

REQUEST FOR BOARD ACTION

HENDERSON COUNTY

BOARD OF COMMISSIONERS

MEETING DATE: November 4, 2024

SUBJECT: Contract Approval for Project Management for Soil and Water Disaster Relief and Recovery Grant

PRESENTER: Charles Russell Burrell

ATTACHMENT(S): Draft agreement

SUMMARY OF REQUEST:

On August 5, 2024, this Board selected Resource Institute, Inc., as the most qualified to act as contract administrator for the grant from the North Carolina Department of Public Safety for Disaster Relief and Recovery, and directed staff to attempt to reach an agreement with them. This draft contract is the result.

County staff will be present and prepared if requested to give further information on this matter.

BOARD ACTION REQUESTED:

Approval of the draft agreement

If the Board is so inclined, the following motion is suggested:

I move that the Board agree to the proposed contract with Resource Institute, Inc.

SERVICES AGREEMENT

THIS NON-EXCLUSIVE SERVICES AGREEMENT ("Agreement") is entered into effective as of the 4th day of November, 2024 (the "Effective Date"), by and between the County of Henderson, a political subdivision of the State of North Carolina, (hereafter referred to as "County," and RESOURCES INSTITUTE, INC., a non-profit corporation, having its office at 2631 Reynolda Road, Winston Salem, NC 27106 (hereafter referred to as "Service Provider" and, together with the County, the "Parties" and, each individually, a "Party").

RECITALS:

WHEREAS, the County desires to engage Service Provider to provide the non-exclusive Services defined below, and Service Provider is willing to perform such Services subject to the terms and conditions of this Agreement, along with other terms and conditions outlined in Schedule 1 and Schedule 2 for each specified project.

NOW, THEREFORE, in consideration of the mutual covenants herein contained and of other good and valuable consideration, the Parties agree as follows:

AGREEMENTS:

1. Appointment. Service Provider shall perform the services described on Schedule 1 attached hereto (collectively, the "Services"). The Parties may agree in writing to mutually amend Schedule 1 from time to time to accommodate project specific terms and conditions.
2. Term and Termination.
 - (a) The term of this Agreement (the "Term") shall commence on the Effective Date and continue until the date upon which the Services are completed, or a period of five years (5 years) after the completion of all work, whichever occurs last, unless sooner terminated by mutual written consent of the Parties; provided that, in the event that a Party (the "Defaulting Party") materially breaches this Agreement, and such breach is incapable of cure, or with respect to a material breach capable of cure, the Defaulting Party does not cure such breach within 60 days after receipt of written notice of such breach, then the other Party may terminate this Agreement, effective upon written notice to the other Defaulting Party.
 - (b) Notwithstanding anything to the contrary herein, if County fails to pay any amount when due hereunder: (a) and such failure continues for ten (10) days after County's receipt of written notice of nonpayment; or (b) more than once during the Term, then Service Provider (1) may retain all prior payments received as liquidated damages, (2) cease providing Services unless and until such breach is cured to Service Provider's reasonable satisfaction, and (3) in addition to its other remedies at law or in equity, terminate this Agreement by written notice to County.

- (c) The rights and obligations of the Parties set forth in this Section 2 and any right or obligation of the Parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement.
- (d) If for any reason should any of the grant funds become unavailable, the Parties may declare the specific project terminated. Execution of this right does not change the terms of the Agreement for other projects with the term period of this Services Agreement. In case of such termination, the Services Provider will be entitled to payment for services rendered up to termination.

3. Limited Warranty and Limitation of Liability.

- (a) Service Provider warrants that it shall perform the Services:
 - (i) In accordance with the terms and subject to the conditions set out in this Agreement;
 - (ii) Using personnel of industry standard skill, experience, and qualifications; and
 - (iii) In a timely, workmanlike, and professional manner in accordance with generally recognized industry standards for similar services.
 - (iv) In accordance with federal, state, and local laws.
- (b) Service Provider's sole and exclusive liability and County's sole and exclusive remedy for breach of this warranty shall be as follows:
 - (i) Service Provider shall use reasonable commercial efforts to promptly cure any such breach; provided, that if Service Provider cannot cure such breach within a reasonable time (but no more than 60 days) after County's written notice of such breach, County may, at its option, terminate this Agreement in accordance with Section 2(a).
 - (ii) In the event this Agreement is terminated pursuant to Section 3(b)(i) above, Service Provider shall within 30 days after the effective date of termination, refund to County any fees paid by the County as of the date of termination for the Services, less a deduction equal to the fees for receipt or use of such Deliverables (as defined below) or Services up to and including the date of termination on a pro-rated basis.

