



## **REQUEST FOR QUALIFICATIONS**

**RFQ #354-UT25-38**

**Project Title: Design of Aerated Sludge Holding Tank**

**Issue Date: May 30, 2025**

**Due Date: July 10th at 3:00 PM ET**

**Issuing Department: Utilities Department**

**Direct all inquiries concerning this RFQ to:**

*Brian Drake*

*Sr. Project Manager*

Email: [Brian.Drake@carync.gov](mailto:Brian.Drake@carync.gov)

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# 1 INTRODUCTION

## 1.1 Purpose

The Town of Cary is seeking one or more qualified firm(s) with which to contract for the following services:

Cary is seeking statements of qualifications from qualified consultants for the design of a new aerated sludge holding tank at its Western Wake Regional Water Reclamation Facility (WWRWRF).

A detailed scope of services is provided in Section 4 of this solicitation.

Information related to this solicitation, including any addenda, will be posted to the North Carolina electronic Vendor Portal (eVP) at <https://evp.nc.gov/solicitations/>.

## 1.2 Background

Cary intends to construct a 3-compartment aerated sludge holding tank system with a volume of approximately 1.5 million gallons, and associated appurtenances, including diffused fine bubble aeration, to provide capacity for sludge storage to allow wasting from the biological process during peak events, equipment outages and/or inclement weather.

WWRWRF's solids handling system, constructed in 2014, includes limited storage for liquid solids, thickening and dewatering of waste activated sludge (WAS) using belt filter presses, dewatered cake storage. The system includes two direct belt-type heat dryers. A 7,000-gallon receiving tank is provided for receiving thickened WAS hauled from the Apex Middle Creek wastewater treatment plant (MCWWRF) to the WWRWRF. Additional liquid solids storage is also available, if needed, in the 60,000-gallon scum digester. The scum digester is aerated using coarse bubble diffusers and two 30 hp positive displacement blowers, each rated at 400 scfm. Dewatered cake storage consists of two 65-cy storage silos at 15% solids. Total storage capacity of the two silos is equivalent to approximately 18 dry tons of dewatered cake at 15% solids and a bulk density of 1,800 lb/cy. A 30-cy (5.4 dry tons) dewatered cake receiving bin is also provided to accept deliveries of dewatered solids from other treatment facilities. Three belt filter presses (two duty and one standby), each with a capacity of 400 gpm, are provided. Belt filter presses have a three-belt system to provide thickening and dewatering in the same unit. WAS from the WWRWRF is pumped from the WWRWRF secondary clarifiers to the dewatering facilities, where it is combined with thickened WAS from the Apex WWTP and fed directly to the belt filter presses. Dewatered solids are fed to the belt dryers. The solids capacity of each dryer is approximately 4,568 lbs/hour, which is equivalent to 5,139 dry tons per year at 15% solids and 7,500 operating hours.

## 1.3 RFQ Timeline

Provided below is a list of the anticipated schedule of events related to this solicitation. The Town of Cary reserves the right to modify and/or adjust this schedule to meet the needs of the project. All times shown are Eastern Time (ET):

RFQ Process	Date and time
RFQ Advertisement Date	May 30 2025
Deadline for written questions	June 25, no later than 3:00 PM, ET
Town Response to Questions (anticipated)	July 2,, 2025
<b>Submittal Due Date and Time</b>	<b>July 10, 2025, no later than 3:00 PM, ET</b>
Evaluation Meeting (anticipated)	July 15, 2025
Interviews (ancitipated date, if required)	July 25, 2025
Selection Announcement (tentative)	July 28, 2025

#### 1.4 Questions

Requests for clarification and questions to this RFQ must be received by the Town not later than the date shown above in Section 1.3, entitled “RFQ Timeline”, for the submittal of written inquires. The Town will not entertain any further questions after the due date. All questions related to this solicitation must be submitted in writing (via email) to the following individual:

Contact Name	Email Address
Brian Drake	Brian.Drake@CaryNC.gov

Indicate “**RFQ #354-UT25-38 – Questions**” in the subject of the email. Questions submitted via telephone will not be answered.

The Town shall issue addenda reflecting questions and answers to this RFQ, if any, which shall be posted to the [NC eVP website](#). No information, instruction or advice provided orally or informally by any Town personnel, whether made in response to a question or otherwise in connection with this RFQ, shall be considered authoritative or binding. Respondents shall be entitled to rely *only* on written material contained in an Addendum to this RFQ.

**It is important that all Respondents submitting to this RFQ periodically check the NC eVP website for any Addenda. It is the Respondent’s responsibility to ensure that all addenda have been reviewed and, if required, signed and returned.**

#### 1.5 Submittal Requirements and Contact Information

Electronic responses ONLY will be accepted through the NC eVP website. Interested parties must be logged in to submit proposals electronically. Registration information is available at [NC Electronic Vendor Portal \(eVP\)](#). Proposals must be clearly marked with name of the submitting company, the RFQ number and RFQ title (**Company Name 354-UT25-38- Design of Aerated Sludge Holding Tank**).

Proposers must submit one (1) electronic version, submitted as a viewable and printable Adobe Portable Document File (PDF), on or before the submittal due date and time provided in Section 1.3. Submissions that do not comply with the stated submission method will be deemed non-responsive.

Cary reserves the right to reject any or all proposals for any reason and to waive any informality it deems in its best interest. Any requirements in the RFQ that cannot be met must be indicated in the proposal. Proposers must respond to the entire Request for Qualifications (RFQ). An incomplete proposal may be eliminated from consideration at the discretion of Cary.

It is the responsibility of the Firm to ensure that their response arrives at the designated location specified in this Section by the due date and time specified in Section 1.3 RFQ Timeline.

#### **1.6 Rights to Submitted Material**

All proposals and supporting materials, as well as correspondence relating to this RFQ, shall become the property of the Town. The content of all submittals will be held confidential until the selection of the firm is made. Proposals will be reviewed by the Evaluation Team, as well as other Town staff and members of the general public who submit public record requests. Any proprietary data must be clearly marked. In submitting a Proposal, each Prospective Proposer agrees that the Town may reveal any trade secret materials contained in such response to all Town staff and Town officials involved in the selection process and to any outside consultant or other third party who serves on the Evaluation Team or who is hired by the Town to assist in the selection process. Proposals marked entirely as “confidential”, “proprietary”, or “trade secret” will be considered non-responsive and will be removed from the evaluation process.

#### **1.7 Communications**

All communications of any nature regarding this RFQ with any Town staff, elected Town officials, evaluation committee members are strictly forbidden from the time the solicitation is publicly posted until award. Questions must be submitted in writing to the individual designated in Section 1.4 prior to the deadline provided in Section 1.3.

Violation of this provision may result in the Firm’s proposal being removed from consideration.

#### **1.8 Lobbying**

By responding to this solicitation, the Firm certifies that it has not and will not pay any person or firm to influence or attempt to influence an officer or employee of the Town or the State of North Carolina, or any elected official in connection with obtaining a contract as a result of this RFQ.

#### **1.9 Gifts and Favors**

Contractor shall become aware of and comply with laws related to gifts and favors, conflicts of interest and the like, including N.C.G.S. §14-234, N.C.G.S. §133-1, and N.C.G.S. §133-32

#### **1.10 Proposer Expenses**

The Town of Cary will not be responsible for any expenses incurred by any Firm in the development of a response to this Request for Qualifications or any other activities associated with this procurement including but not limited to any onsite (or otherwise) interviews and/or presentations, and/or supplemental information provided, submitted, or given to Town of Cary and/or its representatives. Further, the Town of Cary shall reserve the right to cancel the work described herein prior to issuance and acceptance of any

contractual agreement/purchase order by the recommended Firm even if the awarding authority for each entity has formally accepted a recommendation.

**1.11 Proposer Acceptance**

Submission of any proposal indicates a Proposer's acceptance of the conditions contained in this RFQ. The Town of Cary has the sole discretion and reserves the right to cancel this RFQ, and to reject any and all proposals, to waive any and all informalities and/or irregularities, if it is deemed to be in the Town's best interests to do so. The Town of Cary reserves the right to accept or reject any or all of the items in the proposal, and to award the contract in whole or in part and/or negotiate any or all items with individual Firms if it is deemed in the Town of Cary's best interest. Moreover, the Town of Cary reserves the right to make no selection if proposals are deemed not in the best interest of the Town of Cary.

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## 2 QUALIFICATIONS PACKAGE

Responses must follow the format outlined below. The Town may reject as non-responsive at its sole discretion any submittal that does not provide complete and/or adequate responses or departs in any substantial way from the required format.

### 2.1 Request for Qualifications Required Document Format

Responses should be divided using tabs to separate each section, listed sequentially as follows:

#### **Section 1: Cover Letter – 1 single sided page max**

Provide an introduction letter summarizing the unique qualifications of your Firm to meet the needs of this project. This letter should be presented on the Firm's official letterhead and signed by an authorized representative who has the authority to enter into a contract with the Town on behalf of the Firm. Include the name, title, address, telephone and email address of the individual who serves as the point of contact for this solicitation.

#### **Section 2: Corporate Background and Experience – 4 double sided pages max**

Include background information on the Firm and provide detailed information regarding the Firm's experience with similar projects. Provide a list of similar contracts performed in the past five years, accompanied by at least three references, including contact persons, firm, telephone number and email address.

Include the total amount invoiced for each listed project, including initial award amount and final amended contract amount, the length of the project, and list of personnel involved in the project who are also proposed for the subject project named in this solicitation. Failure to provide a list of all similar contracts in the specified period may result in the rejection of the Firm's proposal. The evaluation team reserves the right to contact any or all listed references, and to contact other public entities regarding past performance on similar projects.

#### **Section 3: Project Understanding, Approach and Schedule – 2 double sided pages max**

Provide a comprehensive narrative, outline, and/or graph demonstrating the Firm's understanding and approach to accomplishing the tasks outlined in the Scope of Work section of this RFQ. A description of each task and deliverable and the schedule for accomplishing each shall be included.

#### **Section 4: Team Firm, Experience and Certifications/Qualifications -2 double sided pages max**

This section must include the proposed staffing, deployment and firm of personnel to be assigned to this project. The Proposer shall provide information as to the qualifications and experience of all executive, managerial, legal, and professional personnel to be assigned to this project, including resumes citing experience with similar projects and the responsibilities to be assigned to each person. A project-specific firm chart which clearly illustrates the roles, responsibilities, and the reporting relationships of each team member should be included.

## **2.2 Hourly Rates**

This solicitation is being issued in accordance with NCGS 143-64.31, otherwise known as the Mini-Brooks Act, and therefore price cannot and will not be a determining factor in the selection of the successful contractor. One copy of the hourly rates for all proposed project personnel should be **uploaded as a separate file** using the same naming format described in Section 1.5.

## **2.3 Qualifications Package Documents**

This RFQ is comprised of the base RFQ document, any attachments, and any addenda released before Contract award. All attachments and addenda released for this RFQ in advance of any Contract award are incorporated herein by reference.

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### 3 PROPOSAL EVALUATION

#### 3.1 Evaluation Criteria

This is not a bid. There will not be a public opening. Proposals will be evaluated based solely on the following criteria:

Criteria	(a) Weight	(b) Score (0-3)	(a) x (b) Weighted Score
Corporate Background and Experience	0.05		
Effective, Concise Communication	0.05		
Project Understanding	0.25		
Project Approach	0.35		
Team Firm, Experience, and Qualifications	0.30		
<b>Final Score</b>			

#### Score Points

0- Missing or Does Not Meet Expectation  
1- Partially Meets Expectation

2- Meets Expectation  
3- Exceeds Expectation

#### 3.2 Final Selection

Proposals will be reviewed after opening and will be ranked in order of choice, at which point contract negotiations will begin with the most qualified firm. If negotiations are unsuccessful, the Town will then pursue negotiations with the next most qualified firm.

The Town shall not be bound or in any way obligated until both parties have executed a contract. The Town also reserves the right to delay the award of a contract or to not award a contract.

