

This contract is dated, made, and entered into as of the ____ day of _____, 2021, by and between the City of Durham (“Owner”), a N. C. municipal corporation, and _____ (“Contractor”), a professional association organized and existing under the laws of North Carolina; [Indicate type of entity, for instance]:

- a corporation organized and existing under the laws of [name of State];*
- a limited liability company organized and existing under the laws of [name of State];*
- a professional corporation organized and existing under the laws of [name of State];*
- a professional association organized and existing under the laws of [name of State];*
- a limited partnership organized under the laws of [name of State];*

Sec. 1. Background and Purpose. The Consultant firm will provide inspections and ombudsman services for inspections services for the City projects: ST-286 Petition Streets 2021, WS-85 Sewer Extension on Garrett & Mimosa, SW-80 Trail Repairs 2021.

Sec. 2. Services and Scope to be Performed. The Consultant shall provide professional services for a variety of tasks including, but not limited to, these outlined below:

Act as an Inspector for the project – The engineer shall provide inspection services for the construction projects and address matters pertaining to the project such as:

- Field inspection of the work.
- Verify whether work is done under required specifications.
- Verify the quantities of pay items installed by the Contractor
- Review daily reports and quantities put into PDRx system by contractor
- Addressing questions from the contractor
- Being aware of specifications and standard details for Sidewalks, trails, water and sewer utility line, PROWAG compliant curb ramps and curb and gutter
- Being aware of the challenges of doing asphalt/concrete/water and sewer utility work in the City of Durham and NCDOT public right of way

Act as an Ombudsperson for the project – The engineer shall provide ombudsperson services for the City and address public matters pertaining to the project such as:

- Be present during construction activities to address concerns
- Informing business and home owners of when work will be completed
- Addressing complaints made by the public
- Being aware of the challenges of doing repair in the City of Durham

Design of street/ trail/utility sections included in the project – The engineer shall provide designs to the contractor of the construction contracts for the trail/street/sidewalk/water-sewer with the contracts. The designs should comply with current City, ADA and PROWAG standards.

Preparation of all Traffic and Pedestrian Control Plans – The engineer shall provide traffic and pedestrian control plans to the contractors of the construction contracts for all locations within the projects. These plans should comply with current MUTCD standards.

Other Services – The engineer shall provide additional services related to the construction projects as needed on an hourly basis.

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. Notice to Proceed and Schedule.

(a) Upon award of the Contract, the Contractor will receive a Notice to Proceed to develop a comprehensive Schedule. Subsequent to completion and City approval of the Schedule, the Contractor will receive a Notice to Proceed. No work shall commence without receiving the Notice to Proceed from the City. The work shall be complete in 24 months.

(b) Attachment __ includes the Scope of Services and the hourly rates. This is a cost not to exceed contract and payment will be based upon the work completion of individual line items. Fees for permits, applications, or regulatory fees will be paid by the City. Tasks or (disciplines) are shown in Attachment.

(c) Duration - This Agreement is in effect for a period of 2 years from the date of Notice to Proceed for this agreement.

(d) Disputed Items - In the event that Consultant's invoices and receipts are submitted in compliance with the requirements of this Agreement, if the City disputes any items in any invoices submitted by Consultant, City shall notify the Consultant within 60 days of receipt of any disputed item and request clarification and/or remedial action.

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 or bi-monthly basis for the amounts to be paid pursuant to this contract. Each invoice shall document, to the reasonable satisfaction of the City: such information as may be reasonably requested by the City. Within 60 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.

(a) The City shall pay the Contractor for the Work completed based on the line items provided in the Fee schedule shown in “Attachment” for tasks/milestones below:

- Inspections Services
- Ombudsman Services
- Design Services
- Additional Services

(b) The City shall not be obligated to pay the Contractor any payments, fees, expenses, or compensation other than those authorized by this section. The total dollar amount to be paid under this contract by the City to the Contractor shall not exceed _____.