(iii) The foregoing remedy shall not be available unless County provides written notice of such breach within 30 days after delivery of the Services.

(c) SERVICE PROVIDER MAKES NO WARRANTIES EXCEPT THAT PROVIDED IN THIS SECTION 3. ALL OTHER WARRANTIES, EXPRESS AND IMPLIED, ARE EXPRESSLY DISCLAIMED.

4. Subcontracts. Service Provider shall be permitted to enter into one or more contracts with third parties for the performance of all or any portion of the Services (each, a "Subcontractor"), and Service Provider shall direct and supervise such Subcontractors consistent with Service Provider's obligations hereunder. Service Provider and its subcontractors are responsible for the safety and well-being of their respective employees. Service Provider agrees to resolve subcontractor defect claims directly with subcontractor or consult with the County for assistance in filing such claims if needed.

5. Insurance. Throughout the Term, County and Service Provider each shall obtain and maintain commercial general liability insurance on an occurrence basis and other customary insurance policies, including but not limited to Worker's Compensation insurance as required by statute, with the other Party as additional insureds, with limits of not less than One Million and No/100 Dollars (\$1,000,000) each occurrence combined single limit on bodily injury, death, or property damage. Each Party's insurance shall be primary and non-contributory to any insurance otherwise carried by the other Party. Service Provider will maintain enough general liability insurance to cover subcontractors or will require subcontractors to maintain commercial general liability insurance and Worker's Compensation insurance as required by statute.

6. Waiver of Subrogation. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, COUNTY AND SERVICE PROVIDER HEREBY WAIVE ANY AND ALL RIGHTS OF RECOVERY, CLAIM, ACTION OR CAUSE OF ACTION AGAINST THE OTHER, ITS AGENTS, EMPLOYEES, OFFICERS, DIRECTORS, PARTNERS, MEMBERS, AFFILIATES, SERVANTS OR SHAREHOLDERS FOR ANY LOSS OR DAMAGE TO PROPERTY OWNED OR CONTROLLED BY THE WAIVING PARTY BY REASON OF FIRE, THE ELEMENTS, OR ANY OTHER CAUSE WHICH IS COVERED BY THE INSURANCE POLICIES REQUIRED TO BE CARRIED HEREUNDER, REGARDLESS OF CAUSE OR ORIGIN, INCLUDING NEGLIGENCE OF THE OTHER PARTY HERETO, ITS AGENTS, EMPLOYEES, OFFICERS, DIRECTORS, PARTNERS, MEMBERS, AFFILIATES, SERVANTS OR SHAREHOLDERS. THIS SECTION 6 SHALL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT.

7. County's Obligations. The County shall:

(a) Respond promptly to any reasonable requests from Service Provider for instructions, information or approvals required by Service Provider to provide the Services.

(b) Cooperate with Service Provider in its performance of the Services and provide access to County's premises, employees, contractors, and equipment as required to enable Service Provider to provide the Services.

(c) Without limiting Section 7(b), to the extent applicable County hereby (i) grants to Service Provider and its affiliates, employees, agents, consultants, contractors and subcontractors (collectively, "Service Provider Parties") the right to enter and exit the property on which the Services will be performed (the "Property") at such reasonable times to allow such parties to perform the Services, (ii) represents and warrants that (A) County has the authority to grant such rights to Service Provider Parties, and (B) County is aware of no agreement binding on County or the Property that could reasonably be expected to interfere with Service Provider Parties' ability to enter the Property and perform the Services, and (iii) covenants and agrees that it will take no action, or fail to take any action, that would impair Service Provider Parties' ability to enter or exit the Property or perform the Services. In the event Service Provider reasonably believes that any of the foregoing are untrue, Service Provider shall provide prompt written notice thereof to the County and shall have the right to interrupt Services until such issues have been resolved to Service Provider's reasonable satisfaction.

(d) Take all steps necessary to assist the Service Provider in obtaining any required licenses or consents, to prevent County-caused delays in Service Provider's provision of the Services.

(e) Meet with the Service Provider to conduct a final walk-through prior to project completion.

8. Intellectual Property. All intellectual property rights, including copyrights, patents, patent disclosures and inventions (whether patentable or not), trademarks, service marks, trade secrets, know-how and other confidential information, trade dress, trade names, logos, corporate names and domain names, together with all of the goodwill associated therewith, derivative works and all other rights (collectively, "Intellectual Property Rights") in and to all documents, work product and other materials that are delivered to County under this Agreement or prepared by or on behalf of the Service Provider in the course of performing the Services (collectively, the "Deliverables") shall be owned by the County. Submission or distribution to meet official requirements or for similar purposes in connection with the project is not be construed as publication in derogation of the County's reserved rights.