The general conditions and specifications of the RFQ, including the Contractor's fee proposal, and/or written correspondence applicable to the RFQ, may become part of the contract documents. Failure of the awarded Contractor to perform as represented may result in contract cancellation.

#### 3.3 Notice to Proposers

It shall be the Proposer's responsibility to read the Instructions, all relevant exhibits and attachments, and any other components made a part of this RFQ, and to comply with all requirements and specifications provided herein. Proposers are responsible for obtaining and complying with all Addenda and other changes that may be issued in connection with this RFQ.

## 4 SCOPE OF SERVICES

Awarded Contractor shall provide services, all as set forth in this RFQ and more particularly described in this Section 4.

The selected consultant shall assist Cary in evaluating alternate aeration and mixing systems for the new aerated sludge holding tank. Existing and required blowers capacity shall be evaluated. Alternatives shall be provided, discussing the options of using existing mechanical systems vs installing new pumping systems and incorporated into the final design. A technical memorandum shall be provided that documents these evaluations and recommends a course of action. Final design shall facilitate control of odors. Technical memoranda shall address and compare the relative fiscal impacts of the evaluated alternatives.

After meeting with Town staff and arriving at a final design consensus, the selected consultant shall prepare detailed engineering specifications and design drawings as required to construct the planned improvements. The selected consultant shall be responsible for coordinating all design phase work in a timely manner such that the project construction schedule will not be delayed. The selected consultant shall make a determination of which and what types of permits are required and submit all documents necessary to obtain the permits.

Throughout the design phase, the selected consultant will address all relevant associated factors such as, but not limited to, blowers, sludge feed pumps, drain facilities, structural design, subsurface investigations, electrical demands and the instrumentation and controls and SCADA work necessary to operate the expanded facility. All SCADA work shall be integrated into the existing WWRWRF SCADA systems.

The selected consultant will provide detailed specifications for recommended mixing, pumps, blower and aeration equipment and make an assessment of manufacturer compatibility with existing systems, such that repair and maintenance programs can be streamlined if and when possible. The selected firm shall consider the impact of mechanical failures in their design process and propose a contingency plan for how to proceed in the event of a mechanical failure of any single piece of equipment critical to the successful operation of the new digester.

At completion of the above technical memoranda, at 50% design, and again at completion of final design, the selected consultant shall prepare a cost estimate and schedule for the expansion work. At a minimum, the cost estimates should include all necessary work required to construct and implement the proposed improvements and all construction phase engineering work and inspections required throughout the duration of the project.

The selected consultant shall provide bid period services that include, but are not limited to: distribute bid documents, keep a planholders list, assist the Town in receiving bids, evaluate bids and provide a recommendation of award.

At the completion of the design phase work, the selected consultant shall prepare and submit to the Cary all deliverables including but not limited to the following: hard copy of relevant design reports, construction specifications and contract documents in a hard

copy project manual, mylar prints of the final design plans and design drawings in electronic format on a USB Drive. The drawings submitted via electronic format shall be viewable by the Town's existing computer resources without acquiring additional CADD software.

All technical memoranda and the final report shall be submitted in electronic form to the Town in read-only MS Word-Windows compatible format (including both .pdf and HTML formats). All drawings shall be CAD generated and shall be provided on electronic media downloadable onto an AutoCAD based system.

## 5 EXECUTION OF PROPOSAL

By submitting this proposal, the potential contractor certifies the following:

- This proposal is signed by an authorized representative of the Firm.
- The potential contractor has read and understands the conditions set forth in this RFQ to include any addenda and all attached exhibits and agrees to them with no exceptions.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

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

# APPENDIX I

## References

Offeror **must** supply at least (3) three Governmental Agency or Private Company references for which Professional Engineering Design services have been performed during the past (5) five years. Offerors are cautioned to provide accurate reference information. References will be checked during evaluation period.

**OFFEROR:**

\_\_\_\_\_

**CITY, STATE, ZIP:**

\_\_\_\_\_

**Reference #1**

**Agency or Firm Name:** \_\_\_\_\_

**Business Address** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone Number:** (\_\_\_\_) \_\_\_\_\_ **Fax Number:** (\_\_\_\_) \_\_\_\_\_

**Email Address:** \_\_\_\_\_

**Reference #2**

**Agency or Firm Name:** \_\_\_\_\_

**Business Address** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone Number:** (\_\_\_\_) \_\_\_\_\_ **Fax Number:** (\_\_\_\_) \_\_\_\_\_

**Email Address:** \_\_\_\_\_

**Reference #3**

**Agency or Firm Name:** \_\_\_\_\_

**Business Address** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone Number:** (\_\_\_\_) \_\_\_\_\_ **Fax Number:** (\_\_\_\_) \_\_\_\_\_

**Email Address:** \_\_\_\_\_

**Reference #4**

**Agency or Firm Name:** \_\_\_\_\_

**Business Address** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone Number: (\_\_\_\_) \_\_\_\_\_ Fax Number: (\_\_\_\_) \_\_\_\_\_**

**Email Address:** \_\_\_\_\_

**Reference #5**

**Agency or Firm Name:** \_\_\_\_\_

**Business Address** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone Number: (\_\_\_\_) \_\_\_\_\_ Fax Number: (\_\_\_\_) \_\_\_\_\_**

**Email Address:** \_\_\_\_\_

## APPENDIX II

### Hourly Rate Schedule

Awarded Contractor shall perform the services to be performed as set forth in this RFQ and more particularly described in Section 5 utilizing the following hourly rate schedule below.

Position Title	Hourly Rate

Firm Name: \_\_\_\_\_

Authorized Signature: \_\_\_\_\_ Date \_\_\_\_\_

Signed by: \_\_\_\_\_  
[Type or Print Name]

Title of Signer: \_\_\_\_\_

**APPENDIX III**

**AGREEMENT FOR PROFESSIONAL SERVICES**

**By and Between**

**THE TOWN OF CARY, as OWNER,**

**and**

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**dated as of**

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*Attachment C -- Consultants and Key Personnel*

*Attachment D -- Basic Services*

*Attachment E -- Additional Services*

*Attachment F -- Basic Services Compensation*

*Attachment G -- Additional Services Hourly Rates Schedule*

*Attachment H -- Format of Total Project Cost Estimates*

*Attachment I -- Insurance Certificate*

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## **AGREEMENT FOR PROFESSIONAL SERVICES**

This Agreement, made by and between the Town of Cary (hereinafter, the "OWNER") and \_\_\_\_\_, a professional [architectural] [engineering] [landscape architectural] firm with a partner or principal registered in North Carolina as a licensed architect and with offices in North Carolina (hereinafter, the "DESIGNER").

### **WITNESSETH**

That the OWNER and DESIGNER, for the consideration herein named, do hereby agree as follows:

### **ARTICLE 1** **SCOPE OF SERVICES**

- 1.1 This Agreement is for professional [architectural] [engineering] [landscape architectural] services to be rendered by DESIGNER to OWNER with respect to the project known as \_\_\_\_\_, located in the Town of Cary, North Carolina, and generally consisting of \_\_\_\_\_. The DESIGNER is responsible for performing certain portions of the project, as more particularly described in Section 2.37 and Attachment A.
- 1.2 By its execution of this Agreement, the DESIGNER represents and agrees that it is qualified and fully capable to perform and provide the professional [architectural] [engineering] [landscape architectural] services and other services required or necessary under this Agreement in a fully competent, professional and timely manner.
- 1.3 The services to be performed under this Agreement consist of Basic Services (hereinafter defined) and such Additional Services (hereinafter defined) as may be designated in Article 5 of this Agreement or as may from time-to-time be agreed upon by the OWNER and DESIGNER by Written Amendment. All services performed by the DESIGNER not identified as Additional Services in Attachment E or in a Written Amendment shall be deemed to be Basic Services that are to be provided without additional compensation.
- 1.4 The amount of Compensation for Basic Services is described for such services in Attachment F. The Compensation for Basic Services shall be paid in accordance with Section 7.1. Compensation for Additional Services shall be as described for such services in Section 7.2 and Attachment G, or as set forth in a Written Amendment regarding such services.
- 1.5 The Town's Request for Qualifications, entitled \_\_\_\_\_ and dated \_\_\_\_\_, and the DESIGNER's Proposal dated \_\_\_\_\_ are hereby incorporated into the description of Basic Services by reference. Discrepancies between this Agreement, the Request for Qualifications, and the DESIGNER's Proposal shall be resolved as provided in Section 14.8.
- 1.6 Time is of the essence as to this Agreement.

## **ARTICLE 2** **DEFINITIONS**

- 2.1 Addenda. Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the Construction Contract Documents.
- 2.2 Additional Services. Those services that may be provided by the DESIGNER in connection with the Project for additional compensation, as described in Article 5, Attachment E and Attachment G.
- 2.3 Agreement. This agreement between the OWNER and DESIGNER concerning the DESIGNER's Services to be provided to the OWNER. The Agreement establishes the rights and obligations of the OWNER and DESIGNER in connection with the Project. The Agreement includes all Attachments hereto, the Request for Proposals and the subsequent Proposal submitted by the DESIGNER, and any Written Amendments.
- 2.4 Application for Payment. The form that is to be used by a Contractor during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Construction Contract Documents.
- 2.5 Basic Services. Those professional services required to be provided by the DESIGNER in connection with the Project that are described in Attachment D and designated therein as services that are to be provided by DESIGNER under this Agreement.
- 2.6 Bid. The offer or proposal of a bidder submitted on the prescribed form setting forth the prices for the Work to be performed.
- 2.7 Bidding and Construction Contract Award Phase. See Attachment D for this definition.
- 2.8 Bidding Documents. The Bidding Requirements and the proposed Construction Contract Documents (including all Addenda issued prior to receipt of Bids).
- 2.9 Bidding Requirements. The Advertisement or Invitation to Bid, Instructions to Bidders, Bid security form, if any, and the Bid form with any Addenda.
- 2.10 Certificate of Final Completion. Certificate issued by the OWNER when the Work has been completed in accordance with the Construction Contract Documents and the OWNER has received all documents and items necessary for closeout of the Work.
- 2.11 Change Order. A document recommended by the DESIGNER that is signed by a Contractor and OWNER and authorizes an addition, deletion, or revision in the Work or an adjustment in a Construction Contract Price or Construction Contract Time, issued on or after the effective date of the Construction Contract.

- 2.12 Claim. A demand or assertion by OWNER or a Contractor seeking an adjustment of a Construction Contract Price or Construction Contract Times, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.
- 2.13 Compensation for Additional Services. All compensation due DESIGNER from OWNER for Additional Services, to be calculated and paid in accordance with Section 7.2 and Attachment G.
- 2.14 Compensation for Basic Services. All compensation due DESIGNER from OWNER for all services under this Agreement except for Compensation for Additional Services and Reimbursable Expenses, if any.
- 2.15 Construction Administration Phase. See Attachment D for this definition.
- 2.16 Construction Contract. The written instrument that is evidence of an agreement between the OWNER and a Contractor covering the Work.
- 2.17 Construction Contract Documents. The documents that establish the rights and obligations of the OWNER and Contractor and include the Construction Contract, the Bidding Requirements, the Bidding Documents, the Addenda (that pertain to the Construction Contract Documents), the 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 Contract, the Notice to Proceed, the Bonds, the General Conditions, the Supplementary Conditions and any Special Conditions, the Specifications and the Drawings as the same are more specifically identified in the Construction Contract, together with all Written Amendments, Change Orders, Work Change Directives, Field Orders, and DESIGNER's written interpretations and clarifications issued on or after the Effective Date of the Construction Contract. Approved Shop Drawings and the reports and drawings of subsurface and physical conditions are not Construction Contract Documents. Only printed or hard copies of the items listed in this paragraph are Construction Contract Documents. Files in electronic media format of text, data, graphics, and the like that may be furnished by OWNER to Contractor are not Construction Contract Documents.
- 2.18 Construction Contract Documents Phase. See Attachment D for this definition.
- 2.19 Construction Contract Price. The moneys payable by OWNER to a Contractor for completion of the Work in accordance with Construction Contract Documents.
- 2.20 Construction Contract Times. The number of days or the dates stated in the Construction Contract Documents to: (i) achieve Milestones, if any, (ii) achieve Substantial Completion; and (iii) complete the Work so that it is ready for final payment as evidenced by DESIGNER's written recommendation of final payment.
- 2.21 Contractor. An individual or entity engaged directly by the OWNER pursuant to a Construction Contract. The term "Contractor" includes the terms "Subcontractor" and "Supplier" and the Contractor's, Subcontractor's and Supplier's successors, assigns,

employees, agents, consultants and other representatives and anyone for whose acts a Contractor, Subcontractor or Supplier is legally liable.

