

**[INSERT NAME OF PROJECT]
PROFESSIONAL SERVICES AGREEMENT**

THIS AGREEMENT is entered into by and between the CITY OF NEW BRAUNFELS, TEXAS, hereinafter referred to as “CITY”, and _____, hereinafter referred to as “PROFESSIONAL”, together collectively referred to as “Parties”.

WHEREAS, CITY desires PROFESSIONAL to perform certain work and services set forth in Scope of Services, marked Exhibit “A”, and attached hereto and incorporated herein.

WHEREAS, the PROFESSIONAL has expressed a willingness to perform said work and services, hereinafter referred to only as “services”, specified in said Scope of Services, and enumerated under Article II, of this Agreement.

NOW, THEREFORE, all parties agree as follows:

I. DURATION

This Agreement shall become effective upon the date of the final signature affixed hereto and shall remain in effect through the successful completion of the project as further defined in Exhibit C: Completion Schedule

II. GENERAL

PROFESSIONAL shall furnish and pay for all labor, tools, materials, equipment, supplies, transportation and management necessary to perform all services set forth in Article II hereof for the CITY in accordance with the terms, conditions and provisions of the Scope of Services, marked Exhibit “A”, and attached hereto and incorporated herein for all purposes. CITY may, at any time, stop any services by the PROFESSIONAL upon giving PROFESSIONAL written notice. PROFESSIONAL shall be bound to CITY by the terms, conditions and responsibilities toward the CITY for PROFESSIONAL’S services set forth in this Agreement.

All component parts of the Agreement Documents are intended to be complementary. In order of precedence, the Agreement Documents consist of the following documents (“Agreement Documents”):

- a) All written Change Orders executed after the Effective Date of this Agreement by the CITY Purchasing Agent and Consultant;
- b) This Agreement, along with any Exhibits, as they may later be modified by Amendments;
- c) The Statement of Work executed under this Agreement by the CITY Purchasing Agent and Consultant.
- d) City of New Braunfels Standard Terms and Conditions (found at <https://www.newbraunfels.gov/531/Purchasing>)
- e) The solicitation
- f) Contractor’s proposal

Exclusion from Agreement Documents. No terms and conditions submitted by PROFESSIONAL in connection with any proposal or proposed order will be considered part of the Agreement Documents unless expressly accepted in writing by the CITY Purchasing Agent. If accepted by the CITY, the proposed terms and conditions are limited in effect to the proposal with which they were submitted.

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II. SERVICES

A. The following services, when authorized in writing by a Notice to Proceed, shall be performed by the PROFESSIONAL in accordance with the CITY’S requirements:

[insert project description from the scope of services]

B. PROFESSIONAL shall be responsible for the PROFESSIONAL quality, technical accuracy, and the coordination of all designs, drawings, specifications, plans and other services furnished by PROFESSIONAL under this Agreement. PROFESSIONAL shall, without additional compensation, correct or revise any errors or deficiencies in the design, drawings, specifications, plans and other services.

C. Neither CITY’S review, approval or acceptance of, nor payment for any of the services required under this Agreement, shall be construed to operate as a waiver if any rights under this Agreement or if any cause of action arising out of the performance of this Agreement, and PROFESSIONAL shall be and remain liable to CITY in accordance with applicable law for all damages to CITY caused by PROFESSIONAL’S negligent performance of any of the services furnished under this Agreement.

D. The rights and remedies of CITY under this Agreement are as provided by law.

III. PAYMENT

A. The parties agree that PROFESSIONAL shall be compensated for all services provided pursuant to this Agreement in the amount and manner described and set forth in the Payment Schedule attached hereto and incorporated herein as Exhibit “B”. The contract amount specified shall not exceed \$**XX,XXX**. The contract amount specified in Exhibit “B” shall not be exceeded without written permission of the CITY.

B. CITY shall reimburse PROFESSIONAL for subcontracting expenses limited to actual pre-approved expenses, and expenses shall not be marked up by PROFESSIONAL more than ten percent (10%).

C. CITY shall reimburse PROFESSIONAL for actual, external costs and expenses reasonably incurred by PROFESSIONAL’s employees in performing Services without mark-up by the PROFESSIONAL as detailed in Exhibit B Pricing.

D. Labor Rates. Labor rates shall be based upon bill rates defined by skill level as agreed between CITY and PROFESSIONAL in this Agreement, pursuant to Exhibit B to this Agreement, Labor Rates and subject to revision pursuant to Article III (e). Bill rate ranges for any one skill level are not permissible. PROFESSIONAL shall provide to CITY the components of the labor bill rates, namely salary rate, overhead multiplier and profit multiplier if requested.

E. Revision to Rates for Labor. The initial contracted rate sheet will be in place for the term of this agreement. Any change in scope requiring additional cost will utilize the hourly rate established with this agreement.

IV. TIME FOR PERFORMANCE

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A. PROFESSIONAL agrees to commence work immediately upon execution of this Agreement and to proceed diligently with said work, except for delays beyond the reasonable control of PROFESSIONAL, to completion as described in the Completion Schedule, attached hereto as Exhibit "C", and hereby made a part of this Agreement.

B. In the event PROFESSIONAL'S performance of this Agreement is delayed or interfered with by acts of the CITY or others, PROFESSIONAL may request an extension of time for the performance of same as hereinafter provided but shall not be entitled to any increase in fee or price, or to damages or additional compensation as a consequence of such delays unless such delays exceed 90 days.

C. No allowance of any extension of time, for any cause whatever, shall be claimed or made to the PROFESSIONAL, unless PROFESSIONAL shall have made written request upon CITY for such extension within forty-eight (48) hours after the cause for such extension occurred, and unless CITY and PROFESSIONAL have agreed in writing upon the allowance of additional time to be made.

