

## PROFESSIONAL SERVICES AGREEMENT

THIS PROFESSIONAL SERVICES AGREEMENT (the "Agreement") is made this \_\_\_\_ day of \_\_\_\_\_, 2021 by and between New Castle County ("County"), and \_\_\_\_\_ ("Consultant") located at \_\_\_\_\_.

### W I T N E S S E T H:

WHEREAS, the County desires to employ the Consultant to furnish \_\_\_\_\_ services for \_\_\_\_\_ project under County Bid # \_\_\_\_\_; and

WHEREAS, the Consultant submitted a proposal for the procurement of professional services and was selected by the County, and where the probable cost of such services is estimated to exceed Fifty Thousand Dollars (\$50,000.00), or where the provisions of New Castle County Code Section 2.03.103.C are invoked, such selection was consistent with Delaware Code Subchapter VI, Chapter 69, Title 29 and Section 2.05.502(B) of the New Castle County Code.

NOW, THEREFORE, for good and valuable consideration the sufficiency of which is hereby acknowledged, and intending to be legally bound, the County and the Consultant agree as follows:

#### **1. Agreement to Provide Professional Services**

The County hereby engages the Consultant, and the Consultant hereby agrees, to perform all services (the "Services") necessary and appropriate to complete the tasks defined and set out in the Consultant's Proposal dated \_\_\_\_\_ (the "Consultant's Proposal") which is attached hereto as Exhibit A and incorporated herein by reference.

#### **2. Fees and Payment**

(a) The cost of the Services shall be billed on a **[time and material basis][lump sum basis]**, with the overall contract cost not to exceed \$\_\_\_\_\_ as set forth in the payment section of the Consultant's Proposal (hereinafter, the "Payment Schedule").

(b) For Services performed on a time and materials basis:

(i) No overtime or increased rates shall be paid unless specifically authorized by the County in writing in advance; and

(ii) In the event that the Consultant shall assign personnel to the project who do not fall within the categories set forth in the Payment Schedule, the County and the Consultant shall mutually agree on the billable rates for such personnel in writing.

(c) Unless other payment terms are specified in the Payment Schedule, the Consultant shall invoice the County on a monthly basis: (i) for Services provided on a time and materials basis and for out-of-pocket costs and expenses, monthly in arrears; or (ii) as

otherwise provided in the Payment Schedule. Payment to the Consultant shall be made within sixty (60) days following the County's receipt of such invoice.

(d) The County does not have the obligation to pay the portion of any invoice which is disputed (in whole or in part) by the County in good faith until the dispute is resolved. In the event that any disputed invoices are outstanding, the Consultant shall nevertheless be obligated to continue its Services hereunder without interruption and the parties hereto in good faith shall attempt to resolve their dispute. Notwithstanding anything to the contrary in the Consultant's Proposal, the County shall have no obligation to pay service charges or interest on late or disputed invoices.

(e) At the County's request, the Consultant shall execute a truth-in-negotiation certificate stating that the wage rates and other factual unit costs contained in the Payment Schedule are accurate, complete and current as of the date of this Agreement.

(f) Notwithstanding the foregoing provisions of this Section, it is agreed that the County may withhold up to ten percent (10%) of the invoiced amount until satisfactory completion by the Consultant of the Services under this Agreement. When the County determines that the Services under this Agreement or any specified task hereunder is substantially complete and that the amount of retained percentage is in excess of the amount considered by the County to be adequate for its protection, the County shall release such excess amount to the Consultant.

(g) Upon satisfactory completion of the Services performed hereunder, and prior to final payment under this Agreement for such Services, or prior settlement upon termination of this Agreement, and as a condition precedent thereto, the Consultant shall execute and deliver to the County a release of all claims against the County arising under or by virtue of this Agreement.