- 2.22 Design Development Phase. See Attachment D for this definition.
- 2.23 DESIGNER. The individual or entity named as such in the Agreement. The term “DESIGNER” means the DESIGNER and the DESIGNER’s Consultants and their successors, assigns, employees, agents, consultants and other representatives and anyone for whose acts the DESIGNER is legally liable.
- 2.24 DESIGNER’s Consultants. Any individuals or entities having a contract with DESIGNER to furnish services as DESIGNER’s independent professional associate or consultant with respect to the Project. See Section 3.2.1 and Attachment C for specific provisions regarding and identification of DESIGNER’s Consultants.
- 2.25 DESIGNER’s Services. The professional services and other services required or necessary under this Agreement, consisting of Basic Services and such Additional Services as are agreed upon by the OWNER and DESIGNER by Written Amendment or otherwise in accordance with this Agreement.
- 2.26 Drawings. That part of the Construction Contract Documents prepared or approved by DESIGNER which graphically shows the scope, extent, and character of the Work to be performed by Contractor. Shop Drawings and other Contractor submittals are not Drawings hereunder.
- 2.27 Effective Date of the Agreement. The date of delivery to the DESIGNER from the OWNER of a fully executed original of this Agreement. The DESIGNER is to submit its executed counterpart of this Agreement to the OWNER, and this Agreement will be fully executed upon the OWNER’s counterpart being executed by the Town Manager or the Mayor (or another individual executing the counterpart on behalf of the OWNER after having been duly appointed to do so by the OWNER).
- 2.28 Field Order. A written order issued by DESIGNER that requires minor changes in the Work but that does not involve a change in the Construction Contract Price or the Construction Contract Times.
- 2.29 General Conditions. That part of the Construction Contract Documents that supplements a Construction Contract and that describes the rights, responsibilities and relationships of the OWNER, DESIGNER and Contractor.
- 2.30 Key Milestone Listing. The list of the sequence and timing of the design and construction activities. See Section 6.1 and Attachment B.
- 2.31 Laws and Regulations. Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction over the Project.
- 2.32 Milestone Dates. The dates set forth in the Key Milestone Listing.

- 2.33 OWNER. The Town of Cary, a municipal corporation in North Carolina, and its successors and assigns, and the party for whom the DESIGNER's Services are to be performed. The term "OWNER" means the OWNER and the OWNER's Representative.
- 2.34 OWNER's Representative. The OWNER's Representative is \_\_\_\_\_. The Owner's Representative may be an employee, agent or other representative of the Owner, and may be an individual or any one of several identified individuals, or a committee or entity, in which case the committee or entity shall select one or more individuals to speak and act on its behalf and on behalf of the Owner. The OWNER's Representative shall have the express authority to bind the OWNER with respect to all matters requiring the OWNER's approval or authorization. Except as otherwise specifically stated, the DESIGNER does not have such authority.
- 2.35 Post-Construction Phase. See Attachment D for this definition.
- 2.36 Preliminary or Schematic Design Phase. See Attachment D for this definition.
- 2.37 Project. The following phases of the Project that is to be undertaken in connection with this Agreement that are designated in Attachment D as phases in which the DESIGNER is to provide services to the OWNER: the Schematic Design Phase, the Design Development Phase, the Construction Contract Document Phase, the Bidding and Construction Contract Award Phase, the Construction Administration Phase and the Post-Construction Phase. The Project may be enlarged to include Additional Services through Written Amendments or as otherwise allowed herein.
- 2.38 Project Manual. The bound documentary information prepared for bidding and constructing the Work and includes the Advertisement for Bids, Instructions to Bidders, Bid Forms, Agreements, Bonds, General Conditions, Supplementary Conditions, Special Conditions, Specifications, and Appendices.
- 2.39 Reimbursable Expenses. If there are expenses that are to be separately reimbursable by OWNER to DESIGNER under this Agreement, they will be specified as such in Section 7.3 hereof. Unless expenses are specifically designated or described herein as separately reimbursable, expenses of DESIGNER in performing DESIGNER's Services hereunder shall be deemed compensated by the Compensation for Basic Services and/or the Compensation for Additional Services (if any).
- 2.40 Request for Qualifications. The invitation for a professional services firm, typically with a partner or principal registered in North Carolina as a licensed architect, engineer or landscape architect and with offices in North Carolina, to bid on the right to supply DESIGNER services to the Town of Cary. The specific Request for Proposals made in connection with the making of this Agreement is specified in Section 1.5 hereof.
- 2.41 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.

- 2.42 Shop Drawings. All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for a Contractor and submitted by Contractor to illustrate some portion of the Work.
- 2.43 Site. The lands or areas that will be indicated in the Construction Contract Documents as being furnished by OWNER, upon which the Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by OWNER that are designated for the use of Contractor. The Site may not be specifically identified until after the Effective Date of this Agreement, but shall be specified in the Construction Contract Documents, and reference herein to the "Site" shall mean such areas once determined and specified.
- 2.44 Specifications. That part of the Construction 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. Specifications include all Sections included under the Technical specifications of the Project Manual.
- 2.45 Subcontractor. An individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work on the Project.
- 2.46 Substantial Completion. The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of the DESIGNER and with the approval of the OWNER the Work (or a specified part thereof) is sufficiently complete, in accordance with the Construction Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The OWNER's receipt of all certificates of occupancy applicable to the Project is a condition precedent to the Work being deemed "Substantially Complete." The terms "substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion thereof.
- 2.47 Supplementary Conditions. That part of the Construction Contract Documents that amends or supplements the General Conditions.
- 2.47 Special Conditions. That part of the Construction Contract Documents that amends or supplements the Supplementary Conditions.
- 2.48 Supplier. A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with a Contractor or Subcontractor to furnish materials or equipment to be incorporated in the Work by a Contractor or Subcontractor.
- 2.49 Total Project Cost; Total Project Cost Estimate. The "Total Project Cost Estimate" is an estimate of the total cost of the Project developed in accordance with Section 4.2 and Attachment H. The "Total Project Cost" is the Total Project Cost Estimate that is approved by the OWNER in accordance with Section 4.2.
- 2.50 Utilities Infrastructure. All underground or above-ground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including those that convey electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television,

water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems.

- 2.51 Work. The entire completed construction or the various separately identifiable parts thereof required to be provided to the OWNER under the Construction Contract Documents by parties other than the DESIGNER. The Work includes and is the result of performing or providing all labor, services, and documentation necessary or appropriate to produce such construction, and furnishing, installing, and incorporating all necessary or appropriate materials and equipment into such construction, all as more specifically described in the Construction Contract Documents.
- 2.52 Written Amendment. A written statement modifying the Agreement, signed by OWNER and DESIGNER on or after the Effective Date of the Agreement.

### **ARTICLE 3** **RESPONSIBILITIES OF THE DESIGNER**

#### **3.1 Standard of Care**

3.1.1 The DESIGNER shall exercise reasonable care and diligence in performing the DESIGNER's Services under this Agreement in accordance with generally accepted standards of [architectural] [engineering] [landscape architectural] practice throughout the United States and in accordance with all Laws and Regulations. The DESIGNER shall serve as a representative of the OWNER in accordance with the terms and conditions of this Agreement to guard the OWNER against defects and deficiencies in the Work.

3.1.2 The DESIGNER shall be responsible for all errors or omissions in the Drawings, Specifications, and other documents prepared by the DESIGNER. It shall be the responsibility of the DESIGNER throughout the period of performance under this Agreement to use reasonable professional care and judgment to guard the OWNER against defects and deficiencies in the Work.

3.1.3 The DESIGNER shall assure that all Drawings, Specifications and other documents prepared by the DESIGNER or the DESIGNER's Consultants hereunder are in accordance with all Laws and Regulations and that all necessary or appropriate applications for approvals are submitted to federal, state and local governments or agencies in a timely manner so as not to delay the design or construction activities of the Project.

3.1.4 The DESIGNER shall correct at no additional cost to the OWNER any and all errors, omissions, discrepancies, ambiguities, mistakes or conflicts in the Drawings, Specifications and other documents prepared by the DESIGNER or DESIGNER's Consultants.

3.1.5 In addition to any other damages that might be due to OWNER hereunder in connection with the breach of this Agreement by DESIGNER, DESIGNER shall reimburse OWNER, as described in Article 10 hereof, for costs, damages and expenses that are the result of errors, omissions or delays of the DESIGNER or the DESIGNER's Consultants.

3.1.6 The DESIGNER shall perform the DESIGNER's Services in a timely manner in accordance with all schedules for the Project and the Construction Contract Documents.

3.1.7 If the DESIGNER's key project personnel are listed in Attachment C to this agreement no changes in the DESIGNER's key personnel indicated shall be permitted except with the prior written consent of the OWNER.

### 3.2 DESIGNER's Consultants.

3.2.1 The DESIGNER's Consultants for the project, along with their key project personnel, are listed in Attachment C to this Agreement. No changes in the consultants or key personnel indicated shall be permitted except with the prior written consent of the OWNER, which consent shall not be unreasonably withheld.

3.2.2 All of the DESIGNER's contracts with the DESIGNER's Consultants shall be in writing and shall expressly provide that if this Agreement is terminated for any reason, the OWNER may, at its sole option, take the assignment of the DESIGNER's Consultants' contracts with the DESIGNER, that such assignment shall automatically take place upon notification in writing by the OWNER to the DESIGNER's Consultants and the DESIGNER's Consultants shall continue to be bound by their contract after such assignment. A copy of each contract between the DESIGNER and a DESIGNER's Consultant shall be furnished to the OWNER within seven (7) days of its execution.

## **ARTICLE 4** **BASIC SERVICES**

4.1 Commencement of Basic Services. The DESIGNER's Basic Services shall commence upon the occurrence of the Effective Date of the Agreement and DESIGNER's receipt of a Notice to Proceed from OWNER.

### 4.2 Total Project Cost Estimates and Total Project Cost.

4.2.1 At the times designated herein, the DESIGNER shall develop a Total Project Cost Estimate, including the DESIGNER's fees, costs of the construction, costs of equipment, furnishings, furniture and signage, permit fees and appropriate contingencies. These costs shall be prepared and submitted to the OWNER, with supporting documents listing quantities, unit price, labor rates, man-hour estimates, overhead and profit.

4.2.2 The Total Project Cost Estimates shall be prepared by a qualified cost estimating consultant to the DESIGNER that is acceptable to the OWNER.

4.2.3 The Total Project Cost Estimates shall be prepared/revised at three points in the performance of the DESIGNER's services: (1) at completion of the Preliminary or

Schematic Design Phase; (2) at completion of the Design Development Phase; and (3) at completion of 80% of the Construction Contract Documents Phase.

4.2.4 When the first of the Total Project Cost Estimates has been approved in writing by the OWNER, it shall be used by the OWNER as a basis for appropriating funds specifically for the Project. Once this Total Project Cost Estimate has been so approved by the OWNER, the DESIGNER shall be obligated, without additional compensation, to adjust the design of the Project to assure that it remains within the approved Total Project Cost. Such approved Total Project Cost Estimate shall be referred to herein as the "Total Project Cost".

4.2.5 Should bidding or negotiation with Contractors produce prices which, when added to the other elements of the approved Total Project Cost, produce a cost that is in excess of the approved Total Project Cost, the DESIGNER shall participate with the OWNER in rebidding, renegotiation and design adjustments to the extent such are necessary to obtain prices within the approved Total Project Cost. All activity of the DESIGNER with respect to these matters shall constitute Basic Services and shall be performed by the DESIGNER without additional compensation.