9. Limitation of Liability.

(a) NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT TO THE CONTRARY, NO PARTY TO THIS AGREEMENT SHALL BE LIABLE TO THE OTHER PARTY OR TO ANY THIRD PARTY

FOR ANY LOSS OF USE, REVENUE, OR PROFIT OR DIMINUTION IN VALUE, OR FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, OR PUNITIVE DAMAGES WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE AND WHETHER OR NOT SERVICE PROVIDER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

(b) EACH PARTY EXPRESSLY AGREES THAT THE MEMBERS, MANAGERS, AFFILIATES, PARTNERS AND SHAREHOLDERS OF ANY DEFAULTING OR BREACHING PARTY HEREUNDER ARE NOT LIABLE FOR ANY COSTS, EXPENSES, LOSSES OR DAMAGES ARISING FROM SUCH PARTY'S BREACH OR DEFAULT UNDER THIS AGREEMENT. THE PROVISIONS OF THIS SECTION 9 SHALL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.

(c) IN NO EVENT SHALL SERVICE PROVIDER'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED TWO (2) TIMES THE AGGREGATE AMOUNTS PAID OR PAYABLE TO SERVICE PROVIDER PURSUANT TO THIS AGREEMENT IN THE YEAR PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

10. Compensation to Service Provider.

(a) County shall pay to Service Provider the amounts set forth on Schedule 2, which amounts shall become fully due and payable on the earlier of (i) the date specified on Schedule 2 and (ii) within thirty (30) days after the receipt by County of an invoice.

(b) All amounts required to be paid by County under this Agreement (a) shall be paid by check, or by other method reasonably acceptable to the County and Service Provider, and (b) once paid shall be deemed fully earned by the Service Provider and non-refundable.

(c) Upon expiration of the Term or any earlier termination of this Agreement, County shall pay to Service Provider all amounts which have become payable under this Section 10 or, in the case of milestone payment not yet due, but that have not yet been paid, and such payment obligations shall survive termination of this Agreement. Except for invoiced payments that the County has successfully disputed, all late payments shall bear interest at the lesser of the rate of 5% per month or the highest rate permissible under applicable law, calculated daily and compounded monthly.

(d) County shall reimburse Service Provider for all reasonable expenses incurred in accordance with the performance of the Services within thirty (30) days of receipt by the County

of an invoice from Service Provider accompanied by receipts and reasonable supporting documentation. County shall not be liable to Service Provider for any expenses paid or incurred by Service Provider unless otherwise agreed in writing.

(e) County shall be responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state, or local governmental entity on any amounts payable by County hereunder; provided, that, in no event shall County pay or be responsible for any taxes imposed on, or with respect to, Service Provider's income, revenues, gross receipts, personnel or real or personal property or other assets.

11. Miscellaneous.

(a) Force Majeure. Except for the payment of monetary amounts due pursuant to Section 10 hereof, no Party shall be liable or responsible for failure to satisfy its obligations hereunder if such failure is attributable to Force Majeure. As used herein, "Force Majeure" means any of the following: fires, floods, storms, earthquakes, other weather events, strikes, riots, acts of God, shortages of labor or materials, war, terrorist acts or activities, governmental laws, regulations, or restrictions, adverse determinations from any such parties, delays in permitting or approvals from any governing bodies, changes to the scope of work that extend the time period necessary to complete the Services, delays to a Party that are caused by the other Party or any third party, the migration of endangered species onto the property where the Services are to be performed, discovery of environmental contamination or other adverse site conditions that suspend or delay the performance of the Services, the actions, faulty work or defective work of any third party for whom the delayed Party is not responsible, or any other causes of any kind whatsoever which are beyond the reasonable control of the responsible Party.

(b) Amendments. This Agreement may not be changed, amended, or modified except by an instrument in writing signed by all Parties.

(c) Provision to Third Parties. Consistent with North Carolina state law, neither this Agreement nor the terms hereof nor any confidential information disclosed in connection herewith may be furnished to any third party, including governmental entities, without the written consent of all Parties, such consent not to be unreasonably withheld, except as may otherwise be required by law or a court of competent jurisdiction; provided, that the foregoing shall not be deemed to prohibit the Parties from providing this Agreement or the terms hereof to their attorneys, consultants, professional advisors, and current and prospective investors and primary lenders. The terms and conditions of this paragraph shall survive termination of this Agreement.