### **3. Reimbursable Expenses.**

(a) The County will reimburse the Consultant for the following actual out-of-pocket expenses incurred by the Consultant:

(i) Costs and expenses incurred with the reproduction of drawings, specifications and other documents required to be delivered by the Consultant to the County and others hereunder to the extent that the aggregate amount thereof exceeds Two Hundred and Fifty Dollars (\$250.00) (excluding, however, reproductions for in-house use of the Consultant);

(ii) Special postage, delivery and handling costs; and

(iii) Fees, if any, for securing approvals of governmental authorities having jurisdiction.

(b) Such expenses shall be necessary and properly incurred by the Consultant in connection with the Services. The Consultant shall provide receipts or other

accounts of records as may be requested by the County. The Consultant shall submit its invoices on a monthly basis for reimbursement as part of the payment requests referenced in Section 2(c).

(c) Unless given prior written authorization by the County, the County will not reimburse the Consultant for expenses such as travel expenses, computer time, reference books and special equipment or for any payments made for the services (including secretarial) of other persons to assist the Consultant in the provision of Services.

#### **4. Responsibility of the Consultant**

(a) The Consultant shall: (i) possess the expertise, capability, equipment and personnel to perform properly and professionally the Services hereunder and (ii) be and remain properly and legally licensed to perform such Services.

(b) The Consultant shall be responsible for the professional quality, technical accuracy, timely completion, and the coordination of all designs, drawings, specifications, reports, and other services furnished by the Consultant under this Agreement. The Consultant shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in its designs, drawings, specifications, reports and other services and reimburse the County for costs related to, or caused by, such incorrect or defective work, including, but not limited to, replacement of incorrect or defective material and equipment, removal and reinstallation costs.

(c) Approval by the County of drawings, designs, specifications, reports and incidental engineering work or materials furnished hereunder shall not in any way relieve the Consultant of responsibility for the technical adequacy of its work.

(d) The Consultant shall be and remain liable in accordance with applicable law for all damages to the County caused by the Consultant's negligent performance of any of the Services furnished under this Agreement.

(e) The Consultant shall keep himself fully informed and apprised of all Federal, State and local laws, ordinances, regulations, orders and decrees which in any manner affect those engaged or employed on the work or which in any way affect the execution of its work. The Consultant shall at all times observe and comply with all such laws, ordinances, regulations, orders, and decrees and shall immediately notify the County of any conduct on such Consultant's part which may be in violation of any such laws, ordinances, regulations, orders or decrees.

(f) The Consultant, while performing Services under this Agreement, shall conduct its public dealings in a courteous and professional manner and any employee whose conduct reflects adversely on the County shall be removed from further involvement with the project. When such a removal is warranted, the County will so advise the Consultant and substantiate the causes for said removal.

(g) The Consultant shall maintain all required licenses, pay all taxes, pay all related fees and charges and give all notices necessary and incidental to the due and lawful prosecution of the work.

(h) In the event that the Consultant, its successors, assigns, employees, contractors, subcontractors, agents, and representatives, enters County property (including but not limited to County easements), the Consultant shall repair any damage at its sole cost and expense caused by the Consultant to any property entered on by the Consultant to the extent such damage was caused by the Consultant. The Consultant agrees to indemnify, defend and hold the County, its officers, directors, employees, agents, licensees, contractors, guests and invitees and the property owner (in the case of a County easement or other partial property interest) harmless from any and all liability, claims, demands, liens, damages, penalties, fines, interest, costs and expenses that arose from, were caused by or were related to the Consultant's entry or work on County property or easements (including, without limitation, fees and charges of attorneys and other professionals and court costs).

(i) The Consultant shall perform all Services contemplated by this Agreement by the best and soundest means and methods and in the most expeditious and economical manner consistent with the interests of the County and consistent with its standard of care set forth below. The Consultant represents that its Services shall be performed in a manner consistent with the level of skill and care exercised by other members of the same profession currently practicing in the same locality under similar conditions.