4.2.6 Unless and until the OWNER authorizes an increase in the Total Project Cost, later Total Project Cost Estimates that are greater than the approved Total Project Cost shall not imply or otherwise result in an increase in the approved Total Project Cost.

4.3 Basic Services. The Basic Services to be provided by the DESIGNER hereunder are those services designated in Attachment D.

4.4 Contractor Documentation. The DESIGNER shall utilize the Town's standard General Conditions, Supplementary Conditions and Special Conditions in preparation of bidding documents and construction contracts. These 'front-end' documents define certain roles for the DESIGNER during construction. The DESIGNER agrees that those roles are included in the scope of Basic Services (whether specifically listed in Attachment D or not), and are to be compensated as part of the total compensation described for the Basic Services.

## **ARTICLE 5** **ADDITIONAL SERVICES**

Additional Services that may be provided by the DESIGNER pursuant to the terms of this Agreement are described in Attachment E. Only those services designated on Attachment E as Additional Services (by checkmark or other indication), or those designated as Additional Services in a Written Amendment, shall be considered Additional Services hereunder.

**ARTICLE 6**  
**DURATION OF DESIGNER'S SERVICES**

6.1 Scheduling of Services.

6.1.1 The DESIGNER's schedule for the performance of its activities and the activities of DESIGNER's Consultants shall be reduced to writing and submitted to the OWNER for review and approval. If such schedule has been reviewed and approved prior to execution of this Agreement, it is attached hereto as Attachment B. In any event, once the schedule has been reviewed and approved by the OWNER, it shall constitute the "Key Milestone Listing". The DESIGNER shall also prepare and submit to the OWNER for review and approval a schedule of all known items of information, approvals or decisions to be furnished or made by the OWNER, including the dates by which the OWNER shall have all information necessary from the DESIGNER with respect to that item, approval or decision and the date by which the item of information, approval or decision should be communicated to the DESIGNER. The OWNER shall always have a reasonable time within which to provide such item of information, approval or decision and shall not have any responsibility for any delay occurring by reason of the OWNER's being unable, through no fault of the OWNER, to supply such item of information, approval or decision.

6.1.2 The DESIGNER shall schedule and perform its activities so as to meet the Milestone Dates shown in the Key Milestone Listing. No delay by the DESIGNER in meeting the deadlines in the Key Milestone Listing shall be allowed hereunder without prior written approval by the OWNER.

6.1.3 Should the OWNER determine that the DESIGNER is behind schedule, it may require the DESIGNER to expedite and accelerate its efforts, including providing additional manpower and/or overtime, as necessary, to perform its services in accordance with the Key Milestone Listing, at no additional cost to the OWNER.

6.2 Adjustments to the Schedule.

6.2.1 If the DESIGNER's Services are or will be delayed for more than sixty (60) days through no fault of the DESIGNER, or if the OWNER increases or decreases the scope or size of the Project by ten percent (10%) of the currently approved Total Project Cost, the DESIGNER shall give prompt written notice to the OWNER. Provided that such notice has been given, the DESIGNER may request in writing an adjustment in the Key Milestone Listing dates, which shall be granted by the OWNER to the extent reasonable.

**ARTICLE 7**  
**DESIGNER'S COMPENSATION**

## 7.1 Compensation for Basic Services.

7.1.1 Payments for Basic Services shall become due and payable on a per-Phase basis, after OWNER's approval of all services designated hereunder as Basic Services to be provided by DESIGNER for the Phase for which payment is sought.

7.1.2 For Basic Services, the DESIGNER shall be compensated on a per-Phase basis, in accordance with the percentage of the Total Project Cost allocated to such Phase on Attachment F to this Agreement, unless the OWNER and the DESIGNER otherwise agree in writing.

7.1.3 After approval of all services provided by DESIGNER for a particular Phase, Payments will be made by the OWNER within thirty (30) calendar days of receipt of an invoice that is in form and substance acceptable to the OWNER. In the event the OWNER finds any part of an invoice not to be acceptable, it shall identify to the DESIGNER the part or parts which are not acceptable and shall pay the part or parts of the invoice which are acceptable, if any. The OWNER shall have the right to deduct from payments to the DESIGNER any costs or damages incurred, or which may be incurred, by the OWNER as a result of the DESIGNER's failure to perform on any Phase of the Project.

7.1.4 If the OWNER increases or decreases the scope of the Project by ten percent (10%) or more of the currently approved Total Project Cost, the compensation for Basic Services shall be equitably adjusted.

7.1.5 The Total Fixed Fee of Basic Services, which is a not to exceed contract amount, is Write out dollars here and 00/100 Dollars (\$0.00) unless changed by duly authorized written amendment.

## 7.2 Compensation for Additional Services.

7.2.1 Payments for Additional Services shall become due and payable on a per-service basis, after OWNER's approval of the Additional Service performed by the DESIGNER, in accordance with Article 5 and/or a Written Agreement, for which payment is sought.

7.2.2 For Additional Services, the DESIGNER shall be compensated on a time-spent basis at the hourly rates shown in Attachment G to this Agreement, unless the OWNER and the DESIGNER otherwise agree in writing.

7.2.3 After OWNER's approval of the performance of an Additional Service, payments will be made by the OWNER within thirty (30) calendar days of receipt of an invoice that is in form and substance acceptable to the OWNER. In the event the OWNER finds any part of an invoice not to be acceptable, it shall identify to the DESIGNER the part or parts which are not acceptable and shall pay the part or parts of the invoice which are acceptable, if any. The OWNER shall have the right to deduct from payments to the DESIGNER any costs or damages incurred, or which may be incurred, by the OWNER as a result of the DESIGNER's failure to perform any service with respect to the Project.

7.3 Reimbursable Expenses.

7.3.1 Reimbursable expenses are charges to the OWNER in addition to the fees for Basic Services and Additional Services, and are generally not authorized for design services arrangements. However, if the following items are indicated (by check-mark or similar marking) as reimbursable expenditures, then OWNER shall reimburse such expenditures with respect to DESIGNER's provisions of services for the Project to the extent such expenses are reasonable and actually incurred by the DESIGNER or DESIGNER's Consultants:

The actual cost of reproduction of Plans and Specifications, excluding documents for exclusive use by the DESIGNER.

Other: \_\_\_\_\_

None

7.3.2 Neither the DESIGNER nor its Consultants shall be entitled to any mark-up on actual expenses that are incurred.

7.3.3 DESIGNER shall only be reimbursed for those reimbursable expenses for which the OWNER has provided specific prior written authorization (not all expenses that might fit in any selected categories above but for which DESIGNER did not seek specific OWNER approval).

7.4 Accounting Records.

7.4.1 Accounting records of the DESIGNER's compensation for Additional Services and Reimbursable Expenses pertaining to the Project shall be maintained by the DESIGNER in accordance with generally accepted accounting practices and shall be available for inspection by the OWNER at mutually convenient times for a period of three (3) years after issuance of the Certificate of Final Completion.

**ARTICLE 8**  
**RESPONSIBILITIES OF THE OWNER**

8.1 Cooperation and Coordination.

8.1.1 The OWNER shall meet with the DESIGNER as necessary at mutually convenient times to provide information necessary to enable the DESIGNER to develop a detailed written analysis and needs summary of the Project.

8.1.2 The OWNER shall examine documents submitted by the DESIGNER and shall make reasonable efforts to render decisions pertaining thereto no later than the dates specified in the schedule for such decisions described in Section 6.1.2.

## 8.2 Surveys and Testing.

8.2.1 Unless required to be provided by the DESIGNER as part of the Basic Services (see Attachment D), the OWNER shall furnish the DESIGNER with a certified land survey of the Site, giving, as applicable, grades and lines of streets, alleys, pavements and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the Site; locations, dimensions and complete data pertaining to existing buildings, other improvements and trees, and other pertinent information reasonably requested by the DESIGNER including that concerning available service and Utilities Infrastructure, both public and private, including inverts.

8.2.2 Unless required to be provided by the DESIGNER as part of the Basic Services (see Attachment D), the OWNER shall provide the services of a geotechnical engineer or other consultant, when such services are reasonably deemed necessary by the DESIGNER as shown on the DESIGNER's schedule described in Section 6.1.2, to provide reports, test borings, test pits, soil bearing values, percolation tests, air and water pollution tests, ground corrosion and resistivity tests and other necessary operations for determining subsoil, air and water conditions, all together with reports and appropriate professional recommendations thereof.

8.2.3 All services, data, information, surveys and reports required of the OWNER pursuant to this Article 8, shall be furnished at the OWNER's expense and, absent any negligence or failure to follow professional standards on the part of DESIGNER, the DESIGNER shall be entitled to rely upon the accuracy and completeness of such services, data, information, surveys and reports.

## 8.3 Permits and Approvals

8.3.1 The OWNER shall secure and pay for all necessary permits, licenses, approvals, easements, assessments, and charges required for the construction, use or occupancy of permanent structures or for permanent changes in existing facilities. The DESIGNER shall provide the OWNER with a schedule of all required approvals and of the dates by which application for such approvals must be made in order to avoid any risk of delay to the Project, prepare necessary application forms, present documents requiring approval by the OWNER and submit documents with the OWNER's approval to the appropriate approval agency.

# **ARTICLE 9** **INSURANCE**

## 9.1 General Requirements

9.1.1 The DESIGNER shall purchase and maintain and shall cause each of the DESIGNER's Consultants to purchase and maintain during the period of performance of

this Agreement, and for five years after issuance of a Certificate of Final Completion of the Project, insurance for protection from claims under workers' or workmen's compensation acts including bodily injury, sickness, disease or death of any of the DESIGNER's or DESIGNER's Consultants' employees as required by state law; Commercial General Liability Insurance (including contractual liability and completed operations, explosions, collapse, and underground hazards coverage) covering claims arising out of or relating to bodily injury and to real and personal property including loss of use resulting thereof; Commercial Automobile Liability Insurance, including owned, hired, and non-owned vehicles, if any, covering personal injury or death, and property damage when vehicles are used in performance of work or coming onto Town premises; Cyber Liability Insurance (if applicable) covering infringement, information theft, release of private information, damage, destruction and alteration of electronic information, extortion, network security, breach response costs, and regulatory fines; and Professional Liability Insurance (if applicable), covering professional services and claims arising out of or related to the performance under this Agreement by the DESIGNER.

9.1.2 Insurance policies required hereunder shall include provisions or endorsements containing the following:

- a) *Insurers.* The minimum insurance ratings for any company insuring the DESIGNER shall be Best's A-. Should the ratings of any insurance carrier fall below the minimum rating, the OWNER may, at its option, require the DESIGNER to purchase insurance from a company whose rating meets the minimum standard. DESIGNER's insurance carrier(s) shall be authorized to do business in the state of North Carolina. If DESIGNER is unable to find an authorized carrier for any line of insurance coverage, DESIGNER shall notify OWNER in writing.
- b) *Additional Insured Status.* All insurance policies (except Workers Compensation, Cyber and Professional Liability) shall name the Town of Cary, its elected officials, officers, employees and volunteers as an additional insured.
- c) *Notice of Cancellation.* Each policy shall provide that the OWNER shall receive not less than thirty (30) days prior written notice, when available, of any cancellation or non-renewal of coverage of any of the policies. Upon notice of such cancellation, non-renewal or if a policy's limits are exhausted, DESIGNER shall procure substitute insurance so as to assure OWNER that the minimum limits of coverage are maintained continuously throughout the periods specified herein.
- d) *Primary.* DESIGNER's insurance coverage shall be primary for any claims related to this agreement.
- e) *Waiver of Subrogation.* The insurer shall have no right of recovery or subrogation against OWNER, its agents or agencies, it being the intention of the parties that the insurance policies shall protect OWNER and be primary coverage for any and all losses covered by the policies.
- f) *Verification of Coverage.* A certificate of insurance and all endorsements required shall be provided as Attachment I prior to execution of this Agreement. The OWNER's

review or acceptance of certificates of insurance shall neither relieve DESIGNER of any requirement to provide the specific insurance coverage set forth herein nor shall it constitute a waiver or acknowledgement of satisfaction of the specific insurance requirements set forth in this Agreement.

g) Certificate Holder address should read:

Town of Cary  
 PO Box 8005  
 Cary, NC 27512-8005

h) *Special Risks or Circumstances.* The OWNER reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

i) *Other.* The insurance companies issuing the policy or policies shall have no recourse against the OWNER, its agents or agencies for the payment of any premiums or for assessments under any form of policy; any and all deductibles under the insurance policies shall be assumed by and be at the sole risk and expense of the DESIGNER; coverage shall be deemed to be in connection with this Agreement as revised by any Change Orders or Written Amendments.