V. DOCUMENTS

A. All instruments of service (including plans, specifications, drawings, reports, designs, computations, computer files, estimates, surveys, other data or work items, etc.) prepared under this Agreement shall be submitted for approval of the CITY. All instruments of service shall be professionally sealed as may be required by law or by CITY.

B. Such documents of service, together with necessary supporting documents, shall be delivered to CITY, and CITY shall have unlimited rights, for the benefit of CITY, in all instruments of service, including the right to use same on any other work of CITY without additional cost to CITY. In the event CITY uses such instruments of service on any work of CITY other than that specified in the Scope of Services, attached as Exhibit "A", the CITY hereby agrees, to the extent allowed under Texas law, to protect, defend, indemnify and hold harmless the PROFESSIONAL, their officers, agents, servants and employees, from and against suits, actions, claims, losses, liability or damage of any character, and from and against costs and expenses, including, in part, attorney fees incidental to the defense of such suits, actions, claims, losses, damages or liability on account of injury, disease, sickness, including death, to any person or damage to property including, in part, the loss of use resulting therefrom, arising from any inaccuracy, such use of such instruments of service with respect to such other work except where PROFESSIONAL participates in such other work.

C. PROFESSIONAL agrees to and does hereby grant to CITY a royalty-free license to all such instruments of service which PROFESSIONAL may cover by copyright and to all designs as to which PROFESSIONAL may assert any rights or establish any claim under the design patent or copyright laws. PROFESSIONAL, upon request, agrees to furnish the originals of all such instruments including electronic design files of service to the CITY.

D. All text documents supplied to CITY as provided herein shall be in Word 2018 or fully compatible with Word 2017. Unless otherwise requested all design drawings supplied to CITY as provided herein shall be in Adobe PDF and AutoCAD compatible DWG format.

VI. TERMINATION

A. CITY or the PROFESSIONAL may suspend or terminate this Agreement for cause or without cause by giving 30 days written notice to the other party. In the event suspension or termination is

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without cause, payment to the PROFESSIONAL, in accordance with the terms of this Agreement, will be made only for the services CITY determines were properly performed up to the date of suspension or termination of this Agreement. Such payment will be due upon delivery of all instruments of service to CITY.

B. Should the CITY require a modification of this Agreement with PROFESSIONAL, and in the event CITY and PROFESSIONAL fail to agree upon a modification to this Agreement, CITY or the PROFESSIONAL shall have the option of terminating this Agreement. Payment to PROFESSIONAL shall be made by the CITY in accordance with the terms of this Agreement, for the services CITY determines were properly performed by the PROFESSIONAL prior to the date of termination of this Agreement.

VII. INSURANCE

A. PROFESSIONAL shall provide and maintain Workers Compensation with statutory limits.

B. PROFESSIONAL shall provide and maintain in full force and effect for the duration of this Agreement, auto insurance (including, but not limited to, insurance covering the operation of owned and non-owned automobiles, trucks and other vehicles) protecting PROFESSIONAL and CITY as an additional Insured with limits not less than \$1,000,000 for Bodily Injury/Property Damage (Combined Single Limit, Each Incident) and \$5,000 for Personal Injury Protection (PIP).

C. PROFESSIONAL shall provide general Liability Insurance. Such insurance covering personal and bodily injuries or death shall be in the sum of not less than One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) aggregate. Insurance covering damages to property shall be in the sum of not less than Two Hundred Fifty Thousand Dollars (\$250,000.00). The general Liability Insurance must name the CITY as an additional Insured.

D. PROFESSIONAL shall also provide and maintain PROFESSIONAL Liability Errors and Omissions Insurance coverage to protect PROFESSIONAL and CITY from liability arising out of the performance of PROFESSIONAL services, if any, under this Agreement. Such coverage shall be in the sum of not less than Three Hundred Thousand Dollars (\$300,000.00) per occurrence and Five Hundred Thousand Dollars (\$500,000.00) aggregate. Such insurance shall be kept in effect for four years after the completion of the Agreement. If PROFESSIONAL fails to maintain the insurance covered during that time, CITY may pay the premiums to keep the insurance in effect and recover the cost from the PROFESSIONAL.

E. A signed Certificate of Insurance, satisfactory to CITY, showing compliance with the requirements of this Article shall be furnished to CITY before any services are performed. Such Certificate shall provide 30 days written notice to CITY prior to the cancellation or modification of any insurance referred to therein and continue to issue such certificate for four years after completion of the Agreement.

VIII. INDEMNIFICATION FOR INJURY AND PERFORMANCE

A. PROFESSIONAL further specifically obligates itself to CITY in the following respects, to-wit:

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B. The PROFESSIONAL hereby agrees to the extent allowed by law to protect, indemnify and hold harmless the CITY, its officers, agents, servants and employees (hereinafter individually and collectively referred to as "Indemnitees"), from and against suits, actions, claims, losses, liability or damage of any character, and from and against costs and expenses, including, in part, attorney fees incidental to the defense of such suits, actions, claims, losses, damages or liability on account of injury, disease, sickness, including death, to any person or damage to property including, in part, the loss of use resulting therefrom, and any claimed defect in PROFESSIONAL's performance, arising from any negligent act, error, or omission of the PROFESSIONAL, its officers, employees, servants, agents or subcontractors, or anyone else under the PROFESSIONAL'S, direction and control, and arising out of, resulting from, or caused by the negligent performance or failure of performance of any work or services called for by this Agreement, or from conditions created by the negligent performance or non-performance of said work or services. In the event one or more of the Indemnitees is determined by a court of law to be jointly or derivatively negligent or liable for such damage or injury, the PROFESSIONAL shall be obligated to the extent allowed by law to indemnify Indemnitee(s) as provided herein on a proportionate basis in accordance with the final judgment, after all appeals are exhausted, determining such joint or derivative negligence or liability.