## **5. Insurance Requirements**

(a) The Consultant will be required to provide insurance of the prescribed types and minimum amounts as set forth below:

(i) Comprehensive General Liability coverage, including contractual liability, with a limit of not less than One Million Dollars (\$1,000,000.00) for loss or damage to property in any one occurrence and Bodily Injury Liability with a limit of not less than One Million Dollars (\$1,000,000.00). There is to be a waiver of subrogation endorsement included in favor of the County to the full extent permitted by law. The County should be specifically named as an additional Insured on the said policy and Certificate.

(ii) Automobile liability insurance covering owned, non-owned and hired vehicles used by the Consultant for the Services with a limit of not less than One Million Dollars (\$1,000,000.00) for each occurrence. There is to be a waiver of subrogation endorsement included in favor of the County to the full extent permitted by law. The County should be specifically named as an additional Insured on the said policy and Certificate.

(iii) Workers' Compensation Insurance, including Occupational Disease, which shall comply with the Laws of the State of Delaware and Employer's Liability Insurance in an amount not less than One Million Dollars (\$1,000,000.00) per person/per accident.

(iv) Professional Liability Insurance with a limit of liability in an amount not less than One Million Dollars (\$1,000,000.00) with not more than a One Hundred Thousand Dollars (\$100,000.00) deductible insuring the Consultant and its officers, directors, stockholders, members, employees, consultants and partners, and all other persons for whose acts they or any of them may be liable, against any and all liabilities arising out of, or in connection

with, the negligent acts, errors or omissions of any of the foregoing in connection with the carrying out of its professional responsibilities in providing the Services. If this insurance is written on a claims made form, and if there is a retroactive date, then the date must be prior to the inception date of any work under this Agreement; and that same retroactive date must be maintained unchanged during the term of the Agreement, and for at least three (3) years thereafter.

(b) All required insurance shall be maintained with insurance carriers licensed or approved to do business in the State of Delaware and approved by the County. All insurance companies are to be rated by Best's at least A- and are subject to approval of the County.

(c) Upon execution of this Agreement, the Consultant shall furnish a Certificate of Insurance (the "Certificate") to the County evidencing the insurance required hereunder. Upon request, true copies of the actual policies shall be furnished. Each such Certificate shall name as Insured the Consultant and as additional insured the County (except Workers' Compensation and Professional), as their interest may appear, and shall provide that thirty (30) days prior written notice shall be given to the County in the event of cancellation or material change in the policies of insurance discussed hereunder. All premiums shall be paid in full by the Consultant.

(d) The insurance policies required by this Agreement shall be kept in full force and effect as follows:

(i) All insurance required under Section 5(a)(i), 5(a)(ii) and 5(a)(iii) shall be kept in full force and effect during the performance of this Agreement and until the Consultant has fully performed all Services hereunder to the County's satisfaction; and

(ii) Professional Liability Insurance pursuant to Section 5(a)(iv) hereof shall be kept in force during the performance of this Agreement and for three (3) years after the completion of all work if on a claims made form (if on an occurrence form then Section 5(d)(i) applies).

(e) In the event that the Consultant hires or subcontracts with another entity ("Subcontractor"), the Consultant shall be responsible for ensuring that the subcontractor or agent maintains the levels and types of insurance outlined above, and the Consultant shall be responsible for obtaining an insurance certificate from the Subcontractor which includes the levels and types of insurance coverage outlined above and which names the County as an additional insured (except Workers' Compensation and Professional). The Consultant shall furnish such certificate to the County prior to the Subcontractor's entry onto County property (including but not limited to County easements).

(f) All equipment, materials and supplies belonging to the Consultant or its Subcontractor shall be brought to and kept at the construction area at the Consultant's or Subcontractor's sole cost, risk and expense, and the County shall not be liable for any loss or damage thereto. Any insurance policies maintained by the Consultant or Subcontractor on such

equipment, materials or supplies shall provide for a waiver of underwriter's right of subrogation against the County.

