anticipated costs for services to be provided by others for OWNER so that ENGINEER may make the necessary calculations to develop and periodically adjust ENGINEER's opinion of Total Project Costs.

L. If OWNER designates a construction manager or an individual or entity other than, or in addition to, ENGINEER to represent OWNER at the Site, define and set forth as an attachment to this Exhibit B the duties, responsibilities, and limitations of authority of such other party and the relation thereof to the duties, responsibilities, and authority of ENGINEER.

M. Attend the pre-bid conference, bid opening, pre-construction conferences, construction progress and other job related meetings, and Substantial Completion and final payment inspections.

N. Provide the services of an independent testing laboratory to perform all inspections, tests, and approvals of Samples, materials, and equipment required by the Contract Documents, or to evaluate the performance of materials, equipment, and facilities of OWNER, prior to their incorporation into the Work with appropriate professional interpretation thereof.

O. Provide inspection or monitoring services by an individual or entity other than ENGINEER (and disclose the identity of such individual or entity to ENGINEER) as OWNER determines necessary to verify:

1. That Contractor is complying with any Laws and Regulations applicable to Contractor's performing and furnishing the Work.

2. That Contractor is taking all necessary precautions for safety of persons or property and complying with any special provisions of the Contract Documents applicable to safety.

P. Provide ENGINEER with the findings and reports generated by the entities providing services pursuant to paragraphs B2.01.O and P.

This is EXHIBIT C, consisting of 5 pages, referred to in and part of the Agreement between OWNER and ENGINEER for Professional Services dated \_\_\_\_\_.

Initial:  
OWNER \_\_\_\_\_  
ENGINEER WKS

Payments to ENGINEER for Services and Reimbursable Expenses  
Article 4 of the Agreement is amended and supplemented to include the following agreement of the parties:

Contract Times to complete the Work be extended beyond this period, the total compensation to ENGINEER shall be appropriately adjusted.

ARTICLE 4 -- PAYMENTS TO THE ENGINEER

C4.01 *For Basic Services Having A Determined Scope --Lump Sum Method of Payment*

6. If more prime contracts are awarded for Work designed or specified by ENGINEER for this Project than identified in Exhibit A, the ENGINEER shall be compensated an additional amount to be negotiated for all Basic Services for each prime contract added.

A. OWNER shall pay ENGINEER for Basic Services set forth in Exhibit A, except for services of ENGINEER's Resident Project Representative and Post-Construction Phase services, if any, as follows:

1. A Lump Sum amount of \$265,000.00 based on the following assumed distribution of compensation:

See attached Appendix 1 to Exhibit C

2. ENGINEER may alter the distribution of compensation between individual phases noted herein to be consistent with services actually rendered, but shall not exceed the total Lump Sum amount unless approved in writing by the OWNER.

3. The Lump Sum includes compensation for ENGINEER's services and services of ENGINEER's Consultants, if any. Appropriate amounts have been incorporated in the Lump Sum to account for labor, overhead, profit, and Reimbursable Expenses.

1. The portion of the Lump Sum amount billed for ENGINEER's services will be based upon ENGINEER's estimate of the proportion of the total services actually completed during the billing period to the Lump Sum.

5. The Lump Sum is conditioned on Contract Times to complete the work in accordance with the schedule outlined in the attached Appendix 2 to Exhibit C. Should the

This is Appendix 1 to EXHIBIT C, consisting of 5 pages, referred to in and part of the Agreement between OWNER and ENGINEER for Professional Services dated \_\_\_\_\_.

Initial:

OWNER \_\_\_\_\_  
ENGINEER WLB

## Henderson County Mud Creek Sewer Extension

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### PROPOSED FEE:

Following is a breakdown of the proposed fees for the scope of work described above for pre-construction activities related to the project:

-Topographic and location survey for design	\$25,500.00
-Stream and wetland delineation & Environmental Permitting	\$17,000.00
-Engineering, Design and Permitting	\$130,000.00
-Bidding Assistance, Construction Admin & Inspections	\$70,500.00
-As-built surveys and Record Drawings	\$22,000.00
<b>TOTAL</b>	<b>\$265,000.00</b>

This is Appendix 2 to EXHIBIT C, consisting of 5 pages, referred to in and part of the Agreement between OWNER

and ENGINEER for Professional Services dated

\_\_\_\_\_

Initial:

OWNER \_\_\_\_\_  
ENGINEER WB

## Henderson County

Mill Pond Creek Pump Station and Interceptor

We offer the following project schedule, assuming a notice to proceed is issued by November 16, 2016. Depending on the County's needs, we can adjust the schedule accordingly.

