CONTRACT
for a
PROMOTIONAL ASSESSMENT PROCESS
for the
CITY OF DURHAM POLICE DEPARTMENT
Ranks of Corporal, Sergeant, and Lieutenant

This Contract ("Agreement") is made and entered into on this 4th day of January, 2013, by the **City of Durham ("City") and [Morris & McDaniel, Inc. ("Contractor")**, a corporation organized and existing under the laws of the State of Mississippi, Office of the Secretary of State, and headquartered and authorized to do business in the State of Virginia.

Sec. 1. Background and Purpose. The City of Durham desires to hire a Consultant to provide services, as an independent Contractor, for the purpose of conducting an assessment process that shall determine promotions within the Durham Police Department for the ranks of Corporal, Sergeant and Lieutenant.

Sec. 2. Services and Scope to be Performed; Presumption that Duty is Contractor's. The Contractor shall perform the Work described in the successful Contractor's Proposal for Police Promotional Assessment Services ("RFP"), to include Section 5.01, titled, "Scope of Work", and Section 5.02, titled, "Deliverables," including all Subsections therein, at Attachment A. Unless mutually agreed upon by the parties, the Work shall be performed and provided in accordance with the schedule set forth in the successful Contractor's Proposal, Section 5.03, titled, "Work Schedule," at Attachment B.

The Contractor shall not publish or disclose to third parties, in any way whatsoever, any information, results, conclusions, studies or other data of any kind arising directly or indirectly from the Contractor's performance under this Agreement, without prior review by the City of the final proposed publication or disclosure draft; and shall not, without written permission from the City, publish or disclose such draft or portion thereof. The City shall not be obligated to give such permission.

It is conceivable that all or part of the information, results, conclusions, studies or other data arising out of the performance of this Agreement by the Contractor could be utilized by the City in litigation. If expert Contractor's expert testimony is requested by the City in those actions where there is no legal issue between the City and Contractor regarding the quality of services the Contractor provided, the Contractor shall provide such testimony. Payment for such expert testimony shall not be covered by this Agreement, but shall be subject to subsequent appropriation of necessary funds by the City. Price for such expert testimony, listed in the Contractor's proposal, does not bind either party to honor that price, which shall be subject to negotiation between the parties. Payment for such expert testimony and associated services shall be made at the conclusion of the services rendered. In actions where

there is a material dispute between the City and the Contractor regarding the quality of services provided to the City by the Contractor, there shall be no Contractor fee paid for appearances, testifying before grievance boards or other administrative tribunals, or providing written documentation.

As used in this Agreement, the term, "Work," means the services that the Contractor is required to perform pursuant to this Agreement, and all of the Contractor's duties to the City that arise out of this Agreement. Unless the context requires otherwise, if this Agreement requires a task is to be performed or that a duty is owed, it shall be presumed that the task or duty is the obligation of the Contractor.

Sec. 3. Term of Agreement. The term of this Agreement shall commence upon the date on which this Agreement was made, executed, and entered into; and shall terminate at the end of ten (10) months therefrom, unless extended by either party or otherwise terminated pursuant to the terms of this Agreement. Both parties agree that in the performance of the terms, conditions, and requirements of this Agreement by the Contractor, time is of the essence.

Sec. 4. Complete Work without Extra Cost. Except to the extent otherwise specifically stated in this Agreement, the Contractor shall obtain and provide, without additional cost to the City, all labor, materials, equipment, transportation, facilities, services, permits, and licenses necessary to perform the Work.

Sec. 5. Contractor's Billings to City; Compensation. The City shall pay the Contractor the sum of **$107,095.00** for all Work pursuant to this Agreement as follow:

$35,698.33 on the date when this Agreement is fully executed by both parties to it;

$35,698.34 upon the City's review and approval of written examination (test) and promotional assessment activities; and

$35,698.33 upon final receipt of all Contractor's Work product to the City.

Prior to the City's paying the amounts described immediately above, the Contractor shall send an invoice to the City for each amount to be paid pursuant to this Agreement. Each invoice shall document and describe to the reasonable satisfaction of the City the Work being invoiced. Within twenty (20) days after the City receives such invoice, the City shall send the Contractor a check in payment for all undisputed amounts contained in the invoice.

The City shall not be obligated to pay the Contractor any payments, fees, expenses, or compensation other than those authorized by this Section.

Sec.6 Subcontractors. The City and the Contractor agree that no

Subvendor/subcontractor of any kind will perform any Work pursuant to this Agreement.