## **6. Changes**

(a) The County may, at any time, by written order, make changes within the general scope of this Agreement in the Services to be performed. If such changes cause an increase or decrease in the Consultant's cost of, or time required for, performance of any Services under this Agreement, whether or not changed by any order, an equitable adjustment shall be made and this Agreement shall be modified in writing accordingly. Any claim of the Consultant for adjustment under this clause must be asserted in writing within thirty (30) days from the date of receipt by the Consultant of the notification of change unless the County grants a further period of time, in writing, before the date of final payment under this Agreement.

(b) No services for which an additional compensation will be charged by the Consultant shall be furnished without the written authorization of the County.

## **7. Termination**

(a) This Agreement may be terminated in whole or in part in writing by either party in the event of a material failure by the other party to fulfill its obligations under this Agreement through no fault of the terminating party: PROVIDED, that no such termination may be effected unless the other party is given: (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate; (2) an opportunity for consultation with the terminating party prior to termination; and (3) a right to cure, within ten (10) calendar days from the receipt of notice of termination.

(b) The County may terminate this Agreement in whole or in part at any time and without cause by providing the Consultant thirty (30) calendar days written notice (delivered by certified mail/return receipt requested) of intent to terminate.

(c) The equitable adjustment for any termination shall provide for payment to the Consultant for Services rendered and expenses incurred but no amount shall be allowed for anticipated profit on unperformed services or other work. If termination for default is effected by the County, an equitable adjustment in the price provided for in this Agreement shall be made, but any payment due to the Consultant at the time of termination may be adjusted to the extent of any additional costs occasioned to the County by reason of the Consultant's default.

(d) Upon receipt of a termination action pursuant to paragraphs (a) or (b) above, the Consultant shall: (1) promptly discontinue all services affected (unless the notice directs otherwise), and (2) deliver or otherwise make available to the County all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the Consultant in performing this Agreement, whether completed or in process.

(e) Upon termination, the County may take over the work and prosecute the same to completion by agreement with another party or otherwise. The County

will not hold the Consultant responsible for any subsequent work performed by the County which is not based on the Consultant's original design or authorized revisions.

## **8. Project Design**

(a) In the performance of this Agreement, the Consultant shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods and processes.

(b) The Consultant shall not, in the performance of the Services called for by this Agreement, produce a design or specification such as to require the use of structures, machines, products, materials, construction methods, equipment or processes which are known by the Consultant to be available only from a sole source, unless such use has been adequately justified in writing by the Consultant and approved in writing by the County. If the County so directs, the Consultant shall obtain certain structures, machines, products, materials, construction methods, equipment or processes from the specified source. The County has the right to deny the use of structures, machines, products, materials, construction methods, equipment or processes from any source that it, in its sole discretion, deems objectionable.

(c) The Consultant shall report to the County any restrictive design or specification giving the reason or reasons why it is considered necessary to restrict the design or specification.

## **9. Access to Records**

(a) The Consultant shall maintain books, records, documents and other evidence directly pertinent to performance under this Agreement in accordance with generally accepted accounting principles and practices consistently applied. The Consultant shall also maintain the financial information and data used by the Consultant in the preparation or support of the cost submission in effect on the date of execution of this Agreement and a copy of the cost summary submitted to the County. The County shall have access to such books, records, documents and other evidence for the purpose of inspection, audit and copying. The Consultant will provide proper facilities for such access and inspection.

(b) It is expressly agreed that the County, federal or state auditors and any other persons duly authorized by the County shall have full access to all records described in subsection (a) upon three (3) business days notice to the Consultant. Audits conducted pursuant to this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency(ies).

(c) The Consultant agrees to maintain all records under paragraph (a) above for three (3) years from the date of final payment under this Agreement. In addition, those records which relate to any "Dispute" appeal or litigation, or the settlement of claims arising out of such performance, or costs or items to which an audit exception has been taken, shall be maintained and made available until three (3) years after the date of resolution of such appeal, litigation, claim or exception.