(d) Governing Law. This Agreement shall be governed by and construed under the laws of the State of North Carolina (the "State"). The Parties agree that all litigation arising out

of this contract shall be commenced in the appropriate division of the General Court of Justice in Henderson or Forsyth Counties, North Carolina.

(e) Counterparts; Execution. This Agreement may be signed by facsimile signature, which signature shall be deemed to constitute an original signature and be binding as such. This Agreement may be executed in identical counterparts, each of which when so executed and delivered will constitute an original, but all of which taken together will constitute one and the same instrument. The Parties each represent that the person signing this Agreement is duly authorized to sign this Agreement.

(f) Notices. All notices required or permitted hereunder shall be in writing and shall be served on the Parties at the addresses set forth on their signature pages hereto (or to such other address that the receiving Party may designate from time to time in accordance with this Section 11(f)). Unless otherwise agreed herein, all Notices must be delivered by (i) personal delivery, nationally recognized overnight courier or certified or registered mail (in each case, return receipt requested, postage prepaid) or (ii) by electronic mail addressed to the electronic mail address set forth on the signature page hereto for the Party to be notified with a confirmation copy delivered by another method permitted under this paragraph. Except as otherwise provided in this Agreement, a Notice is effective only (a) on receipt by the receiving Party; and (b) if the Party giving the Notice has complied with the requirements hereof.

(g) Severability; Waiver; Entire Agreement. If any portion of this Agreement is held invalid or inoperative, then so far as is reasonable and possible the remainder of this Agreement shall be deemed valid and operative, and, to the greatest extent legally possible, effect shall be given to the intent manifested by the portion held invalid or inoperative. No waiver by any Party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and signed by the Party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege. This Agreement (including any schedule, exhibits or amendments) embodies the entire agreement between the Parties and supersedes all prior agreements and understandings relating to the Project.

(h) Third Party Beneficiaries. This Agreement benefits solely the Parties to this Agreement and their respective permitted successors and assigns and nothing in this Agreement, express or implied, confers on any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement

(i) Assignment; Successors and Assigns. This Agreement shall be binding upon the Parties and their respective successors and assigns; however, this Agreement may not be

assigned by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed. The foregoing restriction shall not be deemed to prohibit (i) the assignment or transfer of this Agreement by either Party to (A) any third party that controls, is controlled by, or is under common control with, the assigning Party, or (B) any purchaser of all, or substantially all, of the assets of the assigning Party, as long as, in each case, the assignee agrees to assume all obligations of the assigning Party hereunder, or (ii) the pledge or collateral assignment of this Agreement, or any rights and/or remedies hereunder, by any Party to its primary lender(s) as collateral for such Party's obligations under any secured credit facility.

(j) Relationship of the Parties. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment, or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

(k) Iran Divestment Act. Service Provider certifies that they are not listed on the Final Divestment List created by the State Treasurer pursuant to N.C.G.S. 143-6A-4. Individuals or companies on the Final Divestment List are ineligible to contract or subcontract with Local Government Units. (G.S. 143C-6A-6(a).) It is the responsibility of each Service Provider to monitor compliance with this restriction. Contracts valued at less than \$1,000.00 are exempt from this restriction.

(l) Divestment from Companies that Boycott Israel. The Service Provider certifies that it has not been designated by the North Carolina State Treasurer as a company engaged in the boycott of Israel pursuant to N.C.G.S. 147-86.81. It is the responsibility of each Service Provider to monitor compliance with this restriction. Contracts valued at less than \$1,000.00 are exempt from this restriction.

(m) E-Verify. As a condition of payment for services rendered under this agreement, Service Provider shall comply with the requirements of Article 2 of Chapter 64 of the General Statutes. Further, if Service Provider provides the services to the County utilizing a subcontractor, Service Provider shall require the subcontractor to comply with the requirements of Article 2 of Chapter 64 of the General Statutes as well. Service Provider shall verify, by affidavit, compliance of the terms of this section upon request by the County.

(n) Audit Rights. For all work being performed under this contract, the County has the right to inspect, examine, and make copies of any and all books, accounts, records, and other writing relating to the performance of the Services. Audits shall take place at times and locations mutually agreed upon by both parties, although the Service Provider must make the materials to be audited available within one (1) week of the request for them.

(o) Annual Appropriations and Funding. This Agreement may be subject to the annual appropriation of funds by the Henderson County Commissioners. Notwithstanding any provision herein to the contrary, in the event that funds are not appropriated for this Agreement, then County shall be entitled to immediately terminate this Agreement, without penalty or liability, except the payment of all contract fees due under this Agreement up to and through the last day of service.