<u>Task</u>	<u>Complete By</u>
Review and Confirmation of Preliminary Routing	January 2017
Project Survey	January – February 2017
Preliminary Design	April 2017
Final Engineering & Project Specifications	August 2017
Submittal to Regulatory Agencies	September 2017
Easement Acquisition	May – November 2017
Design Approval (Permits Received)	October 2017
<u>Project Bid Schedule</u>	
Advertisement of Bids	October 2017
Bid Opening	November 2017
Approval of Contracts	November 2017
Begin Construction	January 2018
Substantial Completion	April 2019
As-builts and Project Close Out	May 2019

This is Appendix 3 to EXHIBIT C, consisting of 5 pages, referred to in and part of the Agreement between OWNER and ENGINEER for Professional Services dated

\_\_\_\_\_

Initial:  
OWNER \_\_\_\_\_  
ENGINEER: WSD

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**Reimbursable Expenses Schedule**

Current agreements for engineering services stipulate that the Reimbursable Expenses are subject to review and adjustment per Exhibit C. Reimbursable expenses for services performed on the date of the Agreement are:

FAX	\$ 2.00 /page
8"x11" Copies/Impression	0.10 .../page
Blue Print Copies	2.00 / (24" x 36").
Reproducible Copies (Mylar)	2.00 /
Reproducible Copies (Paper)	2.00 /
Mileage (auto)	\$ 0.70 /mile
Electronic Media Charge	\$ 5.00 / CD
Long Distance Phone Calls	at cost
Meals and Lodging	at cost



This is Appendix 4 to EXHIBIT C, consisting of 5 pages, referred to in and part of the Agreement between OWNER and ENGINEER for Professional Services dated \_\_\_\_\_.

Initial:

OWNER \_\_\_\_\_  
ENGINEER WOB

**Standard Hourly Rates Schedule**

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Current agreements for engineering services stipulate that the standard hourly rates are subject to review and adjustment per Exhibit C. Hourly rates for services performed on the date of the Agreement are:

Principal/ Project Manager	William R. Buie, P.E.	\$ <u>125.00</u> /hour
Principal/Project Manager	G. Thomas Jones, P.E.	\$ <u>125.00</u> /hour
Engineering Technician	Timothy Tankersley	\$ <u>65.00</u> /hour
Engineering Technician	Michael Edgerton	\$ <u>55.00</u> /hour
CAD Technician	Kim Carnes	\$ <u>\$45.00</u> /hour
Clerical Staff	Dianne Simons	\$ <u>\$35.00</u> /hour
Field Technician	Steven Watts	\$ <u>\$50.00</u> /hour

SUGGESTED FORMAT  
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This is **EXHIBIT G**, consisting of   2   pages, referred to in  
and part of the **Agreement between OWNER and**  
**ENGINEER for Professional Services** dated  
\_\_\_\_\_.

Initial:  
OWNER \_\_\_\_\_  
ENGINEER WJB

**Insurance**

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Paragraph 6.05 of the Agreement is amended and supplemented to include the following agreement of the parties.

**G6.05 Insurance**

A. The limits of liability for the insurance required by paragraph 6.05.A and 6.05.B of the Agreement are as follows:

1. **By ENGINEER:**

- a. Workers' Compensation: Statutory – North Carolina
- b. Employer's Liability --
  - 1) Each Accident: \$ 100,000
  - 2) Disease, Policy Limit: \$ 500,000
  - 3) Disease, Each Employee: \$ 100,000
- c. General Liability --
  - 1) Each Occurrence (Bodily Injury and Property Damage): \$ 1,000,000
  - 2) General Aggregate: \$ N/A
- d. Automobile Liability --
  - 1) Combined Single Limit (Bodily Injury and Property Damage):  
Each Accident \$ 1,000,000
- e. Professional Liability - Architects/Engineers: - Limit of Liability per claim \$ 1,000,000

2. **By OWNER:**

- a. Workers' Compensation: Statutory
- b. Employer's Liability --
  - 1) Each Accident \$ 100,000
  - 2) Disease, Policy Limit \$ 500,000
  - 3) Disease, Each Employee \$ 100,000
- c. General Liability --
  - 1) General Aggregate: N/A
  - 2) Each Occurrence (Bodily Injury and Property Damage): \$ 1,000,000

- d. Excess Umbrella Liability --
  - 1) Each Occurrence: \$ N/A
  - 2) General Aggregate: \$ N/A
  