Sec. 7. Insurance. Contractor shall maintain insurance of not less than the following:

Commercial General Liability, covering:

- Premises/operations
- Products/completed operations (two years minimum, from date of project completion)
- Broad form property damage
- Contractual liability
- The City of Durham must be named an additional insured, **and an original of the endorsement to effect the coverage must be attached to the Certificate of Insurance If by blanket endorsement, then agent may so indicate in the General Liability Section of the Certificate of Insurance, in lieu of an original endorsement.**
- Combined single limit of not less than $2,000,000 per occurrence, with an annual aggregate of not less than $4,000,000.

Commercial Auto Liability, covering:

- Symbol 1, all vehicles
- Combined single limit of $2,000,000
- The City of Durham must be named an additional insured

Professional Liability, covering:

- Claims arising out of professional advisement or consultation services performed pursuant to this Agreement
- Self-insured retentions/deductibles in excess of $25,000 must be approved by the City of Durham Finance Director
- Combined single limit not less than $1,000,000 per occurrence; if coverage is only available on claims made basis, then additional coverage requirements might apply, subject to review of the City Finance Director

Workers' Compensation Insurance, covering:

- Statutory benefits
- Covering employees; covering owners, partners, officers, and relatives (who work under this Agreement; this must be stated on the Certificate of Insurance)
- Employers' liability, $1,000,000
- Waiver of subrogation in favor of the City of Durham

Insurance shall be provided by:

- Companies authorized to do business in the State of North Carolina
- Companies with Best rating of A-, VII, or better.

Insurance shall be evidenced by a certificate:

- Providing notice to the City of not less than 30 days prior to cancellation or reduction of coverage
- Certificates of Insurance shall be addressed to:
  City of Durham
  Police Department
  505 West Chapel Hill Street
  Durham, North Carolina 27703
  Attention: Eileen W. Bensen, Police Personnel Manager
- The Certificate of Insurance and the additional insured endorsement must be originals, and must be approved by the City's Finance Director before Contractor can begin any Work under this Contract.

Sec. 8. Performance of Work by City. If the Contractor fails to perform the Work according to the schedule agreed upon the parties, and set forth at Attachment C, which is incorporated with this Agreement by reference to the Attachment C, the City may, in its sole discretion, in order to bring the project closer to the schedule, perform or cause to be performed some or all of the Work; and doing so shall not waive any of the City's rights and remedies. Before doing so, the City shall give the Contractor notice of its intention. The Contractor shall reimburse the City for additional costs incurred by the City in exercising its right to perform or cause to be performed some or all of the Work pursuant to this Section.

Sec. 9. Attachments. By reference to them, the following attachments are incorporated with this Agreement:

Attachment A, Request for Proposals, containing 72 pages.
Attachment B, Vendor Proposal, containing 98 pages, plus sample final report, at Attachment A of Contractor's Proposal.
Attachment C, Project Schedule

In case of conflict between an Attachment and the text of this Agreement, excluding the Attachment, the text of this Agreement shall control.

Sec. 10. Notice.

(a) All notices and other communications required or permitted by this Agreement shall be in writing; and shall be given either by personal delivery, e-mail, Federal Express, or certified United States mail, return receipt requested, addressed as follow:

To the City:
Eileen Wilson Bensen
Employee Services Manager
Durham Police Department
505 West Chapel Hill Street
Durham, NC 27701
Telephone number: 919-560-4402 x29155
E-mail: eileen.bensen@durhamnc.gov

To the Contractor:
Joe Nassar
Morris & McDaniel, Inc.
117 South St. Asaph Street
Alexandria, Virginia 22314
Telephone number: 703-830-3600
E-mail: joe@morrisandmcdaniel.com

(b) Change of Address. Date Notice Deemed Given. A change of address, telephone number, e-mail address or person authorized to receive notice may be made by either party by written and signed notice given to the other party. Any notice or other communication under this Agreement shall be deemed given at the time of actual delivery, if it is personally delivered or sent by e-mail. If the notice or other communication is sent by Federal Express or United States Postal Service mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the carrier, or upon actual delivery, whichever first occurs.

Sec. 11. Indemnification.

(a) To the maximum extent allowed by applicable law, the Contractor shall defend, indemnify, and save harmless Indemnitees from and against all charges that arise in any manner from, in connection with, a judgment against Indemnitees, based in whole or in part, upon the design and administration of the promotion assessment work to be performed pursuant to this Agreement by the Contractor and its officers, officials, employees, independent contractors, agents, and representatives.