**10. Price Reduction for Defective Cost or Pricing Data**

The original contract price and any additions thereto shall be adjusted to exclude any significant sums where the County determines that the contract price was increased due to inaccurate, incomplete or noncurrent wage rates and/or other factual unit costs. Upon such determination by the County, such price or cost or profit shall be reduced accordingly and this Agreement shall be modified in writing to reflect such reduction. All such price adjustments shall be made within one (1) year following the end of this Agreement.

**11. Subcontractors**

(a) Any Subcontractors required by the Consultant in connection with the Services covered by this Agreement will be limited to such individuals or firms as were specifically identified and agreed to during negotiations, or as specifically authorized by the County, in writing, during the performance of this Agreement. Any substitutions in or additions to such Subcontractors will be subject to the prior written approval of the County.

(b) The Consultant may not subcontract services in excess of thirty percent (30%) of the contract price to Subcontractors without prior written approval of the County.

(c) The Consultant agrees that each subcontractor agreement shall be in writing and shall provide that the pertinent provisions and requirements of this Agreement are incorporated into such subcontractor agreement. It shall be the Consultant's responsibility to determine that all such provisions are included and such provisions shall be implied where not specifically included.

(d) No subcontract shall release the Consultant of his liability under this Agreement. The Contractor shall be responsible for all acts or omissions of any Subcontractor and shall be liable for all damage caused by acts or omissions of any Subcontractor.

**12. Gratuities**

(a) If it is found, after notice and hearing, by the County that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Consultant, or any agent or representative of the Consultant, to any official, employee or agent of the County, with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of this Agreement, the County may, by written notice to the Consultant, terminate the right of the Consultant to proceed under this Agreement or may pursue such other rights and remedies provided by law or under this Agreement.

(b) In the event this Agreement is terminated as provided in paragraph (a) hereof, the County shall be entitled (1) to pursue the same remedies against the Consultant as it could pursue in the event of a breach of contract by the Consultant, and (2) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the County) which shall not be less than three (3) nor more than ten

(10) times the costs incurred by the Consultant in providing any such gratuities to any such officer or employee.

**13. Contingent Fees**

The firm offering professional services swears that it has not employed or retained any company or person, other than a bona fide employee working primarily for it, to solicit or secure this contract or purchase order, and that it has not paid to or agreed to pay to any person, other than a bona fide employee working primarily for it, any fee, commission, percentage, gift or any other consideration, contingent upon or resulting from the award or making of this contract or purchase order. For a breach or violation of this subsection, the County shall have the right to terminate the contract or purchase order without liability and, at its discretion, to deduct from the contract price or purchase order price or otherwise recover the full amount of such fee, commission, percentage, gift or consideration.

**14. Ownership and Rights in Data**

(a) The Consultant acknowledges that the County shall have exclusive, unlimited ownership rights to all works performed or created under this Agreement including all layers of design and all drawings, specifications, models, materials, information and deliverables prepared hereunder or developed as a result of Services performed hereunder (e.g., Consultant's points file, AUTO CAD drawings, meter data and hydraulic models). All of the foregoing shall be deemed to be work made for hire and made in the course of services rendered and shall belong exclusively to the County, with the County having the sole right to obtain, hold and renew, in its own name and/or for its own benefit, patents, copyrights, trademarks, trade secrets, registrations and/or other appropriate protections.

(b) All drawings, specifications, models, materials, information and deliverables prepared for the County by the Consultant hereunder shall be delivered to the County when so requested by the County. In addition, the Consultant must provide the County with at least one editable electronic file of its work.

(c) All such data furnished by the Consultant pursuant to this Agreement are instruments of its services in respect of the project. It is understood that the Consultant does not represent such data to be suitable for re-use on any other project or for any other purpose. Any re-use by the County of such data beyond its original intent and purpose without specific written authorization by the Consultant will be at the sole risk of the County and without liability to the Engineer.