C. Acceptance and approval of the final plans by the CITY shall not constitute nor be deemed a release of this responsibility and liability of PROFESSIONAL, its employees, associates, agents and consultants for the accuracy or competency of their designs, working drawings and specifications, or other documents and work; nor shall such approval be deemed to be an assumption of such responsibility by the CITY for any defect in the designs, working drawings and specifications, or other documents prepared by PROFESSIONAL, its employees, contractor, agents and consultants.

D. PROFESSIONAL shall defend and indemnify Indemnitees against and hold CITY harmless from any and all claims, suits or liens based upon or alleged to be based upon the non-payment of labor, tools, materials, equipment, supplies, transportation and management costs incurred by PROFESSIONAL in performing this Agreement.

IX. INDEMNIFICATION FOR UNEMPLOYMENT COMPENSATION

PROFESSIONAL agrees that it is an independent contractor and not an agent of the CITY, and that PROFESSIONAL is subject, as an employer, to all applicable Unemployment Compensation Statutes, so as to relieve CITY of any responsibility or liability from treating PROFESSIONAL'S employees as employees of CITY for the purpose of keeping records, making reports or payments of Unemployment Compensation taxes or contributions. PROFESSIONAL further agrees to indemnify and hold CITY harmless and reimburse it for any expenses or liability incurred under said Statutes in connection with employees of PROFESSIONAL.

X. GENERAL INDEMNITY

A. IF THE PARTIES ARE CONCURRENTLY NEGLIGENT, EACH PARTY'S LIABILITY SHALL BE LIMITED TO THAT PORTION OF NEGLIGENCE ATTRIBUTABLE TO IT AS DETERMINED UNDER THE APPLICABLE PROPORTIONATE RESPONSIBILITY RULES OF THE STATE OF TEXAS.

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B. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, NEITHER PARTY SHALL BE LIABLE TO INDEMNIFY THE OTHER FOR THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE OTHER.

XI. INTELLECTUAL PROPERTY INDEMNITY

A. PROFESSIONAL SHALL, AT ITS OWN EXPENSE, DEFEND ALL SUITS OR PROCEEDINGS INSTITUTED AGAINST CITY, CITY AFFILIATES AND THEIR RESPECTIVE DIRECTORS, OFFICERS, AGENTS, OR EMPLOYEES BASED UPON ANY CLAIM THAT THE SERVICES, OR ANY PART THEREOF, OR THE PROCESS PERFORMED THEREBY CONSTITUTES AN INFRINGEMENT OF EITHER ANY PATENT OR COPYRIGHT OF THE UNITED STATES OR OF ANY TRADEMARK OR TRADE SECRET PROTECTED BY EITHER FEDERAL OR STATE LAW. PROFESSIONAL SHALL PAY ALL AWARDS OF DAMAGES ASSESSED WHICH RESULT FROM ANY SUCH CLAIM, SUIT OR PROCEEDING AND SHALL INDEMNIFY, SAVE, AND HOLD HARMLESS THE CITY AGAINST ALL LOSSES, EXPENSES, INCLUDING ATTORNEYS' FEES, AND DAMAGES RESULTING FROM ANY SUCH CLAIM, SUIT OR PROCEEDING, INCLUDING OBEDIENCE TO RESULTING DECREES AND TO RESULTING COMPROMISES.

B. IF, IN ANY SUCH SUIT OR PROCEEDING, A RESTRAINING ORDER OR TEMPORARY INJUNCTION IS GRANTED, PROFESSIONAL SHALL MAKE EVERY EFFORT, BY GIVING A SATISFACTORY BOND OR OTHERWISE, TO SECURE THE SUSPENSION OF ANY SUCH RESTRAINING ORDER OR TEMPORARY INJUNCTION. IF, IN ANY SUCH SUIT OR PROCEEDING, THE SERVICES OR ANY PART THEREOF OR THE PROCESS PERFORMED THEREBY IS HELD TO CONSTITUTE AN INFRINGEMENT AND ITS USE BE PERMANENTLY ENJOINED, PROFESSIONAL SHALL AT ONCE MAKE EVERY EFFORT TO SECURE FOR CITY A LICENSE AT PROFESSIONAL'S EXPENSE AUTHORIZING THE CONTINUED USE OF THE ALLEGED INFRINGING PORTION OF THE SERVICES. IF PROFESSIONAL IS UNABLE TO SECURE SUCH LICENSE WITHIN A REASONABLE TIME, PROFESSIONAL SHALL, AT ITS OWN EXPENSE AND WITHOUT IMPAIRING PERFORMANCE REQUIREMENTS, EITHER PROVIDE NON-INFRINGING REPLACEMENTS OR MODIFY THE SERVICES TO ELIMINATE THE INFRINGEMENT. IN ADDITION TO INDEMNIFYING AND SAVING CITY HARMLESS, PROFESSIONAL SHALL REIMBURSE CITY FOR ANY COSTS INCURRED AS A RESULT OF THE UNAVAILABILITY OF THE INFRINGING ITEM OR ITS NON-INFRINGING REPLACEMENT.

C. THE FOREGOING INDEMNITY PROVISIONS SHALL BE DEEMED INDEPENDENT COVENANTS AND SHALL SURVIVE COMPLETION OR TERMINATION OF THE AGREEMENT OR ANY CLAIMED BREACH THEREOF.

XII. ASSIGNMENT

PROFESSIONAL shall not assign or sublet this Agreement or any part thereof, without the written consent of City Manager. Sale of more than 50% ownership of PROFESSIONAL shall be construed as an assignment.