(p) Equipment. Service Provider and its subcontractors shall supply, at their sole expense, all equipment, tools, materials, and/or supplies required to provide contracted services unless otherwise agreed in writing. The County is not responsible for damage to Service Provider or subcontractor equipment.

(q) Headings. The subject headings of the paragraphs are included for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions. This contract shall be deemed to have been drafted by both parties and no purposes of interpretation shall be made to the contrary.

(r) Existence. Service Provider warrants that It is a non-profit duly organized, validly existing, and in good standing under the laws of the State of North Carolina and is duly qualified to do business in the State of North Carolina and has full power and authority to enter into and fulfill all the terms and conditions of this Contract.

(s) Corporate Authority. By execution hereof, the person signing for Service Provider below certifies that he/she has read this Contract and that he/she is duly authorized to execute this Contract on behalf of the Service Provider. This Contract, together with any amendments or modifications, may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be considered one and the same agreement. This Contract may also be executed electronically. By signing electronically, the parties indicate their intent to comply with the Electronic Commerce in Government Act (N.C.G.S § 66-358.1 et seq.) and the Uniform Electronic Transactions Act (N.C.G.S § 66-311 et seq.). Delivery of an executed counterpart of this Contract by either electronic means or by facsimile shall be as effective as a manually executed counterpart.

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IN WITNESS WHEREOF, County and Service Provider have executed this Agreement effective as of the Effective Date.

SERVICE PROVIDER:

Resources Institute, Inc.,
a 501(c)3 non-profit organization

By: _____

Name: _____

Title: _____

Address:

Attn: _____

Email: _____

With copies of all notices to:

c/o Resource Institute, Inc.

2631 Reynolda Road

Winston Salem, NC 27106

Attn: Lee Rollins

Email: lrollins@resourceinstituteinc.org

IN WITNESS WHEREOF, County and Service Provider have executed this Agreement effective as of the Effective Date.

COUNTY:

Henderson County

By: _____

Name: _____

Title: _____

Address:

1 Historic Courthouse Sq, Suite 2
Hendersonville, NC 28792
Attn: John Mitchell, County Manager
Email: jmitchell@hendersoncountync.gov

This instrument has been preaudited in the manner required by the Local Government and Fiscal Control Act.

Henderson County Finance Officer

SCHEDULE 1

SERVICES

The Scope of Services to be provided relative to each project will include without limitation the general conditions and disciplines outlined below to the extent necessary to provide complete, accurate, and fully coordinated design, permitting, construction, construction administration, and post-construction documents for the project. Further project-specific services to be performed are defined under Schedule 2.

1. Project management services to assist with project development and implementation of the Disaster Relief and Recovery/Mitigation/Resilience Directed Grant.
2. Develop Requests for Qualifications/Proposals in coordination with Henderson SWCD to implement projects identified in the final project list identified by the NC Legislature.
3. Administration and project management. ^a
4. Ensure the development of construction drawings and specifications. ^b
5. Receive cost estimated project installations. ^a
6. Ensure federal, state, and local permitting for specific projects
7. Ensure design, permits, and construction documents. ^{b c}
8. Project Implementation/construction. ^a
9. Ensure the development of quality assurance/inspection plan(s).
10. Construction observation with engineers/contractors.
11. Ensure post-construction, including record drawings, warranty inspections, and an operations and maintenance plan.
12. Provide Quarterly Reports – Attachment B (90-day) to Henderson County for submission to DPS as required, for every quarter of the POP. Quarterly reports will contain the minimum information outlined in Section 4 of the DPS Agreement with Henderson County.
13. Provide Closeout and Reporting information to Henderson County sufficient to allow Henderson County to meet all North Carolina and Federal requirements for all reporting required in the DPS agreement.
14. Reporting and fund drawdowns per funding source.

Disclaimers:

^a Projects will be bid according to general statute applicable to funding source and/or project owner.

^b Designs developed will adhere to current and accepted methodologies.

^c Specialized water quality and floodplain permitting will be submitted as required.

SCHEDULE 2

SPECIAL WORK AUTHORIZATION AND COMPENSATION

RI will provide a monthly invoice to Henderson County for project management services outlined in Section 1 for 10 percent (10%) of the total project cost(s) not to exceed \$350,000. The monthly invoice will be spread over forty (40) months in the amount of \$8,750 per month. The monthly invoice will begin the first month following the execution of this agreement.