9.2 Limits of Coverage

9.2.1 Minimum limits of insurance coverage shall be as follows:

INSURANCE DESCRIPTION	MINIMUM REQUIRED COVERAGE
Workers' Compensation	Limits for Coverage A - Statutory State of N.C.  Coverage B – Employer's Liability \$500,000 each accident and policy limit and disease each employee
Commercial General Liability	\$1,000,000 per occurrence \$2,000,000 aggregate
Automobile Liability	\$1,000,000 CSL
Umbrella /Excess Liability	\$1,000,000 per occurrence
Professional Liability	\$2,000,000 per claim

9.2.2 The DESIGNER may satisfy the insurance limits above with a combination of primary and umbrella/excess liability insurance policies. Umbrella/Excess liability shall follow form as to each of the underlying policies. Any available insurance proceeds in excess of or broader than the specified minimum limits of insurance and coverage shall be available to the OWNER.

9.3 OWNER's Insurance Option

9.3.1 At any time during the performance of this Agreement, the OWNER may, upon thirty (30) days written notice to DESIGNER, at its sole option, provide any or all of the insurance coverage required under the Article.

9.3.2 If the OWNER elects to provide such coverage it shall notify the DESIGNER in writing and provide to the DESIGNER such certificate or certificates of coverage as may be applicable.

9.3.3 If the OWNER elects to provide such coverage it shall be entitled to pro rata reduction in the fees for Basic Services equal to the cost of providing such coverage to the DESIGNER.

## **ARTICLE 10** **DAMAGES AND REMEDIES**

### **10.1 Services, Reimbursement and Deductions.**

10.1.1 The DESIGNER shall reimburse the OWNER, as stipulated in 10.1.1.A and 10.1.1.B for costs, damages and expenses, including reasonable attorney's fees and expert's fees, incurred by the OWNER when such costs, damages and expenses are the result of any error, omission or delay of, or failure to perform as required by the Agreement by the DESIGNER or DESIGNER's Consultants.

A. To the extent that the aggregate cost to the OWNER for all errors, premium value of omissions or delays of the DESIGNER and the DESIGNER's Consultants is less than one-half of one percent (0.5%) of the Total Project Cost, the DESIGNER shall not be liable to the OWNER for such costs.

B. If the aggregate cost to the OWNER for such errors, premium value of omissions or delays of the DESIGNER and the DESIGNER's Consultants equals or exceeds one-half of one percent (0.5%) of the Total Project Cost, the DESIGNER shall reimburse the OWNER for all such costs that equal or exceed said one-half of one percent (0.5%).

10.1.2 The OWNER is entitled to interest on all amounts due from the DESIGNER that remain unpaid thirty (30) calendar days after the amount is deemed due, whether as a result of a resolution of a dispute or otherwise, at a rate of three percentage points above the rediscount rate charged by the Federal Reserve Bank during each month that any amount remains due.

10.1.3 In addition to any other remedies available to the OWNER hereunder, the OWNER shall have the right to deduct from payments to the DESIGNER any costs, damages and expenses, including attorney's fees, that have been or may be incurred by the OWNER as a result of the DESIGNER's failure to perform as required by the Agreement.

## 10.2 Indemnities.

10.2.1 General Indemnity. To the fullest extent permitted by Laws and Regulations, DESIGNER shall indemnify and hold Town, its officers and employees, harmless from and against all claims, costs, charges, civil penalties, fines, losses, liabilities and damages (including but not limited to reasonable professionals' fees and charges and all court or other dispute resolution costs) (collectively, "Claim(s)"), by whomsoever brought or alleged, arising out of, resulting from, or in connection with (a) any breach by DESIGNER of any term or condition of this Agreement or Written Amendment, (b) any breach or violation by DESIGNER of any applicable Law or Regulation, or (c) any other cause resulting from any negligent, reckless, or intentional act or omission constituting a tort under applicable statutes or common law, but only to the extent the fault of the DESIGNER or its derivative parties (as defined in N.C.G.S. 22B-1 as it exists on the date of this Agreement) is a proximate cause of the Claim. This indemnification shall survive the termination of this Agreement.

10.2.2 Intellectual Property Indemnity. To the fullest extent permitted by Laws and Regulations, DESIGNER shall indemnify and hold Town, its officers and employees harmless from and against all Claims, by whomsoever brought or alleged, arising out of or related to infringement of patent rights, copyrights, or other intellectual property rights ("IP Indemnity"), except with respect to designs, processes or products of a particular manufacturer expressly required by the Town in writing. If DESIGNER has reason to believe the use of a required design, process or product is an infringement of a patent, copyright or other intellectual property, the DESIGNER shall be responsible for such loss unless such information is promptly given to the Town. If and to the extent this IP Indemnity is not permitted by Laws and Regulations, Professional agrees that any Claims that would have been subject to the IP Indemnity are subject to the General Indemnity provisions of paragraph 10.2.1.

10.3 Non-Exclusivity of OWNER's Remedies. The OWNER's selection of one or more remedies for breach of this Agreement shall not limit the OWNER's right to invoke any other remedy available to the OWNER under this Agreement or by law.

10.4 Remedies Not Waived. No delay, omission or forbearance to exercise any right, power or remedy accruing to the OWNER hereunder shall impair any such right, power or remedy or shall be construed to be a waiver of any breach hereof or default hereunder. Every such right, power or remedy may be exercised from time-to-time and as often as deemed expedient.

10.5 Waiver of Damages. The DESIGNER shall not be entitled to, and hereby waives any monetary claims for, or damages arising from or related to, lost profits, lost business opportunities, unabsorbed overhead or any consequential damages.

## **ARTICLE 11** **AMENDMENTS TO THE AGREEMENT**

- 11.1 Changes in the Basic Services. Changes in the Basic Services and entitlement to additional compensation or a change in duration of this Agreement shall be made by a Written Amendment. The DESIGNER shall proceed to perform the Services required by the Written Amendment only after receiving a fully executed Written Amendment from the OWNER.
- 11.2 OWNER Changes. The OWNER may, without invalidating this Agreement, make written changes in the Basic Services or Additional Services of this Agreement by preparing and executing a Written Amendment to the Agreement. Within three (3) days of receipt of such a Written Amendment, the DESIGNER shall notify the OWNER in writing of any change contained therein that the DESIGNER believes significantly increases or decreases the DESIGNER's Services and request an adjustment in compensation with respect thereto. If the Written Amendment significantly increases or decreases the DESIGNER's Services, the DESIGNER's compensation may be equitably adjusted as agreed to by the OWNER.

## **ARTICLE 12** **TERMINATION AND SUSPENSION**

- 12.1 Termination for Convenience of the OWNER. This Agreement may be terminated without cause by the OWNER and for its convenience upon ten (10) days written notice to the DESIGNER.
- 12.2 Other Termination. After ten (10) days written notice to the other party of its material breach of the Agreement, this Agreement may be terminated by the noticing party, provided that the other party has not taken all reasonable actions to remedy the breach.
- 12.3 Compensation After Termination.
- 12.3.1 In the event of termination for the convenience of the OWNER, the DESIGNER shall be paid that portion of its fees and expenses that it has earned to the date of termination, plus five percent (5%) of its Compensation for Basic Services earned to date or of its unearned Compensation for Basic Services, whichever is less, less any costs or expenses incurred or anticipated to be unearned by the OWNER due to errors or omissions of the DESIGNER. Upon receiving notice of termination, DESIGNER shall immediately and expeditiously terminate any ongoing Basic Services and Additional Services it is to provide hereunder and inform DESIGNER's Consultants of the termination of this Agreement, so as to minimize the costs and expenses sustained prior to the effective date of the termination.
- 12.3.2 In the event of termination by reason of a material breach of the Agreement by the OWNER, the DESIGNER shall be entitled to the same compensation as it would have received had the OWNER terminated the Agreement for convenience, and the DESIGNER expressly agrees that said compensation is fair and appropriate as liquidated damages for any and all costs and damages it might incur as a result of such termination.

12.3.3 In the event of termination by reason of a material breach of the Agreement by the DESIGNER, the DESIGNER shall be paid that portion of its fees and expenses that it has earned to the date of termination, less any costs or expenses incurred or anticipated to be incurred by the OWNER due to errors or omissions of the DESIGNER or by reason of the DESIGNER's breach of this Agreement.

12.3.4 Should this Agreement be terminated, for whatever reason, the DESIGNER shall, at the request of the OWNER, expend such additional effort as may be necessary, at its cost and expense, to provide professionally certified and sealed drawings to the OWNER, with respect to any Phase or item of the project. If the DESIGNER provides such certified and sealed drawings, DESIGNER shall be compensated in accordance with this Agreement.

12.4 Survival. Termination of this Agreement, for whatever reason, shall not terminate DESIGNER's representations and warranties to OWNER hereunder, nor nullify any indemnity of OWNER by DESIGNER hereunder.

#### 12.5 Suspension

12.5.1 The OWNER may order the DESIGNER in writing to suspend, delay or interrupt all or any part of the DESIGNER's Services on the Project for the convenience of OWNER.

12.5.2 In the event the DESIGNER believes that any suspension, delay or interruption of the Project ordered by OWNER may require an extension of the duration of Basic Services or an increase in the level of staffing by DESIGNER, it shall so notify the OWNER and propose an amendment of the Key Milestone Listing for consideration of the OWNER. Such amendment or extension shall be effective only upon the written approval of the OWNER. In the event the duration of Basic Services is extended or shortened or the level of staffing by the DESIGNER is increased or decreased, the Compensation for Basic Services may be equitably adjusted.

12.5.3 A suspension, delay or interruption of the Project shall not terminate this Agreement; provided, however, that if such suspension, delay or interruption causes a suspension of the DESIGNER's Services for a period exceeding ninety (90) days, the Compensation for Basic Services may be equitably adjusted.

### **ARTICLE 13** **OWNERSHIP OF DOCUMENTS**

13.1 OWNER's Ownership of Documents. The OWNER shall be granted, at no additional cost, ownership of all documents, drawings, and electronic data bases relating to the Project, including the ownership and use of all drawings, specifications, documents and materials relating to the Project prepared by or in the possession of the DESIGNER. The DESIGNER shall turn over to the OWNER in good unaltered condition, reproducibles of all original drawings, specifications, documents, electronic data bases and materials

within seven (7) days after issuance of the Certificate of Final Completion or after termination, whether for the Owner's convenience or otherwise. The DESIGNER may retain one set of drawings for its records.

- 13.2 Termination. In the event of termination, whether for the OWNER's convenience or otherwise, should the OWNER use such drawings for completion of the Project, the OWNER shall indemnify and hold the DESIGNER harmless from and against any cost, expense, damage or claim arising out of the loss of life, personal injury or damage to tangible property occasioned wholly or in part by any act or omission by the OWNER or a Contractor in connection with OWNER's improper use (or misuse) of such drawings, plans, specifications, renderings, models and other work provided as part of Basic Services and Additional Services.
- 13.3 Other Projects. Said drawings, specifications, documents and materials relating to the Project prepared by or in the possession of the DESIGNER may be used by the OWNER on any other project without additional compensation to the DESIGNER. The use of the documents by the OWNER or by any person or entity for any purpose other than the Project as set forth in this Agreement shall be at the full risk of the OWNER or such person or entity.
- 13.4 Incorporation of Provision in all Contracts. The DESIGNER specifically agrees to incorporate the provisions of this Article 13 in all contracts for the services of DESIGNER's Consultants.