XIII. DEFAULT OF PROFESSIONAL

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In the event PROFESSIONAL fails to comply or becomes unable to comply with the provisions of this Agreement, and the failure or inability to comply is not remedied within ten (10) days of City’s sending of written notice of such failure to comply, the CITY may, at its sole discretion and without prejudice to any other right or remedy:

A. Terminate this Agreement and be relieved of the payment of any further consideration to PROFESSIONAL except for work determined by CITY to be satisfactorily completed prior to the termination of this Agreement. Payment for work satisfactorily completed shall be for actual costs, including reasonable salaries and travel expenses of PROFESSIONAL to and from meetings called by CITY at which PROFESSIONAL is required to attend, but shall not include any loss of profit. In the event of such termination, CITY may proceed to complete the services under this Agreement (“services”) in any manner deemed proper by CITY. The PROFESSIONAL shall be liable for all costs in excess of the total contract price under this Agreement that are incurred to complete the services and may be deducted from monies to be paid to PROFESSIONAL for services satisfactorily completed.

B. CITY may, without terminating this Agreement or taking over the services, furnish the necessary materials, equipment, supplies and/or help necessary to remedy the situation, at the expense of the PROFESSIONAL.

XIV. AGREEMENT AMENDMENTS AND ADJUSTMENTS IN SERVICES

This Agreement contains the entire understanding of the parties with respect to the subject matter hereof and there are no oral understandings, statements or stipulations bearing upon the meaning or effect of this Agreement which have not been incorporated herein. This Agreement may only be modified, amended, supplemented or waived as agreed in writing by both parties, except as may be otherwise provided therein.

No claims for extra services, additional services or changes in the services will be made by PROFESSIONAL without a written agreement with CITY prior to the performance of such services, as noted in the paragraph above.

XV. NOTICES AND AUTHORITY

A. The PROFESSIONAL agrees to send all notices required under this Agreement to the City Manager of the City of New Braunfels, or the City Manager’s designee, at 550 Landa Street, New Braunfels, Texas 78130. The PROFESSIONAL understands that only the City Manager or his designee has the authority to represent the CITY or bind the CITY under this Agreement.

B. The CITY agrees to send all notices required under this Agreement to the PROFESSIONAL at:

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TITLE:

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ADDRESS:

XVI. INVOICING

1. Invoices shall be directed to ACCOUNTING@NEWBRAUNFELS.GOV and shall include:
 - a. Purchase order number prominently displayed on each invoice.
 - b. Unique invoice number
 - c. Invoice period
 - d. Invoice or billing date
 - e. Timesheets for services performed on a time and materials basis
 - f. Receipts for all materials used for services performed on a time and materials basis
 - g. Itemization of all deliverables completed and delivered to the CITY
 - h. Records supporting all reimbursable expenses, including without limitation for lodging, meals, mileage, airfare and car rentals
2. Payments may be based on completion of the services, fulfillment of milestones, or delivery of deliverables as agreed in the order. PROFESSIONAL shall invoice CITY once a month for orders in progress that have activity for that month. Final payment by CITY shall not waive any rights and remedies that CITY has and shall not release PROFESSIONAL from any duties and obligations set forth in the Agreement Documents.
3. No invoice shall be considered complete or payable unless all documentation is submitted with invoice supporting reimbursable and CITY approved expenses, such as time sheets, transportation, lodging and meal expenses.
4. Invoices shall be supported by billing information, tie to a specific order and shall detail amount spent/remaining. Direct expenses shall include supporting detail showing the nature and extent of the expenses and shall reference the appropriate deliverable, milestone payment, and order line detail. Labor charges shall detail the name and category of the person providing services and shall show the hours worked by each category/name, the associated rate, and the extended total for the invoice. Supporting documentation shall also be submitted for sub-contractor work invoiced.
5. Payment terms are Net 30 Days.

XVII. TRAVEL PROCEDURES

Qualifying expenses are automobile rental, fuel, lodging, meals, airline tickets, taxi cabs, parking, and mileage. Travel that does not follow the policy outlined herein shall not be payable without prior written consent by the CITY:

1. Travel Per Diem shall equal the U.S. General Services Administration domestic federal per diem rates ("Per Diem") for the applicable primary destination for the year in which travel shall occur, which can be located here: <https://www.gsa.gov/travel/plan-book/per-diem-rates>
 - a. Should the primary destination not be referenced in the Per Diem, the per diem amount shall be
 - b. no greater than \$124.
 - c. Meals shall not exceed a total of \$59 per day.
2. Mileage shall be based on the IRS standard mileage rate (currently located at <https://www.irs.gov/taxPROFESSIONALS/standard-mileage-rates>)
3. Airline tickets shall be booked fourteen (14) days in advance. Only economy class tickets shall be booked.
4. PROFESSIONAL shall use its corporate rate for hotels, when available or book hotels through a discount travel service.
5. Entertainment and alcoholic beverages are not reimbursable.

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XVIII. REVIEW AND ACCEPTANCE

A. Review and acceptance requirements may be specified in an Order. Review and acceptance of all performance, reports or other Deliverables under this Article shall be performed at the place of delivery specified in the individual Order.

B. When PROFESSIONAL can demonstrate that the Services are complete in accordance with the acceptance criteria included in the Order and so notifies CITY, CITY shall review the Services for general compliance with the Agreement. If the CITY determines that Services comply with the Agreement requirements, and PROFESSIONAL has furnished any required Deliverables, then CITY shall notify PROFESSIONAL in writing of CITY's acceptance of the Services ("Acceptance"). If CITY determines the Services to be deficient, CITY shall notify the PROFESSIONAL accordingly. The PROFESSIONAL shall, without delay, correct any deficiency without additional compensation. When the PROFESSIONAL can demonstrate that the deficiency has been corrected, the PROFESSIONAL shall notify CITY for review of said correction. Upon CITY finding that the correction appears to comply with the requirements and no deficiency remains with the Services, CITY shall notify the PROFESSIONAL in writing of acceptance of the Services. Acceptance shall not limit nor diminish PROFESSIONAL's warranties and other obligations under the Agreement.