(b) **Definitions.** As used in Subsection 11(a) above, **"Charges"** means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, expenses, and interest and reasonable attorneys' fees assessed as part of any such item. **"Indemnitees"** means the City of Durham, North Carolina and its officers, officials, independent contractors, agents, and employees, excluding the Contractor.

(c) **Other Provisions Separate.** Nothing in this Section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this Agreement. This Section is in addition to, and shall be construed separately from, any other indemnification provisions that might be part of this Agreement.

(d) **Survival.** This Section 11 shall remain in force despite termination of this

Agreement (whether by expiration of the term or otherwise) and/or termination of the services of the Contractor under this Agreement.

Sec. 12. Miscellaneous

a) **Choice of Law and Forum; Service of Process.** (i) This Agreement shall be deemed made in the City of Durham, Durham County, North Carolina. This Agreement shall be governed by and construed in accordance with the laws of North Carolina. The exclusive forum and venue for all actions arising out of this Agreement shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to United States Federal District Court. This Subsection 12(a) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this Subsection 12(a). (ii) If the Contractor is not a natural person (for instance, the Contractor is a corporation or limited liability company), this Subsection 12(a) (ii) applies. **"Agent for Service of Process"** means every person now or hereafter appointed by the Contractor to be served or to accept service of process in any State of the United States. Without excluding any other method of service authorized by law, the Contractor agrees that every Agent for Service of Process is designated as its non-exclusive agent for service of process, summons, and complaint. The Contractor shall instruct each Agent for Service of Process that after such Agent receives the process, subpoena, summons, or complaint, such Agent shall promptly send it to the Contractor. This Subsection 12(a)(ii) does not apply while the Contractor maintains a registered agent in North Carolina with the office of the North Carolina Secretary of State, and such registered agent can be found with due diligence at the registered office.

(b) **Waiver.** No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this Agreement, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

(c) **Performance of Government Functions.** Nothing contained in this Agreement shall be deemed or construed so as in any way to stop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

(d) **Severability.** If any provision of this Agreement shall be unenforceable, the remainder of this Agreement shall be enforceable to the extent permitted by law.

(e) **Assignment; Successors and Assigns.** Without the City's written consent, the Contractor shall not assign (which includes delegating) any of its rights (including the right to payment) or duties that arise out of this Agreement. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Contractor and all assignees shall be subject to all of the City's defenses, and shall be liable for all of the Contractor's duties that arise out of this Agreement, and all of the City's claims that arise out of this Agreement. Without granting the Contractor the right to assign, it is agreed that the duties of the Contractor that arise out of this Agreement shall be binding upon the Contractor and its heirs, personal representatives, successors, and assigns.

(f) **Compliance with Law.** In performing all of the Work, the Contractor shall comply with all applicable law.

(g) **Notice of City Policy. The City of Durham, North Carolina opposes discrimination on the basis of race, gender, disability, national origin, color, religion, age, political affiliation**

or belief, and urges all of its Contractors to provide a fair opportunity for minorities and women to participate in their workforces, and as Subcontractors under Agreements entered into by the City of Durham, North Carolina and its Contractors.

(h) **EEO Provisions.** During the performance of the Work under this Agreement, the Contractor agrees as follows: (1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, gender, national origin, political affiliation or belief, age, or disability. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated, equally during employment, without regard to race, color, religion, gender, national origin, political affiliation or belief, age, or disability. Such affirmative action shall include, but not be limited to, the following: employment, upgrading/promotion, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (2) The Contractor shall in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants shall receive consideration for employment without regard to race, color, religion, gender, national origin, political affiliation or belief, age, or disability. (3) The Contractor shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. (4) In the event of the Contractor's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this Agreement, in whole or in part; and the City may declare the Contractor ineligible for future City Contracts. (5) Unless exempted by the City Council of the City of Durham, the Contractor shall include these EEO provisions in every purchase order for goods to be used in performing Work pursuant to this Agreement

(i) **Small Disadvantaged Business Enterprises ["SDBE"].** The Contractor shall comply with all applicable provisions of Article III, Chapter 18 of the Durham City Code (Equal Business Opportunities Ordinance), as amended from time to time. The failure of the Contractor to comply with that Article shall be a material breach of this Agreement, which may result in the rescission or termination of this Agreement and/or other appropriate remedies in accordance with the provisions of that Article III, Sec. 18, this Agreement, and State law. The Participation Plan submitted pursuant to that Article III is binding on the Contractor. Article III, Section 18-59(f) provides, in part, "If the City Manager determines that the Contractor has failed to comply with the provisions of the Contract, the City Manager shall notify the Contractor in writing of the deficiencies. The Contractor shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed by the parties to this Agreement that those two quoted sentences apply only to the Contractor's alleged violations of or deficiencies regarding its obligations under Article III of Chapter 18 of the Durham City Code, and not to the Contractor's alleged violations of other obligations.