#### **ARTICLE 14** **ADDITIONAL PROVISIONS**

- 14.1 Confidentiality. The DESIGNER shall use its best efforts not to disclose or permit the disclosure of any confidential information relating to the Project, except to its agents, employees and other consultants who need such confidential information in order to properly perform their duties relative to this Agreement.
- 14.2 Dissemination of Information. The OWNER takes efforts to assure that accurate information about the OWNER is disseminated such that neither the public trust nor the public's perception of OWNER impartiality is compromised. DESIGNER, mindful of those efforts, agrees that it shall not publicly disseminate any information concerning the Project without prior approval from the OWNER. Any approval given by the OWNER may be given with certain stipulations, such as OWNER participation in the creation of the public product or OWNER review and the option to refuse ultimate release of the final product should it fail to meet the OWNER's standards and goals. Publicly disseminate means but is not limited to electronic, video, audio, photographic or hard copy materials serving as, in whole or part, advertising, sales, promotion, professional papers or presentations, news releases, articles, or other media products, and/or DESIGNER's business collateral pieces. Notwithstanding the foregoing, the parties agree the DESIGNER may list OWNER as a reference in response to requests for proposal and may identify the OWNER as a customer in presentations to potential customers.

- 14.3 Limitation and Assignment. This Agreement shall bind DESIGNER and its successors and permitted assigns. DESIGNER shall not assign or transfer its rights or interest in Agreement (including the right to payment), nor shall contractor delegate its duties under Agreement, without the OWNER's written consent, which the OWNER may grant or withhold in its sole discretion. The OWNER's consent shall not release DESIGNER of any obligation under Agreement and DESIGNER and permitted assigns shall be subject to all of OWNER's defenses. Any attempt to assign Agreement without the prior written approval of OWNER shall be void. If DESIGNER utilizes approved subcontractors, DESIGNER shall be responsible for the scheduling, completeness, quality, accuracy and timeliness of all their work. OWNER has the right to request that any subcontractor be replaced due to unsatisfactory performance.
- 14.4 Governing Law. The parties acknowledge Agreement is a "business contract" subject to the provisions of N.C.G.S. Chapter 1G and agree that Agreement and the rights and duties of the Parties shall be governed by the laws of the State of North Carolina, without regards to conflict of laws provisions. The Parties further agree that any dispute arising from Agreement shall be litigated in the courts of the State of North Carolina and any and all suits or actions related to Contract shall be brought exclusively in Wake County, North Carolina. Service of process may be effected by delivery by any method permitted under the N.C. Rules of Civil Procedure on the office or individual specified in Paragraph 14.14 'Notice' or on any officer of the DESIGNER.
- 14.5 Dispute Resolution. Unless the OWNER instructs the DESIGNER otherwise, DESIGNER shall carry on with the timely performance of the Basic Services and any Additional Services to be provided by DESIGNER hereunder during any period of disputes or disagreements between the DESIGNER and the OWNER. No services shall be delayed or postponed pending the resolution of any dispute unless the OWNER otherwise agrees in writing. Any and all suits or actions to enforce, interpret or seek damages with respect to any provision of, or the performance or non-performance of, this Agreement shall be brought exclusively in the General Court of Justice of North Carolina sitting in Wake County, North Carolina and it is agreed by the parties that no other court shall have jurisdiction or venue with respect to such suits or actions. To the extent the DESIGNER's role in the Project is relevant under any dispute resolution process required by N.C.G.S. § 143-128(f1), the DESIGNER shall participate in the OWNER's dispute resolution process which shall be considered part of Basic Services unless specifically agreed otherwise herein.
- 14.6 Extent of Agreement/Electronic Version Deemed Original. This Agreement represents the entire and integrated agreement between the OWNER and the DESIGNER and supersedes all prior negotiations, representations or agreements, either written or oral including clickthrough agreements, clickwrap agreements, clickwrap licenses, or similar non-reciprocal agreements (collectively, "clickthrough agreement"). This Agreement may be amended only by Written Amendment. Neither party may amend, or seek to amend, this Agreement by clickthrough agreement. OWNER may convert a signed original of this Agreement to an electronic record pursuant to a North Carolina Department of Natural and Cultural Resources approved procedure and process for converting paper records to electronic records for record retention purposes. Such electronic record of this Agreement shall be deemed for all purposes to be an original signed Agreement.

- 14.7 Severability. If any provision of this Agreement is held as a matter of law to be unenforceable, the remainder of this Agreement shall be enforceable without such provision.
- 14.8 Resolving Discrepancies. Except as may be otherwise specifically stated in the Agreement, the provisions of the Agreement shall take precedence in resolving any conflict, error, ambiguity or discrepancy between the provisions of the Agreement and the Attachments, Request for Proposals and the DESIGNER's resulting Proposal, and the provisions of any standard, specification, manual, code or instruction of any technical society, organization or association if the standard, specification, manual, code or instruction. Aspects of the DESIGNER's Proposal, if not specifically covered in this Agreement (and there are no inconsistent provisions of this Agreement to such aspects) shall be deemed incorporated herein as part of the DESIGNER's Basic Services. If the provisions of any standard, specification, manual, code or instruction of any technical society, organization or association if the standard, specification, manual, code or instruction imposes a more stringent standard or obligation upon the DESIGNER than in the Agreement, the standard, specification, manual, code or instruction of any technical society, organization or association shall take precedence in resolving any conflict, error, ambiguity or discrepancy between the provisions of the Agreement and the provisions of such standard, specification, manual, code or instruction.
- 14.9 Conduct. OWNER has adopted a Mission Statement and Statement of Values. To support those values, OWNER has published *Working with the Town of Cary – A Guide for Temporary Employees, Contractors, Consultants, and Volunteers*. To the extent consistent with the terms and conditions of this Agreement, DESIGNER agrees to support and abide by the policies and elements contained in the chapters titled 'Our Culture' and 'Working with the Media' in such publication.
- 14.10 Gifts and Favors. DESIGNER shall become aware of and comply with all applicable laws and regulations related to gifts and favors, conflicts of interest, bribery, lobbying and the like, including N.C.G.S. §14-234, §133-1, and §133-32.
- 14.11 Data, Designs, Drawings, Memoranda, Etc.: Protocol. DESIGNER shall provide all technical memoranda and the final report and testing protocol shall be submitted in electronic form to the Town in read-only MS-Windows compatible format (including a either screen readable .pdf or HTML formats). All drawings shall be CAD generated and shall be provided on electronic media downloadable onto an AutoCAD based system. In order to meet US Justice Department standards for Internet accessibility, all materials--draft or final--intended for presentation on the Town of Cary's Web site must be provided to the Town in a manner and format compatible, consistent, and in compliance with all Town technology standards, including but not limited to a screen reader friendly version of any PDF version and alternate text tags of no more than 34 characters for all graphics contained in the HTML version. In the event that DESIGNER notices any errors in electronic data provided to the OWNER in connection with this Agreement, DESIGNER shall immediately notify OWNER, and if DESIGNER provided such electronic data, DESIGNER shall immediately replace same with correct versions thereof. If there are

any inconsistencies between electronic and hard copies of documentation provided under this Agreement, the electronic versions shall control.

- 14.12 Compliance with Laws and Regulations. Without limitation as to any other provision hereof regarding DESIGNER's compliance with Laws and Regulations in the performance of its duties hereunder, DESIGNER shall ensure that it complies with all federal and state Laws and Regulations as to the portion of the Project its services pertain. Such compliance shall include ensuring that the performance of and product of the DESIGNER's services comply with federal and state Laws and Regulations, including without limitation, compliance with the American with Disabilities Act of 1990, fair hiring and compensation legislation, immigration laws and regulations, and other Laws and Regulations applicable to DESIGNER's provision of services hereunder and the resulting Work to be performed in connection with DESIGNER's services. All completion and submission of forms and reports, posting of notices, and the like to comply with federal and state Laws and Regulations shall constitute required elements of DESIGNER's provision of services hereunder. DESIGNER, and all subcontractors, shall comply with Article 2, Chapter 64, of the North Carolina General Statutes.
- 14.13 Public Records. DESIGNER acknowledges that records made or received in connection with the transaction of public business are public records and subject to public records requests. OWNER may provide copies of such records, including copyrighted records, in response to public record requests, except that, upon request of and indemnification by DESIGNER, the OWNER will not disclose records that meet all of the requirements of a trade secret as set forth in N.C.G.S. 66-152, that are specifically designated as a "trade secret" or "confidential" at the time of initial disclosure by DESIGNER, and that are otherwise entitled to protection under N.C.G.S. 132-1.2(1). DESIGNER shall make OWNER aware of any public records requests and shall defer to OWNER for response to the requesting party.
- 14.14 Notice. Whenever any provision of this Agreement requires the giving of written notice, it will be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the OWNER's or DESIGNER's address. The date of said notice shall be the date of such delivery or mailing.

The notice address for the OWNER shall be:

UtilitiesDepartment  
Town of Cary  
PO Box 8005 / 316 North Academy Street  
Cary, NC 27512  
Attn: \_\_\_\_\_

The notice address for the DESIGNER shall be:

\_\_\_\_\_  
\_\_\_\_\_

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Nothing herein contained shall be deemed to restrict the transmission of routine communications between representatives of the DESIGNER and OWNER.

- 14.15 No Third Party Beneficiaries. There are no third party beneficiaries to Agreement.
- 14.16 Independent Contractor. DESIGNER is an independent contractor and is solely responsible for its Services and the supervision of its employees and permitted subcontractors. All persons assigned by DESIGNER to provide Services pursuant to this Agreement shall, for all purposes of this Agreement, be considered employees of DESIGNER only. DESIGNER shall assume the sole and exclusive responsibility for the payment of wages to individuals for services performed under this Agreement and the withholding of all applicable Federal, State, and local taxes, unemployment insurance, and maintaining workers compensation coverage in an amount and under such terms as required by law. If OWNER notifies DESIGNER in writing that any person providing Services appears to be incompetent, disorderly, or otherwise unsatisfactory to OWNER, such person shall be removed from the project and shall not again be employed on it except with the prior written consent of OWNER. No extension to any "Milestone Date" or completion date will be granted for replacement of such personnel or subcontractors.
- 14.17 Nondiscrimination. To the extent permitted by law, neither Party, their officers, employees, contractors, agents, successors, or permitted assigns, shall discriminate against any member of a protected class as defined by federal, state, or local law, including Wake County Code of Ordinances Section 34.01.
- 14.18 Pre-Audit Requirement. This Agreement has not been fully executed and is not effective until the Preaudit Certificate (if required by N.C.G.S. § 159-28) has been affixed and signed by the Town of Cary finance officer or deputy finance officer.
- 14.19 Performance of Government Functions. Nothing contained in this Agreement shall be deemed or construed so as to restrict or inhibit the OWNER's police powers or regulatory authority.
- 14.20 Principles of Interpretation and Definitions. In this Agreement, unless the context requires otherwise: (1) The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. (2) References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words "include," "including," etc. mean include, including, etc. without limitation. (3) References to a "Section" or "section" or "paragraph" shall mean a section or paragraph of this Agreement. (4) "Contract" and "Agreement," whether or not capitalized, refer to this instrument. (5) Titles of sections, paragraphs, and articles are for convenience only, and shall not be construed to affect the meaning of this Agreement. (6) "Duties" includes obligations. (7) The word "person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (8) The word "shall" is mandatory. (9) The

word “day” means calendar day. (10) Normal business hours means Monday through Friday from 8:00 a.m. until 5:00 p.m. Eastern Standard Time.