XIX. REMEDIES

A. PROFESSIONAL shall be liable for any actual damages incurred by CITY arising out of PROFESSIONAL's failure to perform on time.

B. In the event of a breach of contract by PROFESSIONAL, CITY shall have the right to any remedy at law or in equity including the remedies of a temporary and permanent injunction and specific performance. All remedies shall be cumulative. In any action to enforce any portion of this Agreement or related Order the prevailing party shall be entitled to its reasonable attorney's fees and costs as authorized under Texas law. CITY shall have the right to set off any amounts owed it by PROFESSIONAL and deduct those sums from amounts which CITY may owe PROFESSIONAL.

C. Back Charges. CITY may impose back charges against PROFESSIONAL or deduct back charges from moneys owed PROFESSIONAL for performance or re-performance by CITY or third parties of the Services.

XX. FORCE MAJEURE

A. The nonperformance or delayed performance by PROFESSIONAL or CITY of any obligation under the Agreement shall be excused if such nonperformance or delay is caused by an event beyond the control of the affected Party ("Force Majeure"), except to the extent that PROFESSIONAL knew of, or should reasonably have been able to foresee such an event and failed to take measures to avoid the event, or adequately take reasonable measures that would allow PROFESSIONAL to perform despite the occurrence of the event. Items beyond the control of the Parties include, but are not limited to: acts of war, acts of a public enemy, acts of domestic or foreign terrorism, natural disasters, strikes, epidemics or quarantine restrictions, riot, or sabotage and acts of civil or military authority having jurisdiction. Except for extreme weather events including without limitation named or numbered storms or tornados, weather shall not be considered a Force Majeure event unless so stated in an Order.

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B. Upon occurrence of a Force Majeure event, the affected party shall notify the other party, in writing, of the reason for such delay, the estimated amount of the delay and the steps which can be taken to minimize the delay. No Force Majeure event shall exist until such writing is received by the unaffected party. Once a Force Majeure event occurs the date for performance of the Services shall be extended for a period equal to the time lost by reason of the delay, provided PROFESSIONAL or CITY has taken steps to proceed with the performance of the Agreement and has made written notification of such delay and of any Corrective Action taken. PROFESSIONAL shall not be entitled to any increase in compensation by reason of Force Majeure.

C. The following delays shall not be deemed Force Majeure or constitute excusable delays in performance by PROFESSIONAL. The following shall not constitute a reason for extending the date for performance of the Services:

- 1) Delays by subcontractors or by PROFESSIONAL for reasons other than Force Majeure;
- 2) Delays in approval of documentation because of inadequate performance or unrealistic approval schedules;
- 3) Delays caused by PROFESSIONAL's lack of sufficient personnel with the necessary skills; or
- 4) Delays caused by Services in hazardous environments.

XXI. TERMINATION FOR CONVENIENCE

A. CITY shall have the right to terminate this Agreement and any Order placed under it for its convenience at any time. After receipt of the notice of termination, the PROFESSIONAL shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due at that point in the Agreement:

- 1) Stop all ongoing Services;
- 2) Place no further subcontracts or orders for materials or Services;
- 3) Terminate all subcontracts;
- 4) Cancel all Orders, as applicable; and
- 5) Take any action that is necessary to protect and preserve all property related to this Agreement that is in the possession of the PROFESSIONAL.

B. Upon termination for convenience, PROFESSIONAL will comply with instructions in the notice of termination regarding delivery to CITY of all Deliverables in progress and all completed Deliverables.

C. In the event of a termination under paragraph (a) of this Article, CITY shall pay for portions of Services completed and accepted by CITY and materials purchased. CITY shall not be liable in connection with any termination under this Article for indirect, special, incidental, consequential or punitive damages, including without limitation loss of anticipated future Services, anticipated profits, administrative costs or overhead on anticipated Services. Final payment shall be made upon the Parties' agreement of the amount of the final invoice and CITY's Acceptance of the Services.

XXII. TERMINATION FOR CAUSE

A. The occurrence of any one or more of the following events will constitute an event of default:

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- 1) PROFESSIONAL's persistent failure to perform the Services in accordance with the Agreement Documents (including, but not limited to, failure to supply sufficiently skilled workers, suitable materials or equipment, or to adhere to project schedules as adjusted from time to time by the Parties);
- 2) PROFESSIONAL's disregard of applicable laws or regulations;
- 3) PROFESSIONAL's disregard of the authority of the CITY's Agent;
- 4) PROFESSIONAL's violation in any material way of any provisions of this Agreement and the Agreement Documents;
- 5) Failure of PROFESSIONAL to pay subcontractors and/or material suppliers;
- 6) PROFESSIONAL's violation of CITY's ethics policy or the Ethics Requirements contained herein; or
- 7) CITY designates a Key Person, and that Key Person is no longer employed by PROFESSIONAL.

B. If one or more of the events identified in paragraph (a) occur, the CITY may, at its sole discretion, choose to either terminate this Agreement at the time of CITY's choosing upon written notification to the PROFESSIONAL, or provide a Corrective Action Request to PROFESSIONAL.

C. If PROFESSIONAL fails to initiate such Corrective Action or submit an acceptable plan within the aforementioned timeframe, or fails to follow through on completion of the plan, CITY may take any or all of the following actions without affecting the contracted price or schedule:

- 1) CITY personnel may direct PROFESSIONAL to cease performance on all or part of the Agreement until satisfactory Corrective Action has been taken;
- 2) CITY may have others take Corrective Action necessary to achieve compliance with the Agreement. CITY may deduct the cost of such Corrective Action by others from any moneys due to PROFESSIONAL. Corrective Action by others shall be taken when, in the judgment of CITY, the noncompliance threatens safety, unreasonably interferes with or delays the work of others, or otherwise creates a situation the resolution of which cannot be delayed without adversely impacting quality, cost or timely completion;
- 3) CITY may seek any of the Remedies set forth further in this Agreement; and/or
- 4) CITY may Terminate for Cause as provided herein.

