

CONTRACT FOR Professional Consulting Services (Program Management)  
Department of Water Management Mist Lake Facilities Expansion

This contract is dated, made, and entered into as of the xxx day of                     , 2016, by the City of Durham (“City”), a N. C. municipal corporation, and **Heery International, Inc.** (“Contractor”), a corporation organized and existing under the laws of Georgia.

Sec. 1. Background and Purpose. Department of Water Management (DWM) completed a Mist Lake Facilities Master Plan in March 2014. The master plan provided schematic building and facility layout recommendations to house the consolidated DWM water/sewer maintenance personnel at the Mist Lake facility. A portion of DWM’s Regulatory Compliance Division along with a new South Durham Water Reclamation Facility wastewater treatment plant laboratory and is to be relocated to a new facility to be constructed at the South Durham Water Reclamation Facility. The new facility complex will house all of Department of Water Management consisting of approximately 300 staff of the following divisions along with associated vehicles, equipment, and inventory. Contractor shall assist the Department of Water Management and General Services Department personnel by providing project management augmentation services in managing the projects.

Sec. 2. Services and Scope to be Performed. Presumption that Duty is Contractor’s. The Contractor shall provide professional consulting services for program management of a new Department of Water Management (DWM) Mist Lake Facility Complex at Mist Lake and a new Laboratory Building at the South Durham Water Reclamation Facility (SDWRF). Basic services include assisting City personnel in the projects program management from pre-design through bidding, construction and post-construction activities as detailed in the attached Exhibit A, The fundamental commissioning of HVAC and utility systems are detailed in Exhibit A-1 and Leadership in Environmental and Energy Design (LEED) Certification services are as detailed in Exhibit A-2. The Contract completion time for all work on this project is 1,400 calendar days from the date of the Notice to Proceed including an anticipated construction window of 930 calendar days.

In this contract, “Work” means the services that the Contractor is required to perform pursuant to this contract and all of the Contractor’s duties to the City that arise out of this contract. Unless the context requires otherwise, if this contract states that 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. Reserved.

Sec. 4. Complete Work without Extra Cost. Except to the extent otherwise specifically stated in this contract, 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 Contractor shall send invoices to the City on a monthly basis for the amounts to be paid pursuant to this contract. Each invoice shall document, to the reasonable satisfaction of the City: Name/position of each individual, hours worked, and hourly billing rate, total cost expended per phase, detailed expense breakdown and explanation of services performed. Hourly Billing Rates shall be as detailed in Exhibit B - Basis of Compensation. Within thirty days after the City receives an invoice, the City shall send the Contractor a check in payment for all undisputed amounts contained in the invoice.

The City shall pay the Contractor for the Work as follows: The work shall be performed on a time and materials basis generally consistent with the estimated distribution of work identified in the table below for the not-to-exceed amount of \$2,360,000.00.

Mist Lake Facility Expansion

<b>Program Management Services</b>	<b>Duration (months)</b>	<b>Hours</b>	<b>Average FTE’s per month</b>	<b>Cost</b>
PM Services				
Pre-construction	15	2,423	0.8	\$275,000
Construction	25	7,670	1.7	\$860,000
Post-construction	6	848	0.8	\$95,000

<b>Total (Labor)</b>	<b>46</b>	<b>10,941</b>		<b>\$1,230,000</b>
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South Durham Water Reclamation Facility Laboratory Building

<b>Program Management Services</b>	<b>Duration (months)</b>	<b>Hours</b>	<b>Average FTE's per month</b>	<b>Cost</b>
PM Services				
Pre-construction	15	1,047	0.4	\$115,000
Construction	14	2,772	1.1	\$300,000
Post-construction	6	764	0.7	\$85,000
<b>Total (Labor)</b>	<b>35</b>	<b>4,583</b>		<b>\$500,000</b>

Additional Support Service Estimates for Commissioning, LEED Consulting and New Equipment Planning and Logistics.