- 14.21 Further Assurances. DESIGNER agrees that it will cooperate with Town and will execute and deliver, or cause to be delivered, all such other instruments, and will take all such other actions, as OWNER may reasonably request from time to time in order to effectuate the provisions and purposes of Agreement.
- 14.22 No Waiver of Immunity. Nothing in this Agreement shall be construed to mandate purchase of insurance by OWNER pursuant to N.C.G.S. 160A-485 or to in any way waive OWNER’s defense of governmental immunity from any cause of action alleged or brought against any Party for any reason if otherwise available as a matter of law. No officer, agent or employee of OWNER shall be subject to any personal liability by reason of the execution of this Agreement or any other documents related to the transactions contemplated hereby. Such officers, agents, or employees shall be deemed to execute this Agreement in their official capacities only, and not in their individual capacities. This section shall not relieve any such officer, agent, or employee from the performance of any official duty provided by law.
- 14.23 Federal Funds. The DESIGNER shall make all necessary inquiries to correctly identify the source of funding for Agreement. If the source of funds for Agreement is federal funds, the following federal provisions apply pursuant to 2 C.F.R. § 200.326 and 2 C.F.R. Part 200, Appendix II (as applicable), unless a more stringent state or local law or regulation is applicable: Equal Employment Opportunity (41 C.F.R. Part 60); Davis-Bacon Act (40 U.S.C. 3141-3148); Copeland “Anti-Kickback” Act (40 U.S.C. 3145); Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708); Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387); Debarment and Suspension (Executive Orders 12549 and 12689); Byrd Anti-Lobbying Amendment (31 U.S.C. 1352); Procurement of Recovered Materials (2 C.F.R. § 200.322); and Record Retention Requirements (2 CFR § 200.334); Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment (2 C.F.R. § 200.216); and Domestic Preferences for Procurements (2 C.F.R. § 200.323).
- 14.24 Emergencies. Notwithstanding anything else in this Contract, while federal, state, or local state(s) of emergency are in effect, or when a public health emergency has been declared, DESIGNER shall comply with all guidance and recommendations of the Centers for Disease Control, the State of North Carolina, Wake County, or Chatham County, unless mutually agreed to by Town and Professional.
- 14.25 Electronic Signatures. DESIGNER acknowledges and agrees that the electronic signature application DocuSign may be used, at the sole election of Cary, to execute this Agreement and any associated documents. By selecting "I Agree," "I Accept," or other similar item, button, or icon via use of a keypad, mouse, or other device, as part of the DocuSign application, DESIGNER consents to be legally bound by the terms and conditions of this Agreement and that such act constitutes DESIGNER's signature as if actually signed by DESIGNER in writing. DESIGNER also agrees that no certification authority or other third-party verification is necessary to validate its electronic signature and that the lack of such certification or third-party verification will not in any way affect the enforceability of

its electronic signature. DESIGNER acknowledges and agrees that delivery of a copy of this Agreement or any other document contemplated hereby, through the DocuSign application, will have the same effect as physical delivery of the paper document bearing an original written signature.

14.26 List of Attachments. The following Attachments are incorporated herein and made a part of this Agreement by reference:

- *Attachment A -- Description of the Project*
- *Attachment B -- Key Milestone Listing*
- *Attachment C -- Consultants and Key Personnel*
- *Attachment D -- Basic Services*
- *Attachment E -- Additional Services*
- *Attachment F -- Basic Services Compensation*
- *Attachment G -- Additional Services Hourly Rates Schedule*
- *Attachment H -- Format of Total Project Cost Estimates*
- *Attachment I -- Insurance Certificate*

IN WITNESS WHEREOF, the Contractor has executed the foregoing with the signature(s) of its duly authorized officer(s), and the Town has executed with the signature of its Town Manager or Designee.

**Contractor (Name)**

By: \_\_\_\_\_  
(signature)

Name: \_\_\_\_\_  
(typed or printed name)

Title: \_\_\_\_\_

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

**Town of Cary**

By: \_\_\_\_\_  
(signature)

Name: \_\_\_\_\_  
(typed or printed name)

Title: \_\_\_\_\_

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

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

\_\_\_\_\_  
Deputy Finance Officer

\_\_\_\_\_  
Date

DRAFT

**Attachment A -- Description of the Project**

*[Town of Cary's Request for Proposals, entitled \_\_\_\_\_, dated \_\_\_\_\_ shall be inserted here.]*

DRAFT

**Attachment B -- Key Milestone Listing**

*[Project Schedule as provided in DESIGNER's Proposal shall be inserted here.]*

DRAFT

**Attachment C -- Consultants and Key Personnel**

*[Key DESIGNER personnel who will be working on the Project and Consultants and Consultant's key personnel as provided in the DESIGNER's Proposal shall be inserted here.]*

DRAFT

## Attachment D – Basic Services

Any services described in the Agreement as Basic Services shall be considered Basic Services to be provided to OWNER by DESIGNER or DESIGNER's Consultants. Additionally, the following services, if marked by checkmark or other similar indication below as being included, comprise Basic Services to be performed for the Owner by the DESIGNER or the DESIGNER's Consultants. The lettered Phases (each, a "Phase" of the Project) include various associated services, as described below. Marking the Phase as an included Basic Service indicates that all services in that Phase are to be provided; marking only individual sub-sections of a described Phase indicates that only those portions of the relevant Phase are to be provided as Basic Services.

A. Preliminary or Schematic Design Phase.

A.1 The DESIGNER shall consult with the OWNER to ascertain the requirements of the Project and shall review available surveys, tests and reports to ascertain that each is consistent and comparable with the others and the requirements of the Project.

A.2 The DESIGNER shall perform a preliminary evaluation of the Site by taking, at a minimum, the following steps:

- Physiographic analysis - Conduct an elevation study to determine general character of Site, including slope analysis and Site inspections to review actual field conditions, and analyze various development strategies to accommodate topography
- Geotechnical analysis - Analyze subsurface investigation reports to be prepared for the OWNER by a separately contracted geotechnical engineer and develop design options taking geotechnical findings into account.
- Surface hydrology - Delineate surface drainage patterns and watershed areas and analyze the effect on proposed development.
- Infrastructure analysis - Analyze existing Utilities Infrastructure and identify potential opportunities or limitations to development of the Project (e.g. electric, gas, water, sewer, CATV, telecommunication and fiber optics); coordinate and review alternatives with the OWNER to determine design feasibility; and identify any potential difficulties and cost considerations for connection to existing utilities
- Permits and approvals - Identify required permits and approvals of governmental agencies having jurisdiction over the Project and assess any difficulties or scheduling conflicts in obtaining approvals to develop the Project.
- ~~Architectural programming~~

- ~~Master planning~~
- ~~Space planning~~
- ~~Architectural schematic design~~
- Code summary
- Evaluate the effect of programming issues as they relate to use of the Site, and address any concerns with compatibility with existing and proposed surrounding land use.
- Develop estimates of probable Site development cost for the various development alternatives.
- Prepare a detailed summary document addressing all findings and recommendations for development of the Site.
- All other services customarily furnished by a Designer and its Consultants with respect to projects and activities similar to the Project.

  X   A.3 Based on the information obtained during the preliminary evaluation, the DESIGNER shall prepare Preliminary drawings illustrating alternative approaches to design and construction of the Project (the “Preliminary or Schematic Design”).

  X   A.4 The DESIGNER shall make a formal presentation to the Utility Department and/or other public forums as may be required of the proposed Preliminary or Schematic Design for the Project. These presentations will be made after the OWNER’s Representative and the DESIGNER have completed their review of the proposed presentation. Once the OWNER has officially approved the Preliminary or Schematic Design submittal and accompanying Total Project Cost, no unauthorized deviations to either may be made by the DESIGNER.

  X   A.5 The DESIGNER shall furnish a certified land survey of the Site, showing, as applicable, grades and lines of streets, alleys, pavements and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the Site; locations, dimensions and complete data pertaining to existing buildings, other improvements and trees; and other pertinent information reasonably required to perform the work, including information concerning available service and Utilities Infrastructure, both public and private, including inverts.

  X   A.6 The DESIGNER shall provide the services of a geotechnical engineer or other consultant, when such services are required to provide reports, test borings, test pits, soil bearing values, percolation tests, air and water pollution tests, ground corrosion and resistivity tests and other necessary operations for determining subsoil, air and water conditions, all together with reports and appropriate professional recommendations thereof.

X   B.     Design Development Phase.

  X   B.1     The DESIGNER shall prepare from the approved Preliminary or Schematic Design, for approval by the OWNER, the Design Development Documents, which shall include Site and floor plans, elevations, perspective drawings, other appropriate drawings, and outline specifications as are necessary to fix and illustrate the size and character of the entire Project as to kinds of materials, type of structural, mechanical and electrical systems and such other work as may be required, including:

- Fixed equipment
- Civil design
- Structural design
- Plumbing/mechanical/electrical design
- ~~Architectural design~~
- Civil engineering
- Landscape and irrigation system design
- ~~Interior design~~
- ~~Signage and graphics design~~
- Cost estimates
- Summary report

  X   C.     Construction Contract Documents Phase.

  X   C.1     Upon OWNER's approval of the Design Development Documents, the DESIGNER shall prepare the Construction Contract Documents and shall furnish copies of complete Construction Contract Documents to the OWNER for review. The Owner shall have the right and option to require the Designer to prepare eight separate bid packages with no additional compensation due the Designer. Such bid packages, at the Owner's option, may include: demolition and preliminary site work, general work, plumbing, mechanical, electrical, fire protection, landscaping and irrigation, signage, and furniture.

  X   C.2     A complete tabulation shall be furnished showing the breakdown of Total Project Cost with attached detailed estimates for major categories, including construction, equipment, furniture and signage.

  X   C.3     Upon the OWNER's review, the DESIGNER shall revise the Construction Contract Documents in accordance with the OWNER's comments. The DESIGNER shall furnish final copies to the OWNER and obtain written approval prior to issuance of the Construction Contract Documents to Contractors for pricing.

X   C .4 The OWNER has developed [front-end] Standard Specifications and Details, which shall guide the DESIGNER in formatting and preparing the Specifications. DESIGNER shall provide all technical Specifications and drawing standard detail Drawings unless otherwise directed by the Town.

  X   C .5 Specifications shall be prepared for review purposes and shall be subdivided into sections similar to Construction Specifications Institute standards. Specifications must be typewritten using the latest edition of the MasterSpec or SpecText system and be clearly legible. Review sets shall be complete with all forms and documents. Submit on 8-1/2" x 11" paper, securely side bound and print double sided.

  X   C .6 Field and laboratory testing of compacted soils, concrete, masonry materials, asphalt, structural steel, and welding shall be identified in Construction Contract Documents. All such tests shall be conducted by a qualified independent laboratory in accordance with ASTM specifications in a contract with and paid for directly by the OWNER. The testing laboratory utilized and the Contract for his services shall be approved by the OWNER. Additional tests resulting from failure of initial tests to meet Specification requirements shall be reimbursed to the OWNER by the Contractor.

  X   C .7 Subsurface investigation, where conditions are unknown or questionable, shall be conducted by a qualified testing laboratory, coordinated by the DESIGNER and paid for directly by the OWNER. The testing laboratory utilized and the contract for its services shall be approved and executed by the OWNER. Reports of tests shall be bound with the Specifications.

  X   C .8 The date for receipt of Bids shall be established by the DESIGNER in consultation with the OWNER. Generally, a period of four weeks will be required between publication of the Notice to Bidders and the receipt of Bids. Advertisement costs shall be paid directly to the advertising firm by the OWNER.

  X   C .9 Upon Cary approving the DESIGNER to do so, the DESIGNER shall file all required documents for the approval of governmental authorities having jurisdiction over the Project prior to issuing Bidding Documents to Contractors, and shall provide the OWNER with a list of any permit fees to be paid by the OWNER and with written approval from all such authorities. All permit fees for document approvals shall be paid either directly to the appropriate agency by the OWNER or as a reimbursable expense to the DESIGNER, with the exception of construction permit fees which shall be paid by the appropriate Contractor.

  X   C.10 The Construction Contract Documents shall require that Contractors, Subcontractors and Suppliers develop and submit operation and maintenance manuals in a form acceptable to the OWNER. Instructional and training sessions shall be required to properly train the OWNER's maintenance personnel. The OWNER's Standard Project Closeout specifications shall be included in Bidding Documents.