D. If this Agreement has been so terminated by CITY, the termination will not affect any rights or remedies of CITY against PROFESSIONAL or any surety then-existing or which may thereafter accrue. No retention or payment of moneys due PROFESSIONAL by CITY will release PROFESSIONAL from liability.

E. If it is ever determined that CITY wrongfully terminated PROFESSIONAL for Cause, the termination shall be converted to a termination for convenience.

XXIII. SUSPENSION

A. CITY may, at any time and at its sole option, suspend all or any portions of the PROFESSIONAL's performance under this Agreement by providing ten (10) calendar days written notice to the PROFESSIONAL. Upon receipt of any such notice, PROFESSIONAL shall:

- 1) Immediately discontinue performance under this Agreement on the date and to the extent specified in the notice;

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- 2) Place no further orders with subcontractors or PROFESSIONAL with respect to the suspended portion of the performance, other than to the extent necessary to protect any portion of the performance already completed;
- 3) Promptly make every reasonable effort to obtain suspension, upon terms satisfactory to CITY, of all orders, subcontracts and rental agreements to the extent that they relate to performance suspended by the notice;
- 4) Continue to protect and maintain the portion of the performance already completed, unless otherwise specifically stated in the notice; and
- 5) Continue to perform PROFESSIONAL's obligations for the portions of the Agreement not suspended.

B. CITY shall reimburse PROFESSIONAL for the cost of maintaining and protecting any portion of PROFESSIONAL's performance that has not been delivered to CITY, subject to approval by CITY.

C. Upon receipt of notice to restart the suspended portion of the performance, PROFESSIONAL shall immediately resume the suspended performance to the extent required in the notice. Within fourteen (14) calendar days after receipt of notice to restart the performance, the PROFESSIONAL shall submit a revised schedule for approval by CITY. If, as a result of any suspension, the cost to PROFESSIONAL of subsequent performance or the time required to do so is changed, a claim for an adjustment in the contracted price may be made. Any claim on the part of PROFESSIONAL for change in price or extension of time shall be made in accordance with this Agreement.

D. If amounts set forth in (b) above cannot be negotiated then CITY may terminate this Agreement with no further liability to PROFESSIONAL.

XXIV. DISPUTE RESOLUTION

Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach hereof, must be referred to upper management of the parties for good faith discussion and resolution prior to invoking any other dispute resolution method authorized under this Agreement. Pending resolution of any such dispute, PROFESSIONAL must continue to perform its obligations under this Agreement and CITY must continue to make payment to PROFESSIONAL for any undisputed items. The Parties agree that in the event of a dispute concerning the performance or non-performance of any obligations flowing from or as a result of this Agreement and prior to the initiation of any litigation, the Parties will voluntarily submit the dispute to mediation before a mediator selected by the Parties as though it were referred through the operation of the Texas Alternative Dispute Resolution Procedures Act, Title 7, Chapter 154, Texas Civil Practices & Remedies Code. No record, evidence, statement or declaration resulting from or in connection with such alternate dispute resolution procedure may be used in evidence in subsequent litigation except to demonstrate that this Article has been complied with in good faith by a Party. PROFESSIONAL shall proceed diligently with performance of the Agreement, pending final resolution of any request for relief, claim, appeal, or action arising under the Agreement. During a dispute, CITY has right to use any deliverables, work product, material or equipment provided by PROFESSIONAL under this Agreement until the dispute is settled through a predefined court process.

XXV. GOVERNING LAW

- A. This Agreement shall be governed, interpreted and enforced under the laws of the State

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of Texas, without regard to its conflict of law principles. In the event of litigation between the Parties arising out of or related to this Agreement, venue for such litigation shall be in a court of competent jurisdiction in Comal County, Texas.

B. PROFESSIONAL shall be aware of and shall comply with all federal, state and local laws, ordinances, codes (including applicable PROFESSIONAL codes) and regulations applicable to performance of this Agreement, including standards and codes of technical societies that have been adopted by law or regulation or compliance with which is required in the Agreement Documents. If any of the work fails to comply with such laws, ordinances, codes and regulations, PROFESSIONAL shall bear any expense arising from that failure, including the costs to bring the work into compliance.

C. Without limiting the generality of the foregoing, during the performance of the Agreement, PROFESSIONAL agrees to comply with all applicable regulations of Executive Order No. 11246 of September 24, 1965, and the rules, regulations and relevant orders of the Secretary of Labor as they may apply to Equal Employment Opportunity. PROFESSIONAL will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor pursuant thereto, and will permit access to its books, records and accounts by the cognizant agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

XXVI. INDEPENDENT CONTRACTOR

A. PROFESSIONAL shall perform in all respects under this Agreement as an independent contractor and not as an employee, partner, joint venturer or agent of the CITY. PROFESSIONAL's performance shall be subject to the CITY's review, approval and acceptance as provided in the Agreement Documents, but the detailed manner and method of performance shall be under the control of PROFESSIONAL. However, because PROFESSIONAL's performance may be associated in the minds of the public with CITY, PROFESSIONAL shall ensure that all work by its employees, subcontractors and agents are performed in an orderly, responsible and courteous manner. **PROFESSIONAL AGREES TO INDEMNIFY AND HOLD HARMLESS CITY FROM ANY DAMAGE, JUDGMENT, LOSS, FINE, PENALTY OR INTEREST AWARDED TO PROFESSIONAL PERSONNEL OR ANY TAXING AUTHORITY BASED UPON A CLAIM THAT PROFESSIONAL PERSONNEL ARE EMPLOYEES OF CITY.**