(d) Work created under this Agreement by the Consultant or anyone employed by the Consultant is not intended to include any proprietary software and associated rights or off the shelf training materials or training products developed by a trainer for group or individual learning, regardless of whether the materials or products are modified for use at the County.

(e) To the extent that exclusive title and/or ownership rights may not originally vest in the County as contemplated in subsection (a), the Consultant hereby irrevocably assigns, transfers and conveys to the County all right, title and interest therein. The

Consultant and its personnel shall give the County and/or any County designee, at the County's expense, all reasonable assistance and execute all documents necessary to assist and/or enable the County to perfect, preserve, register and/or record its rights in any such work, materials, information and/or deliverable.

**15. Confidentiality**

(a) All work performed under this Agreement shall be confidential in nature. As such, all documents created pursuant to the terms of this Agreement shall be marked "Privileged and Confidential". In addition, no employee, agent or assign of the Consultant shall convey information obtained in the course of fulfilling its contract obligations to any person or entity other than the County without first obtaining the County's express written authorization, provided that the Consultant, its employees, agents or assigns may convey information to entities other than the County if the conveyance of the information is necessary to obtain required permits or otherwise fulfill contract requirements.

(b) The County specifically prohibits the photographing of any project or County property, reproduction of any work product developed hereunder by the Consultant for publicity or advertising or for any other purpose outside the scope of performance of this Agreement without the express prior written authorization of the County.

**16. Warranty; Indemnification; Remedies**

(a) The Consultant represents and warrants that: (i) this Agreement constitutes the legal, valid and binding obligation of the Consultant, enforceable against the Consultant in accordance with its terms; (ii) the execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate or other action of the Consultant; and (iii) the execution and delivery of this Agreement and all agreements, documents and instruments executed and delivered by the Consultant pursuant hereto and the performance of the transactions contemplated by this Agreement and such other agreements, documents and instruments, do not and will not violate, conflict with or result in a violation of, or constitute a default under any provision of any law, regulation or rule, or any board or governmental agency.

(b) The Consultant further represents and warrants that: (i) the performance of the Services by the Consultant will be in accordance with all applicable laws and regulations; (ii) all Services will be performed in accordance with the instructions and directions of the County; (iii) each of the Consultant's personnel working on the project will be duly qualified to provide such Services, including, if appropriate, appropriate professional licensure; (iv) there are no relevant facts that could give rise to a conflict of interest under this Agreement; and (v) the performance of the Services will not violate any proprietary rights of any third party (including, without limitation, any third party confidential relationships, patent, copyrights, trade secrets or other proprietary rights).

(c) The Consultant agrees to indemnify and hold harmless the County, its officers, directors, agents, employees, licensees, contractors, guests and invitees, from and against any and all actions, claims, damages, losses, expenses and other associated costs (including, without limitation, fees and charges of attorneys and other professionals and court

costs) asserted against or suffered by any such indemnified party by reason of (i) any breach by the Consultant of the terms of this Agreement (including, without limitation, any failure of the Consultant to timely deliver the Services); (ii) any violation of any laws, ordinances, regulations, orders and decrees that govern the Consultant's performance hereunder, and (iii) any negligent act or omission or willful misconduct on the part of the Consultant or any partner, member, shareholder, officer, employee or agent of the Consultant in connection with the performance of its obligations hereunder. These indemnification obligations shall survive termination of the Agreement.

(d) The rights or remedies provided in and contemplated by this Agreement are cumulative and not exclusive of any other rights or remedies provided by applicable law. In addition to actual damages, the County may recover any incidental or consequential damages suffered as a result of the Consultant's breach.

#### **17. Most Favored Customer**

Upon execution of this Agreement, until the expiration of the term of this Agreement, Consultant agrees to treat the County as its most favored customer in connection with its obligations under this Agreement, including but not limited to the assignment of staff on a priority basis. In accordance with such treatment, Consultant agrees not to re-assign any staff assigned to County projects to other projects until such time as the Consultant's projects are completed to the County's satisfaction.