X   C.11 The OWNER and DESIGNER will establish a Project Manual with procedures in accordance with Town standards for bidding and construction of the Work. The Project Manual shall be followed for review and processing of all Shop Drawings, catalog submissions, Project reports, Change Order proposals, test reports, maintenance manuals, and other necessary documentation.

  X   D. Bidding and Construction Contract Award Phase.

  X   D.1 Following issuance of the Bidding Documents, the DESIGNER shall obtain and evaluate Bids in strict compliance with applicable North Carolina General Statutes.

  X   D.2 The DESIGNER shall prepare such clarifications and Addenda to the Bidding Documents as may be required. The DESIGNER shall provide such clarifications and addenda to the OWNER, all persons or entities who are issued Bidding Documents.

  X   D.3 The DESIGNER shall schedule and conduct pre-bid conferences with prospective bidders to review the Project requirements. The DESIGNER shall provide knowledgeable representatives, including representatives of DESIGNER's Consultants, to participate in these conferences to explain and clarify Bidding Documents. Within two working days after the pre-bid conference, the DESIGNER shall deliver to all recipients of Bidding Documents an Addendum to document any changes(s) to the Construction Contract Documents resulting from pre-bid conferences.

  X   D.4 The DESIGNER shall review all proposals received and make written recommendations to the OWNER relative to acceptance/rejection of proposals and award of Construction Contract(s) to the lowest responsible bidder or bidders, taking into consideration quality, performance and the time specified in the proposals for performance of the Construction Contract Documents.

~~\_\_\_\_\_ E. Construction Administration Phase. The Construction Administration Phase shall include construction inspection services and construction contract administration. It will commence with the award of the Construction Contract(s) and, together with the DESIGNER's obligation to provide Basic Services under this Agreement, will terminate when final payment to the Contractor is due.~~

~~\_\_\_\_\_ E.1 The DESIGNER shall work with the other parties providing services and materials in connection with the project that is the subject of the Construction Contract Documents, which other parties may be specifically identified in the Construction Contract Documents or by instruction from OWNER to DESIGNER as to another party's participation in the project.~~

~~\_\_\_\_\_ E.2 The DESIGNER shall provide all of the administrative services described in the Construction Contract Documents and shall serve as a representative of the OWNER during construction. In this capacity, the DESIGNER shall: (a) guard the OWNER against variances from the requirements of the Construction Contract Documents, (b) require Contractor(s) to complete the Work within the time specified in~~

the Construction Contract Documents, (c) guard the OWNER against defects and deficiencies in the Work, and (d) warn the OWNER and protect against any negative environmental impacts the DESIGNER observes as occurring or likely to occur as a result of the Work.

~~\_\_\_\_\_ E.3 — The DESIGNER shall notify the OWNER and Contractor of any defective work observed by the DESIGNER. The DESIGNER will advise and consult with the OWNER regarding the performance and progress of the Contractor and regarding solutions to condition or problems that may arise out of the design or construction. The DESIGNER shall have authority to act on behalf of the OWNER to the extent provided in the Construction Contract Documents.~~

~~\_\_\_\_\_ E.4 — The DESIGNER shall administer the Change Order procedures provided in the Construction Contract Documents. The DESIGNER shall review and evaluate Change Order proposals submitted by a Contractor and shall recommend, as applicable, the Contractor's proposals for acceptance by the Owner. Each recommendation of acceptance will be based upon the DESIGNER's professional opinion that a proposal is complete, in conformance with the Construction Contract Documents, represents fair and reasonable pricing, and justifies Change Order action in the case of claims for extra Work, or does not warrant procurement by competitive bid in the case of added Work. The DESIGNER shall promptly prepare Change Order documentation complete with narrative description and justification for each item, so as to not delay the Work. The DESIGNER shall not permit variations from the Construction Contract Documents unless and until Change Orders have been approved by the OWNER.~~

~~\_\_\_\_\_ E.5 — The DESIGNER shall provide the OWNER and Contractor(s), within a maximum of four (4) working days, interpretations of the requirements of the Construction Contract Documents. The DESIGNER shall make all interpretations consistent with the intent of the Construction Contract Documents. Should errors, omission, discrepancies, ambiguities, mistakes or conflicts be discovered in the Construction Contract Documents, the DESIGNER shall prepare and submit to the OWNER and Contractor(s), within a maximum of four (4) working days, such amendments or supplementary documents associated with change proposal documentation and provide consultation as may be required.~~

~~\_\_\_\_\_ E.6 — The DESIGNER shall make such visits to the Site as may be necessary to monitor the progress and observe in detail the quality of the Work and to determine if the Work is proceeding in accordance with the Construction Contract Documents and in accordance with Laws and Regulations. On the basis of the DESIGNER's observations and Site visits, the DESIGNER shall promptly make an oral and written report regarding any deficiency to OWNER and take the appropriate steps to guard the OWNER against defects and deficiencies in the Work. Defects and deficiencies shall be deemed to include threats to environmental health and sustainability to the extent such impacts are not specifically anticipated by the Construction Contract Documents. If the DESIGNER observes any Work that does not conform to the Construction Contract Documents, the DESIGNER shall issue a written report within four (4) working days of all such inspections and Site visits to the OWNER and Contractor(s). The OWNER's approval, acceptance, use of or payment for all or any part of the DESIGNER's Basic Services~~

hereunder or of the Project itself shall in no way alter or diminish the DESIGNER's obligations or OWNER's rights hereunder.

~~\_\_\_\_\_ E.7 \_\_\_\_\_ Unless specifically provided otherwise herein, the DESIGNER shall schedule, conduct and document regular meetings to be held at the Site every r week throughout the entire construction period. Attendance at the meetings is to be by authoritative home office and Project representatives of each Contractor. The DESIGNER shall chair the meetings, prepare and distribute to the OWNER and all others in attendance a report of the pertinent and salient matters considered and conclusions reached at each of these weekly meetings, together with such matters relating to the Project progress.~~

~~\_\_\_\_\_ E.8 \_\_\_\_\_ The DESIGNER shall create and maintain a typewritten project directory including names and phone numbers of key personnel.~~

~~\_\_\_\_\_ E.9 \_\_\_\_\_ The DESIGNER shall review and verify compliance of all required field testing with the Construction Contract Documents for the Project.~~

~~\_\_\_\_\_ E.10 \_\_\_\_\_ The DESIGNER shall process shop drawings and all other submittals, provide details and interpretations, process materials lists and other data with sufficient dispatch to preclude delaying the progress of construction.~~

~~\_\_\_\_\_ E.11 \_\_\_\_\_ The DESIGNER shall determine the amounts owed to any Contractor based upon observation of the work and evaluation of an Application for Payment, and shall issue Certificates for Payment in such amounts, as provided in the Construction Contract Documents. The issuance of a Certificate for Payment shall constitute a representation by the DESIGNER to the OWNER, based on the DESIGNER's observations and inspections at the Site and on the data comprising the Contractor's Application for Payment, that the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Construction Contract Documents and the Contractor is entitled to payment in the amount certified.~~

~~\_\_\_\_\_ E.12 \_\_\_\_\_ When the OWNER and DESIGNER agree that the Work or portions of the Work are substantially complete, the DESIGNER and its consultants shall inspect the Work or portions of the Work and prepare and submit to the OWNER and Contractor(s) punchlists of the Work that is not in conformance with the Construction Contract Documents. The DESIGNER shall issue a Certificate of Substantial Completion at such time that the work is determined to be substantially complete as defined in the Construction Contract Documents. When incomplete, defective or deficient work has been remedied, the DESIGNER will inspect the work and advise the OWNER in writing that all work has been satisfactorily completed. The DESIGNER will then issue a Certificate of Final Completion.~~

~~\_\_\_\_\_ E.13 \_\_\_\_\_ The DESIGNER shall assist in obtaining governing agency occupancy approval if any exceptions arise related to the design or specified materials.~~

~~\_\_\_\_\_ E.14 \_\_\_\_\_ The DESIGNER shall observe and review test data of the initial start-up testing, adjusting and balancing of equipment and building systems to make sure that all~~

equipment and systems are properly installed and functioning in accordance with the Construction Contract Documents.

~~\_\_\_\_\_ E.15 The DESIGNER shall assemble, and review for completeness, written guarantees, affidavits, manuals of instruction for operation, and other required closing papers of the Contractors and forward them in organized three-ring binders to the OWNER.~~

~~\_\_\_\_\_ E.16 Upon completion of the Project and prior to issuing Final Certificates for Payment, the DESIGNER shall compute the total time for completion as allowed in the Construction Contract Documents, plus any time extensions granted, and determine the number of days if any in excess of the Construction Contract Time for which a Contractor appears liable for liquidated damages. The DESIGNER shall notify the affected Contractor of any proposed assessments of liquidated damages, and allow the Contractor time to respond thereto. Subsequently, the DESIGNER shall prepare a recommendation to the OWNER as to the amount of liquidated damages, if any, to be assessed and the portion of such assessment attributed to each Contractor.~~

~~\_\_\_\_\_ E.17 Upon correction of the deficiency reports (punch lists), and acceptance of all other closeout submittals and certificates, the DESIGNER shall approve a final application for final payment for each Contractor and forward it to the OWNER.~~

~~\_\_\_\_\_ E.18 If DESIGNER is given a role in the Construction Contract Documents with respect to resolving disputes between the OWNER and the Contractor (or other parties), the DESIGNER shall participate in such dispute resolution procedures as necessary in accordance with the terms of the Construction Contract Documents.~~

~~\_\_\_\_\_ F. Post Construction Phase. The Post Construction Phase shall commence upon the issuance of the Certificate of Substantial Completion and, except for the warranty inspection, shall end when the Project has been fully completed, closed out and accepted by the OWNER.~~

~~\_\_\_\_\_ F.1 Upon completion of the Project, the DESIGNER shall revise the Drawings to conform to the Project as finally constructed, and shall deliver to the OWNER reproducible record drawings along with an electronic data base containing record drawing data in accordance with The Town of Cary CAD Guidelines.~~

~~\_\_\_\_\_ F.2 The DESIGNER shall conduct an inspection of the Project thirty (30) working days prior to warranty expiration and shall provide the OWNER and Contractor(s) with a written report identifying all defective and deficient work covered by the Project warranty. The written deficiency report shall be sent to all parties by Certified Mail within four (4) working days after the date of the Warranty Inspection.~~

## **Attachment E – Additional Services**

Any services described in the Agreement as Additional Services shall be considered Additional Services to be provided to OWNER by DESIGNER or DESIGNER's Consultants in accordance with the terms of the Agreement upon execution by OWNER of a Written Amendment specifying that such services shall be provided. Additionally, the following services, if marked as included, comprise Additional Services to be performed for the Owner by the DESIGNER or the DESIGNER's Consultants, for Additional Compensation, as described in Attachment F.

\_\_\_ **None Presently Anticipated**

\_\_\_ [Describe Additional Services Contemplated]

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## Attachment F – Basic Services Compensation

Following are the percentages of the Total Project Cost that are allocable to each Phase for which DESIGNER is to perform Basic Services. Payments are not to exceed the stated percentages of the Total Project Cost for each Phase:

- Preliminary or Schematic Design Phase \_\_\_\_\_ %
  - Design Development Phase \_\_\_\_\_ %
  - Construction Contract Documents Phase \_\_\_\_\_ %
  - Bidding and Construction Contract Award Phase \_\_\_\_\_ %
  - ~~Construction Administration Phase \_\_\_\_\_ %~~
  - ~~Post Construction Phase \_\_\_\_\_ %~~
- Total: 100%

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**Attachment G -- Hourly Rates Schedule**

*[Rate Table as provided in DESIGNER's Proposal shall be inserted here.]*

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**Attachment H – Format of Total Project Cost Estimates**

*[To be negotiated with DESINGER prior to executing Agreement.]*

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**Attachment I – Insurance Certificate**

*[Provided by DESIGNER prior to executing Agreement.]*

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