B. Upon prior notification to and written approval of CITY, PROFESSIONAL may hire subcontractors to perform work hereunder. PROFESSIONAL shall be responsible to CITY for the performance of all such subcontractors. The CITY reserves the right, in its sole discretion, to reject the employment by PROFESSIONAL of any subcontractor to which CITY has an objection. PROFESSIONAL, however, shall not be required to contract with any subcontractor to which it has an objection. CITY shall require any and all such subcontractors to sign contracts with PROFESSIONAL that bind the subcontractors to perform their subcontracts in accordance with the applicable requirements of the Agreement Documents. Upon the request of CITY, PROFESSIONAL shall furnish CITY with copies of such subcontracts. In addition, PROFESSIONAL agrees that it is PROFESSIONAL's responsibility to ensure that such subcontractors make all appropriate tax payments or tax withholding in relation to subcontractor's employees providing work to CITY through PROFESSIONAL under this Agreement. PROFESSIONAL represents that it and its subcontractors have skills necessary to perform the work contemplated in this Agreement and any related Orders and are fully trained to perform the tasks required by this Agreement and that they need no training by the CITY.

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XXVII. ON-SITE ACTIVITIES

A. This Article shall only apply if PROFESSIONAL has any personnel performing Ancillary Services at a CITY Site, under this Agreement.

B. PROFESSIONAL shall have an authorized representative at the Site to whom CITY SME or representative may give instructions at all times when Ancillary Services are being performed. The authorized representative of PROFESSIONAL shall be identified to CITY in writing.

C. PROFESSIONAL shall have competent supervision at the Site at all times to direct and observe the Ancillary Services to be performed. PROFESSIONAL will investigate and take appropriate action with respect to any personnel problems brought to its attention by CITY's Agent.

D. PROFESSIONAL shall confine all of its operations and personnel to those areas of the Site to which CITY authorizes access.

E. PROFESSIONAL's personnel may not operate CITY's tools, vehicles, materials or equipment (collectively "CITY Equipment") without CITY Agent's prior authorization. If PROFESSIONAL borrows CITY Equipment, it is conclusively presumed PROFESSIONAL agrees to the following terms and conditions, regardless as to whether such authorization is granted by CITY:

- 1) The CITY Equipment is provided AS IS, with no representations or warranties;
- 2) PROFESSIONAL assumes full responsibility for the protection of the CITY Equipment;
- 3) PROFESSIONAL agrees to return the CITY Equipment to CITY in the same condition as when it was borrowed, or, if repairs are necessary, to cause such repairs to be performed promptly at PROFESSIONAL's sole expense before the CITY Equipment is returned to CITY. CITY may deduct or offset any costs associated with repairing any damage to the CITY Equipment from any payment owed to the PROFESSIONAL hereunder;
- 4) PROFESSIONAL releases and discharges CITY, its directors, officers, and employees from all liability for any loss or damage arising from, related to, or resulting from any use of the CITY Equipment by any individuals, other than CITY employees; and
- 5) PROFESSIONAL agrees to defend, indemnify and hold harmless CITY, its directors, officers, and employees from and against any and all claims, demands, suits, causes of action, proceedings, judgments, damages, costs, expenses, and liabilities (including reasonable attorneys fees and costs) arising out, related to, or resulting from any use of the CITY Equipment by any individuals, other than CITY employees.

CONTRACTOR SHALL PROVIDE ALL TOOLS AND EQUIPMENT ASSOCIATED WITH WORKER SAFETY AND HEALTH, NEEDED TO PERFORM THE WORK, INCLUDING WITHOUT LIMITATION AIR MONITORING EQUIPMENT, CONFINED SPACE EQUIPMENT, PERSONAL PROTECTIVE EQUIPMENT, WARNINGS, BARRICADES AND LOCK OUT/TAG OUT EQUIPMENT. PROFESSIONAL shall cooperate with CITY and others working at or near the Site. CITY has no obligation to lend CITY Equipment to PROFESSIONAL and may decline to do so at any time in its sole discretion.

F. PROFESSIONAL shall promptly report to CITY's Agent any defects in the work of others which impacts on PROFESSIONAL's Ancillary Services or the performance of its obligations hereunder. Failure to report such defects constitutes acceptance of the conditions by PROFESSIONAL.

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G. PROFESSIONAL shall keep all of its work areas free from trash and debris and keep its work areas “broom clean” on a continuous basis.

H. PROFESSIONAL shall secure and protect its own materials, tools, equipment and Ancillary Services, including any CITY Equipment, whether provided by CITY under this Agreement or borrowed from CITY.

XXVIII. RIGHT TO AUDIT

CITY shall have the right to audit all books and records (including the supporting or underlying documents and materials), in whatever form they may be kept, whether written, electronic or other, relating or pertaining to this Agreement (Collectively “Records”), kept by or subject to the control of the PROFESSIONAL, including, but not limited to those kept by the PROFESSIONAL, its employees, agents, assigns, successors and subcontractors. The PROFESSIONAL shall maintain, and shall require its subcontractors to maintain, such books and records, together with such supporting or underlying documents and materials, for the duration of this Agreement and for at least two (2) years following the completion of the last Order completed under this Agreement, including any and all extensions thereof. The books and records, together with the supporting or underlying documents and materials shall be made available, upon request, to CITY during normal business hours at the PROFESSIONAL’s office or place of business. In the event that no such location is available, then the books and records, together with the supporting or underlying documents and records, shall be made available for audit at a time and location which is convenient for CITY. This right to audit applies to all books, records and supporting documents and materials regardless of the format in which those items are maintained. In the event that the PROFESSIONAL fails the audit, CITY shall be compensated by PROFESSIONAL as appropriate and as demonstrated by the audit findings. Specifically, in the case that the audit finds that PROFESSIONAL over-charged CITY, PROFESSIONAL shall compensate CITY by the amount of the overcharge plus a late charge of 1% per month beginning with the month in which the overcharge occurred to the month in which the overcharge is compensated by the PROFESSIONAL.