(j) **No Third Party Rights Created.** This Agreement is intended for the benefit of the City and the Contractor, and not for the benefit of any other person or business entity.

(k) **Principles of Interpretation and Definitions.** (1) The singular includes the plural, and the plural the singular. The pronouns, "it" and "its," include the masculine and feminine. References to statutes or regulations include all statutory and regulatory provisions consolidating, amending, or replacing the statute or regulation. References to "Contract" and

"Agreement" shall be deemed to include all amendments to them. The words, "include," "including," etc., mean include, including, etc. without limitation. (2) References to a "Section" or "Sections" shall mean a Section of this Agreement, unless otherwise specifically noted. (3) "Contract" and "Agreement," whether or not capitalized, refer to this instrument. (4) "Duties" includes obligations. (5) The word, "person," includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (6) The word, "shall," is mandatory. (7) The word, "day," means calendar day. (8) The word, "Work" is defined in Section 2 ¶5 of this Agreement, supra. (9) A definition in this Agreement shall not apply to the extent that the context requires otherwise.

(l) **Modifications. Entire Agreement.** A modification of this Agreement is not valid unless signed by both parties to it, and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless it is signed by the City Manager, a deputy or assistant City Manager, or, in limited circumstances, a City Department Director. This Agreement contains the entire agreement between the parties with regard to the subject matter of this Agreement. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referred to in this Agreement and its incorporated Attachments.

(m) **City's Manager's Authority.** To the extent, that the City has the power to suspend or terminate this Agreement, or the Contractor's services under this Agreement, that power may be exercised by City Manager or a deputy or assistant City Manager without City Council action.

Sec. 13. Termination for Convenience ("TFC").

(a) **Procedure.** Without limiting any party's right to terminate for breach, the parties agree that the City may, without cause, and in its sole discretion, terminate this Agreement for convenience by giving the Contractor written notice that refers to this Section 13. TFC shall be effective on the date and at the time indicated in the notice.

(b) **Obligations.** Upon TFC, all obligations that are still executory on both sides shall be discharged, except that any right based on prior breach or performance survives, and the indemnification provisions shall remain in force. At the time of TFC or as soon thereafter as is practical, the Contractor shall give the City all work product, including partly completed work product

(c) **Payment.** Within 20 days after TFC notice has been effected, the City shall pay the Contractor for all Work performed except to the extent previously paid for. Work shall be paid for in accordance with the method (unit prices, hourly fees, etc.) to be used for payment had the Work been completed, except to the extent it would be inequitable to either party; and if any portion of the Work was to have been paid on a lump-sum basis, the City shall pay the part of the lump sum that reflects the percentage of completion attained for that Work or portion of it. The Contractor shall not be entitled to any payment because of TFC except as stated in this Section 13(c), whether on the basis of overhead, profit, damages, other economic loss, or otherwise.

IN WITNESS WHEREOF, the City of Durham, North Carolina and the Contractor have caused this Agreement to be executed under seal, themselves or by their respective duly authorized agents or officers.

ATTEST: **CITY OF DURHAM**

_____ By: _____

Pre-audit certificate, _____

ATTEST: **MORRIS & MCDANIEL, INC.**

Rosa H. McMillan, Jr.
Secretary

By: _____ VICE
[Type the individual's name], President
JOE F. NASSAR
VICE PRESIDENT

Date: 1/4/13

ACKNOWLEDGMENT BY CORPORATION

STATE OF VIRGINIA

COUNTY OF FAIRFAX

I, a Notary Public in an for said county and state, certify that JOE F. NASSAR

personally appeared before me this day and acknowledged that he ~~or she~~ is the _____ VICE PRESIDENT of Morris & McDaniel, Inc., and that by authority duly given and as the act the Corporation, he or she sign the foregoing contract with the City of Durham, North Carolina, and the corporate seal was affixed thereto. This the 4th day of JANUARY, 2013.

My Commission expires:

DAVID M. MORRIS
NOTARY PUBLIC
REG # 7102764
COMMISSION EXPIRES 1/31/2015
COMMONWEALTH OF VIRGINIA

_____

_____
Notary Public