- e. Automobile Liability --
  - 1) Bodily Injury:
    - a) Each Accident \$ 1,000,000
  
  - 2) Property Damage:
    - a) Each Accident \$ 1,000,000

B. *Additional Insureds*

1. The following persons or entities are to be listed on OWNER's policies of insurance as additional insureds as provided in paragraph 6.05.B:

- a. WGLA ENGINEERING, PLLC  
ENGINEER
  
- b. \_\_\_\_\_  
ENGINEER'S CONSULTANT
  
- c. \_\_\_\_\_  
ENGINEER'S CONSULTANT

SUGGESTED FORMAT  
(for use with No. 1910-1, 1996 Edition)

This is **EXHIBIT H**, consisting of   1   pages, referred to in  
and part of the Agreement between **OWNER** and  
**ENGINEER** for Professional Services dated  
\_\_\_\_\_.

Initial:

OWNER \_\_\_\_\_  
ENGINEER   WB  

**Dispute Resolution**

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Paragraph 6.09 of the Agreement is amended and supplemented to include the following agreement of the parties:

*H6.09 Dispute Resolution*

A. OWNER and ENGINEER agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in questions and other matters in question between them arising out of or relating to this Agreement or the breach thereof ("Disputes") to mediation by Macon County Dispute Settlement Center.

Said mediation shall be non-binding and shall not be a pre-condition to the litigation of such claims, conterclaims, disputes and other matters in question.

(for use with No. 1910-1, 1996 Edition)

This is EXHIBIT I, consisting of 1 pages, referred to in and part of the Agreement between OWNER and ENGINEER for Professional Services dated \_\_\_\_\_.

Initial:

OWNER \_\_\_\_\_  
ENGINEER WJB

#### Allocation of Risks

Paragraph 6.11 of the Agreement is amended and supplemented to include the following agreement of the parties:

#### **16.11.B Limitation of ENGINEER's Liability**

1. *ENGINEER's Liability Limited to Amount of Insurance Proceeds.* ENGINEER shall procure and maintain insurance as required by and set forth in Exhibit G to this Agreement. Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, the total liability, in the aggregate, of ENGINEER and ENGINEER's officers, directors, partners, employees, agents, and ENGINEER's Consultants, and any of them, to OWNER and anyone claiming by, through, or under OWNER for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied, of ENGINEER or ENGINEER's officers, directors, partners, employees, agents, or ENGINEER's Consultants, or any of them (hereafter "OWNER's Claims"), shall not exceed the total insurance proceeds paid on behalf of or to ENGINEER by ENGINEER's insurers in settlement or satisfaction of OWNER's Claims under the terms and conditions of ENGINEER's insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal). If no such insurance coverage is provided with respect to OWNER's Claims, then the total liability, in the aggregate, of ENGINEER and ENGINEER's officers, directors, partners, employees, agents, and ENGINEER's Consultants, and any of them to OWNER and anyone claiming by, through, or under OWNER for any and all such uninsured OWNER's claims shall not exceed \$ 1,000,000.

2. *Agreement Not to Claim for Cost of Certain Change Orders.* OWNER recognizes and expects that certain Change Orders may be required to be issued as the result in whole or part of imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies in the Drawings, Specifications, and other design documentation furnished by ENGINEER or in the other professional services performed or furnished by ENGINEER under this Agreement ("Covered Change Orders"). Accordingly, OWNER agrees not to sue and otherwise to make no claim directly or indirectly against ENGINEER on the basis of professional negligence, breach of contract, or otherwise with respect to the costs of approved Covered Change Orders unless the costs of such approved Covered Change Orders exceed 25 % of Construction Cost, and then only for an amount in excess of such percentage. Any responsibility of ENGINEER for the costs of Covered Change Orders in excess of such percentage will be determined on the basis of applicable contractual obligations and professional liability standards. For purposes of this paragraph, the cost of Covered Change Orders will not include any costs that OWNER would have incurred if the Covered Change Order work had been included originally without any imprecision, incompleteness, error, omission, ambiguity, or inconsistency in the Contract Documents and without any other error or omission of ENGINEER related thereto. Nothing in this provision creates a presumption that, or changes the professional liability standard for determining if, ENGINEER is liable for the cost of Covered Change Orders in excess of the percentage of Construction Cost stated above or for any other Change Order. Wherever used in this paragraph, the term ENGINEER includes ENGINEER's officers, directors, partners, employees, agents, and ENGINEER's consultants.