XXIX. FINANCIAL OBLIGATIONS

A. PROFESSIONAL hereby certifies that it has the financial ability to perform this Agreement and all the Orders executed hereunder to final completion and that it shall notify CITY if it appears that: PROFESSIONAL ceases to have the financial ability to perform this Agreement or any Order hereunder, if the PROFESSIONAL’s liabilities exceed its assets, or if it is generally unable to pay its debts. Upon notice thereof, CITY reserves the right to require a letter or credit or other financial guarantee acceptable to CITY.

B. PROFESSIONAL shall, at its own expense, prepare and submit for review annually by CITY audited financial statements. Such statements shall be submitted to CITY no later than May 1 of each year. If CITY, in its sole judgment, concludes that PROFESSIONAL’s financial statements indicate that PROFESSIONAL poses an unwarranted risk to CITY, then CITY may terminate this Agreement for its own convenience.

XXX. BANKRUPTCY

Subject to the rights of any trustee in bankruptcy and to applicable law, in the event that either Party becomes or is declared insolvent or bankrupt, is the subject of any proceedings related to its liquidation, insolvency or for the appointment of a receiver or similar officer, makes an assignment for the benefit of all or substantially all of its creditors, or enters into an agreement for the composition, extension, or readjustment of all or

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substantially all of its obligations, such Party agrees to furnish notification to the other within five working days by registered mail. Then the other Party may, by giving written notice thereof to the other Party, terminate this Agreement as of a date specified in such notice of termination.

XXXI. PUBLICITY

PROFESSIONAL shall not directly or indirectly publish, approve or issue any advertising, sales promotion, press release or public statement relating to this Agreement or any other work performed by PROFESSIONAL for CITY wherein CITY's name, trade name, trademark and/or logo is expressly mentioned or language is used from which CITY's identity may, in CITY's responsible judgment, be inferred or implied (a "Prohibited Publication"), without the prior written approval of the CITY Purchasing Agent, which approval may be withheld in CITY's absolute discretion.

XXXII. AGREEMENT NON-EXCLUSIVE

The Agreement is not exclusive. CITY has the right to hire others to provide the same or similar work.

XXXIII. SEVERABILITY

If any term or provision of this Agreement is held illegal or unenforceable by a court of competent jurisdiction, all other terms in this Agreement will remain in full force and effect and the illegal or unenforceable provision shall be deemed stricken. In the event the stricken provision materially affects the rights, obligations or duties of either party, CITY and PROFESSIONAL shall substitute a provision by mutual agreement that preserves the original intent of the parties as closely as possible under applicable law.

XXXIV. INTERPRETATION AND RELIANCE

While this Agreement was initiated by CITY, PROFESSIONAL had the opportunity to take exception to and seek clarification of it. Thus, this Agreement is the product of negotiations between the Parties. No presumption will apply in favor of any Party in the interpretation of this Agreement or in resolution of any ambiguity of any provision.

XXXV. SURVIVAL

Termination or expiration of this Agreement shall not relieve, reduce, or impair any rights or obligations of a party which expressly or by implication survive termination or expiration of this Agreement. Without limiting the generality of the foregoing, the following Articles shall survive the termination or expiration of this Agreement: General, Services, Documents, Termination, Insurance, Indemnification for Injury and Performance, Indemnification for Unemployment Compensation, General Indemnity, Intellectual Property Indemnity, Default of Professional, Notices & Authority, Invoicing, Remedies, Termination for Convenience, Termination for Cause, Dispute Resolution, Governing Law, Independent Contractor, Right to Audit, Publicity, Agreement Non-Exclusive and Severability.

XXXVI. BUSINESS REVIEWS

CITY and PROFESSIONAL shall conduct business reviews at least annually. PROFESSIONAL shall attend business reviews at PROFESSIONAL's own expense. These business reviews may be held formally or informally at the discretion of CITY. As part of the business review process, the

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PROFESSIONAL shall be evaluated on ability to perform, quality, service, value, and innovation. PROFESSIONAL shall be required to submit updated qualifications to the CITY Agent upon request.

As part of the Business Review process, PROFESSIONAL shall provide to CITY proposals for cost reduction opportunities on open Orders or opportunities available overall.

XXXVII. MISCELLANEOUS

The PROFESSIONAL shall prepare and execute in any form and detail as CITY shall direct all estimates, certificates, reports, and other documents required to be executed by the PROFESSIONAL pursuant to any Order or this Agreement, including, without limitations, a monthly report of progress on the form of schedule referred to within this Agreement or any subsequent Order showing the percentage of completion of each of the Deliverables thereof. Reporting for Time and Materials based Orders shall include costs incurred and matched to its respective SOW Deliverable. Reporting shall also include this cost incurred against the forecasted total cost and indicate any potential schedule or cost impacts. Reporting shall include spend to date. Any representations or recommendations on the part of the PROFESSIONAL made subject to this Article shall not constitute a change to the Order.

(Signatures on Following Page)

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IN WITNESS WHEREOF, the parties to these presents have executed this Agreement in the year and day first above written.

OWNER
THE CITY OF NEW BRAUNFELS

PROFESSIONAL
XX

BY: _____
Robert Camareno

BY: _____
name

TITLE: CITY MANAGER

TITLE: title

DATE: _____

DATE: _____

ADDRESS:
550 Landa Street
New Braunfels, TX 78130

ADDRESS:
XX
XX

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**EXHIBIT A
SCOPE OF SERVICES**

**[INSERT NAME OF PROJECT]
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**EXHIBIT B
PAYMENT SCHEDULE**

**[INSERT NAME OF PROJECT]
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**EXHIBIT C
COMPLETION SCHEDULE**