#### **18. Restrictions on Contracting with the County**

Section 2.05.502.B(3) of the New Castle County Code requires that the provisions of Section 2.03.103.C of the New Castle County Code are provided to all professional service contractors whose contracts are valued at more than Five Hundred Dollars (\$500.00). The provisions of Section 2.03.103.C of the New Castle County Code are reproduced below:

No County official or County employee or his or her spouse, child, parent, step-parent or sibling of the whole or half-blood or any business with which the County official or County employee or his or her spouse, child, parent, step-parent or sibling of the whole or half-blood is associated or who has a legal or equitable ownership of more than five (5) percent (more than one (1) percent in the case of a corporation whose stock is regularly traded on an established securities market) shall enter into any contract with the County (other than an employment contract) or any subcontract with a County contractor unless such contract or subcontract was made or let after public notice and competitive bidding. Such notice and bidding requirements shall not apply to a contract not involving more than five hundred dollars (\$500.00) per year if the terms of such contract reflect arms' length negotiations, if the subcontractor is a sole source provider, or if there are exigent circumstances. There will be a rebuttable presumption of a knowing and willing violation of the section only if the contract or subcontract is awarded to a spouse or child of the County employee or official.

**19. Mutual Drafting**

The parties hereto are sophisticated and have been represented by attorneys throughout the transactions contemplated hereby who have carefully negotiated the provisions hereof. As a consequence, the parties do not intend that the presumptions of laws or rules relating to the interpretation of contracts against the drafter of any particular clause, should be applied to this Agreement or any agreement or instrument executed in connection therewith, and therefore waive their effects.

**20. Headings**

The headings of the various sections contained in this Agreement are intended for convenience of reference only and in no way define, limit or describe the scope or intent of this Agreement or in any way affect the interpretation of this Agreement.

**21. Notices**

Except as otherwise herein provided, any notices under or pursuant to this Agreement shall be in writing and shall be delivered either by personal delivery, by telecopy or electronic mail, by nationally recognized overnight courier or by certified or registered mail, return receipt requested, addressed as follows:

If to the County, to:

**[Name of Project Manager]**  
New Castle County  
187-A Old Churchmans Road  
New Castle, DE 19720

If to the Consultant, to:

To the address listed on the first page of the Consultant's Proposal,

or at such other address as the party affected shall designate, subsequent to the date of this Agreement, by written notice given in the matter herein above set forth. Notices shall be deemed given when sent, if sent by telecopy or electronic mail with delivery confirmed; one day after mailing, if sent by nationally recognized overnight courier; when delivered and receipted for (or upon the date of attempted delivery where delivery is refused), if hand-delivered; or when receipted for (or upon the date of attempted delivery where delivery is refused or a properly addressed and mailed notice is returned as undeliverable or unclaimed), if sent by certified or registered mail.

**22. Severability**

If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable for any reason whatsoever: (a) the validity, legality and enforceability of the remaining provisions of the Agreement (including without limitation, each portion of any Section of this Agreement containing any such provision held to be invalid, illegal or unenforceable, that is not itself invalid, illegal or unenforceable) shall not in any way be affected

or impaired thereby and shall remain enforceable to the fullest extent permitted by law; (b) such provision or provisions shall be deemed reformed to the extent necessary to conform to applicable law and to give the maximum effect to the intent of the parties hereto; and (c) to the fullest extent possible, the provisions of this Agreement (including, without limitation, each portion of any Section of this Agreement containing any such provision held to be invalid, illegal or unenforceable, that is not itself invalid, illegal or unenforceable) shall be construed so as to give effect to the intent manifested thereby.