<b>Service Description</b>	<b>Hours</b>	<b>Cost</b>	<b>Estimated Expenses</b>	<b>Cost</b>
New Equipment Planning & Logistics	1,059	\$126,300	\$2,500	\$129,000
Commissioning	1,244	\$161,720	\$13,700	\$175,000
LEED consulting	1,025	\$133,250	\$19,900	\$153,000
Expenses (Program Management) <sup>1</sup>				\$85,000
Move Management	699	\$88,000	As Required	\$88,000
<b>Total (Labor and Expenses)</b>				<b>\$630,000</b>
<b>Total Contract</b>				<b>\$2,360,000</b>

Notes:

1. Estimated program management expenses include MICS client license, travel, mileage, parking, phone, postage and printing.
2. Items to be provided by the City:
  - a. Office space
  - b. Access to copier

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. Prompt Payment to Subcontractors. (a) Within 7 days of receipt by the Contractor of each payment from the City under this contract, the Contractor shall pay all Subcontractors (which term includes subconsultants and suppliers) based on work completed or service provided under the subcontract. Should any payment to the Subcontractor be delayed by more than 7 days after receipt of payment by the Contractor from the City under this contract, the Contractor shall pay the Subcontractor interest, beginning on the 8<sup>th</sup> day, at the rate of 1% per month or fraction thereof on such unpaid balance as may be due. By appropriate litigation, Subcontractors shall have the right to enforce this subsection

(a) directly against the Contractor, but not against the City of Durham.

(b) If the individual assigned to administer this contract for the City (in this section, titled "Prompt Payment to Subcontractors," he or she will be referred to as the "Project Manager") determines that it is appropriate to enforce subsection (a) in this manner, the City may withhold from progress or final payments to the Contractor the sums estimated by the Project Manager to be

- (i) the amount of interest due to the Subcontractor under subsection (a), and/or
- (ii) the amounts past-due under subsection (a) to the Subcontractor but not exceeding 5% of the

payment(s) due from the City to the Contractor.

This subsection (b) does not limit any other rights to withhold payments that the City may have.

(c) Nothing in this section (titled "Prompt Payment to Subcontractors") shall prevent the Contractor at the time of invoicing, application, and certification to the City from withholding invoicing, application, and certification to the City for payment to the Subcontractor for unsatisfactory job progress; defective goods, services, or construction not remedied; disputed work; third-party claims filed or reasonable evidence that such a claim will be filed; failure of the subcontractor to make timely payments for labor, equipment, and materials; damage to the Contractor or another subcontractor; reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(d) The Project Manager may require, as a prerequisite to making progress or final payments, that the Contractor provide statements from any Subcontractors designated by the Project Manager regarding the status of their accounts with the Contractor. The statements shall be in such format as the Project Manager reasonably requires, including notarization if so specified.

#### Sec. 7. Insurance.

##### **Insurance Requirements**

Contractor agrees to maintain, on a primary basis and at its sole expense, at all times during the life of this Contract the following coverage's and limits. The requirements contained herein, as well as City's review or acceptance of insurance maintained by Contractor is not intended to and shall not in any manner limit or qualify the liabilities or obligations assumed by Contractor under this Contract.

**Commercial General Liability** – Combined single limit of no less than \$1,000,000 each occurrence and \$2,000,000 aggregate. Coverage shall not contain any endorsement(s) excluding nor limiting Product/Completed Operations, Contractual Liability or Cross Liability.

**Automobile Liability** – Limits of no less than \$1,000,000 Combined Single Limit. Coverage shall include liability for Owned, Non-Owned and Hired automobiles. In the event Contractor does not own automobiles, Contractor agrees to maintain coverage for Hired and Non-Owned Auto Liability, which may be satisfied by way of endorsement to the Commercial General Liability policy or separate Auto Liability policy. Automobile coverage is only necessary if vehicles are used in the provision of services under this Contract and/or are brought on a City of Durham site.

**Worker's Compensation & Employers Liability** – Contractor agrees to maintain Worker's Compensation Insurance in accordance with North Carolina General Statute Chapter 97 and with Employer Liability limits of no less than \$1,000,000 each accident, each employee and policy limit. This policy must include a Waiver of Subrogation.

**Professional Liability** - Contractor agrees to maintain Professional Liability Insurance with limits no less than \$1,000,000 per occurrence, covering claims arising out of professional architect, engineers and surveyors services performed in connection with this contract.

**Additional Insured** – Contractor agrees to endorse the City as an Additional Insured on the Commercial General Liability. The Additional Insured shall read 'City of Durham as its interest may appear'.