**23. Entire Agreement; Interpretation**

This Agreement, including the Consultant's Proposal, constitutes the entire agreement between the parties with respect to the subject matter hereof. Any and all prior understandings are merged herewith and superseded hereby. This Agreement may not be changed, waived, modified or amended except by an instrument in writing signed by the party against whom such change, waiver, modification or amendment is sought to be enforced. The Consultant confirms and agrees that no representations of any kind whatsoever have been made to them by the County other than as appear in this Agreement, that they have not relied on any such representations and that no claim that they have so relied may be made at any time or for any purpose. All of the terms of the Consultant's Proposal are incorporated in and form a part of this Agreement; provided, that in the event of any conflict or inconsistency between the terms of this Agreement and the terms of such Consultant's Proposal, then the terms of this Agreement shall govern.

**24. Assignment**

The Consultant shall have no right to assign, convey, subcontract, pledge or otherwise transfer this Agreement, or any interest herein or any right to payment hereunder, or any duty, obligation or claim hereunder, without the prior written approval of the County, which approval may be withheld in the County's absolute discretion.

**25. Independent Contractor**

It is expressly understood and agreed that the Consultant, in performing its obligations under this Agreement, shall be deemed an independent contractor and not an agent or employee of the County. The Consultant has no authority to enter into any contracts or other agreements with any person or entity on behalf of the County or otherwise to bind the County. Furthermore, nothing contained in this Agreement shall be construed to mean that the County and the Consultant are joint ventures, partners or the like.

**26. No Waiver**

The failure of the County to insist upon the strict performance of any provisions of this Agreement, the failure of the County to exercise any right, option or remedy hereby reserved, or the existence of any course of performance hereunder shall not be construed as a waiver of any provision hereof or of any such right, option or remedy or as a waiver for the future of any such provision, right, option or remedy or as a waiver of a subsequent breach thereof. The payment by the County of any amount due hereunder with knowledge of a breach of any provision of this Agreement shall not be deemed a waiver of such breach.

**27. Further Assurances**

Each of the parties hereto agrees to execute such documents, to make such filings with regulatory authorities, and otherwise to provide such cooperation as the County, on the one hand, or the Consultant, on the other hand, may reasonably request in order to consummate the transactions contemplated by this Agreement.

**28. Business Days**

The term “business days” as used in this Agreement shall mean all calendar days excluding Saturdays, Sundays and any public holidays recognized by the County.

**29. GOVERNING LAW; CONSENT TO JURISDICTION**

THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF DELAWARE. THE CONSULTANT HEREBY IRREVOCABLY CONSENTS, FOR ITSELF AND ITS LEGAL REPRESENTATIVES, PARTNERS, MEMBERS, SUCCESSORS AND ASSIGNS, TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF THE STATE OF DELAWARE AND OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FOR ALL PURPOSES IN CONNECTION WITH ANY ACTION OR PROCEEDING WHICH ARISES FROM OR RELATES TO THIS AGREEMENT, AND HEREBY WAIVES ANY RIGHTS IT MAY HAVE TO PERSONAL SERVICE OF SUMMONS, COMPLAINT, OR OTHER PROCESS IN CONNECTION THEREWITH, AND AGREES THAT SERVICE MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO SUCH CONSULTANT AND SENT IN ACCORDANCE WITH THE PROVISIONS OF SECTION 21 HEREOF.

**30. No Waiver of Immunity**

Nothing in this Agreement is intended to waive the sovereign immunity of New Castle County or the immunity granted to New Castle County and its employees in the County and Municipal Tort Claims Act contained in Title 10, Chapter 40 of the Delaware Code.

**IN WITNESS WHEREOF**, the undersigned have caused this Agreement to be executed as of the date first written above.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
[CONSULTANT]

Recommend Approval:

NEW CASTLE COUNTY

\_\_\_\_\_  
Witness

\_\_\_\_\_  
General Manager – Public Works

\_\_\_\_\_  
Witness

\_\_\_\_\_  
County Executive (Seal)

EXHIBIT A

CONSULTANT'S PROPOSAL

[See Attached]