**Certificate of Insurance** – Contractor agrees to provide City of Durham a Certificate of Insurance evidencing that all coverage's, limits and endorsements required herein are maintained and in full force and effect, and Certificates of Insurance shall provide a minimum thirty (30) day endeavor to notify, when available, by Contractor's insurer. If Contractor receives a non-renewal or cancellation notice from an insurance carrier affording coverage required herein, or receives notice that coverage no longer complies with the insurance requirements herein, Contractor agrees to notify the City within five (5) business days with a copy of the non-renewal or cancellation notice, or written specifics as to which coverage is no longer in compliance. The Certificate Holder address should read:

City of Durham  
Attn: Robert Gasper, Project Manager  
101 City Hall Plaza  
Durham, NC 27701

**Umbrella or Excess Liability** – Contractor may satisfy the minimum liability limits required above under an Umbrella or Excess Liability policy. There is no minimum Per Occurrence limit of liability under the Umbrella or Excess Liability, however, the Annual Aggregate limits shall not be less than the highest ‘Each Occurrence’ limit for required policies. Contractor agrees to endorse City of Durham as an ‘Additional Insured’ on the Umbrella or Excess Liability, unless the Certificate of Insurance states the Umbrella or Excess Liability provides coverage on a ‘Follow-Form’ basis.

All insurance companies must be authorized to do business in North Carolina and be acceptable to the City of Durham’s Risk Manager.

Sec. 8. Performance of Work by City. If the Contractor fails to perform the Work in accordance with the schedule required by this contract, the City may, in its 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. Exhibits. The following exhibits are made a part of this contract:

Exhibit A Program Management Basic Services containing 9 page(s).

Exhibit A-1 Fundamental Commissioning containing 4 page(s).

Exhibit A-2 LEED Certification and Energy Simulation Services containing 6 page(s).

Exhibit B Basis of Compensation containing 1 page(s).

In case of conflict between an exhibit and the text of this contract excluding the exhibit, the text of this contract shall control.

Sec. 10. Notice. (a) This subsection (a) pertains to all notices related to or asserting default, breach of contract, claim for damages, suspension or termination of performance, suspension or termination of contract, and extension or renewal of the term. All such notices shall be given by personal delivery, fax, UPS, Federal Express, a designated delivery service authorized pursuant to 26 U.S.C. 7502(f)(2), or certified United States mail, return receipt requested, addressed as follows. The parties are requested to send a copy by email.

To the City:

Director, Department of Water Management  
City of Durham  
101 City Hall Plaza  
Durham, NC 27701-3329

To the Contractor:

*[Insert name and address]*

The fax number is \_\_\_\_\_.

Email:

(b) Change of Address. Date Notice Deemed Given. A change of address, email address, fax number, or person to receive notices under subsection (a) shall be made by notice given pursuant to subsection (a). All notices and other communications related to or under this contract shall be deemed given and sent at the time of actual delivery, if personally delivered or sent by fax, personal delivery, UPS, Federal Express, or a designated delivery service. If the notice or other communication is sent by United States 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 United States Postal Service or upon actual delivery, whichever first occurs.

Sec. 11. Indemnification.

(a) Indemnification for Charges Arising from Professional Services. Solely with respect to Charges which arise out of Contractor’s performance of professional services hereunder, to the maximum extent allowed by law, the Contractor shall defend, indemnify, and save harmless Indemnitees from and against all such Charges that arise in any manner from, in connection with, or out of Contractor’s performance of professional services under this Contract, but only to the extent such Charges are caused by the professional negligence of the Contractor or its subcontractors or anyone directly or indirectly employed

by any of them or anyone for whose acts any of them may be liable. For purposes of this subsection 11(a), "professional negligence" shall mean any failure on the part of the professional to comply with the professional standard of care legally required or reasonably expected under the circumstances in the performance or non-performance of professional services hereunder.

(b) Indemnification for Charges Not Arising from Professional Services. With respect to all Charges other than those which arise out of Contractor's performance of professional services hereunder, to the maximum extent allowed by law, the Contractor shall defend, indemnify, and save harmless Indemnitees from and against all such Charges that arise in any manner from, in connection with, or out of this contract as a result of acts or omissions of the Contractor or subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. In performing its duties under this subsection 11(b), the Contractor shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City.

(c) Definitions. As used in subsections "a" and (b) above and "d" below -- "Charges" means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within "Charges" are (1) interest and reasonable attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations of sedimentation pollution, erosion control, pollution, or other environmental laws, regulations, ordinances, rules, or orders -- including but not limited to any such alleged violation that arises out of the handling, transportation, deposit, or delivery of the items that are the subject of this contract). "Indemnitees" means City and its officers, officials, independent contractors, agents, and employees, excluding the Contractor.

(d) 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 contract. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this contract.

(e) Survival. This section shall remain in force despite termination of this contract (whether by expiration of the term or otherwise) and termination of the services of the Contractor under this contract.

(f) Limitations of the Contractor's Obligation. Subsections "a" and "b" above shall not require the Contractor to indemnify or hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of Indemnitees.

Sec. 12. 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 discretion, terminate this contract for convenience by giving the Contractor written notice that refers to this section. TFC shall be effective at the time indicated in the notice. (b) *Obligations.* Upon TFC, all obligations that are still executory on both sides are discharged except that any right based on prior breach or performance survives, and the indemnification provisions and the section of this contract titled Trade Secrets and Confidentiality, if any, shall remain in force. At the time of TFC or as soon afterwards as is practical, the Contractor shall give the City all Work, including partly completed Work. In case of TFC, the Contractor shall follow the City's instructions as to which subcontracts to terminate. (c) *Payment.* The City shall pay the Contractor an equitable amount for the costs and charges that accrue because of the City's decisions with respect to the subcontracts, but excluding profit for the Contractor. Within 20 days after TFC, the City shall pay the Contractor one hundred dollars as a TFC fee and 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 Work was to be paid for 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. The Contractor shall not be entitled to any payment because of TFC except as stated in this section, whether on the basis of overhead, profit, damages, other economic loss, or otherwise.

Sec. 13. Miscellaneous

(a) Choice of Law and Forum; Service of Process. (i) This contract shall be deemed made in Durham County, North Carolina. This contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this contract shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This subsection (a) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this subsection. (ii) If the Contractor is not a natural person (for instance, the Contractor is a corporation or limited liability company), this subsection (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 will instruct each Agent for Service of Process that after such agent receives the process, summons, or complaint, such agent shall promptly send it to the Contractor. This subsection (ii) does not apply while the Contractor maintains a registered agent in North Carolina with the office of the N. C. 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 contract, 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 contract shall be deemed or construed so as to in any way estop, 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 contract shall be unenforceable, the remainder of this contract 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 to delegate) any of its rights (including the right to payment) or duties that arise out of this contract. 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 contract and all of the City's claims that arise out of this contract. Without granting the Contractor the right to assign, it is agreed that the duties of the Contractor that arise out of this contract shall be binding upon it 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 OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

(h) SDBE. The Contractor shall comply with all applicable provisions of Article III of 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 contract which may result in the rescission or termination of this contract and/or other appropriate remedies in accordance with the provisions of that article, this contract, and State law. The Participation Plan submitted in accordance with that article is binding on the Contractor. Section 18-59(f) of that article 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 that those two quoted sentences apply only to the Contractor's alleged violations of its obligations under Article III of Chapter 18 and not to the Contractor's alleged violations of other obligations.

(i) No Third Party Rights Created. This contract is intended for the benefit of the City and the Contractor and not any other person.

(j) 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 or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words "include," "including," etc. mean include, including, etc. without limitation. (2) References to a "Section" or "section" shall mean a section of this contract. (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. (9) A definition in this contract will not apply to the extent the context requires otherwise.

(k) Modifications. Entire Agreement. A modification of this contract is not valid unless signed by both parties 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 contract contains the entire agreement between the parties pertaining to the subject matter of this contract. 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 referenced in this contract.

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

Sec. 14. E-Verify Requirements. (a) If this contract is awarded pursuant to North Carolina General Statutes (NCGS) 143-129 – (i) the contractor represents and covenants that the contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the NCGS; (ii) the words "contractor," "contractor's subcontractors," and "comply" as used in this subsection (a) shall have the meanings intended by NCGS 143-129(j); and (iii) the City is relying on this subsection (a) in entering into this contract. (b) If this contract is subject to NCGS 143-133.3, the contractor and its subcontractors shall comply with the requirements of Article 2 of Chapter 64 of the NCGS.

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

ATTEST:

CITY OF DURHAM

\_\_\_\_\_

By: \_\_\_\_\_

Preaudit Certification: \_\_\_\_\_

**Heery International, Inc.**

By: \_\_\_\_\_ (SEAL)

Title of officer: \_\_\_\_\_

*[The following officers may sign for the corporation: chairperson; president; chief executive officer; vice-president; assistant vice-president; treasurer; or chief financial officer.]*

State of \_\_\_\_\_

**ACKNOWLEDGMENT BY CORPORATION**

County of \_\_\_\_\_

I, a notary public in and for the aforesaid county and state, certify that \_\_\_\_\_ personally appeared before me this day and stated that he or she is

~~(strike through the inapplicable:)~~ chairperson/ president/ chief executive officer/ vice-president/ assistant vice-president/ treasurer/ chief financial officer of

Heery International, Inc., a corporation, and that by authority duly given and as the act of the corporation, he or she signed, under seal, the foregoing contract or agreement with the City of Durham.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2016.

My commission expires: \_\_\_\_\_

\_\_\_\_\_

Notary Public