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 subcontractors 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 8th 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; or a reasonable amount for retainage not to exceed 10%.

(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.

This section is modified based on type of project & input from Risk Mgmt.

Sec. 7. Insurance. 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. All insurance companies must be authorized to do business in North Carolina and have no less than an A VIII rating or better.

- a) 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.
- b) 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
- c) Workers' Compensation & Employers Liability – Contractor agrees to maintain Worker's Compensation Insurance in accordance with North Carolina General Statute Chapter 97 and with limits of no less than \$1,000,000 each accident, each employee and policy limit.
- d) 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.

- e) Professional Liability - Contractor agrees to maintain Professional Liability Insurance with limits no less than \$1,000,000, covering claims arising out of professional architect, engineers and surveyors services performed in connection with this contract.
- f) 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’.
- g) 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
Public Works Dept./Contract Mgmt.
101 City Hall Plaza, Ste. 3100
Durham, NC 27701

Sec. 8. Performance of Work by City. If the Contractor fails to perform the Work in accordance with the schedule referred to in section two above, 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:

- (a) Attachment “A” Scope of Services Letter

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) In General. 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 must be in writing and made by personal delivery, 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; in addition, subsection (b) must also be complied with.

(b) Additional Notice by Fax or Email. In addition to complying with subsection (a), the party giving notice or other communication shall also send it by fax or email if the other party has provided a valid, working fax number or email address.

(c) When Notice Period Is Less than 9 Days. If a required notice period is less than 9 days, the party shall also make reasonable attempts, before or promptly after giving written notice under subsections (a) and (b), to use a telephone to orally communicate the substance of the contents of the written notice. Communicating the substance of the contents by an in-person conversation will satisfy the preceding sentence.

(d) Change of Address; Discovery of Invalid Fax Number or Email Address. A change of address, fax number, email address, telephone number, or person to receive notice may be made by either party by notice given to the other party. At any time that a party discovers that the other party has

provided it a fax number or email address that is not valid, the discovering party shall provide notice of the discovery to the other party, so that it can substitute a valid fax number or email address.

(e) Date Notice Deemed Given. If a notice is sent by United States mail, it is deemed complete upon actual delivery or on the third day following the day on which it is deposited with the United States Postal Service, whichever occurs first. Notice is deemed given when both subsection (a) and subsection (b) have been complied with.

(f) When Undeliverable Notice Is Deemed Sent. If a notice is undeliverable because the address or other information provided to the sender by the other party is incorrect, incomplete, or out of date, the notice will be deemed sent on the date that the sender attempts to deliver by fax or email, or the date it places the notice in the custody of UPS, Federal Express, a designated delivery service authorized pursuant to 26 U.S.C. 7502(f)(2), or the U. S. Postal Service for certified United States mail, return receipt requested. If a fax is not received because the recipient's fax number is busy on three attempts to fax that are at least ten minutes apart during a 4-hour period, the fax will be deemed undeliverable.

(g) Addresses. Subject to change pursuant to subsection (d), the addresses for these notices, are:

To the City of Durham (Owner):

Attn: Erik Adkins
Public Works Department
101 City Hall Plaza
Durham, North Carolina 27701
Phone: (919) 560-4326 x.30266
Erik.Adkins@DurhamNC.gov

To the Contractor:

Sec. 11. Indemnification applicable to professional agreements.

(a) (Definitions). These definitions apply to this Section unless otherwise stated.

Contractor – the design professional that is a party to this contract.

Defend – to pay for or furnish counsel at the expense of the Contractor to defend any of the Indemnitees against claims alleged or brought against any of the Indemnitees by a third party alleged or brought in any court or other tribunal, including forms of alternative dispute resolution required by law or contract, before the court or tribunal has reached a final determination of fault.

Derivative parties -- with respect to a party, any of that party's subcontractors, agents, employees, or other persons or entities for which the party may be liable or responsible as a result of any statutory, tort, or contractual duty.

Design professional -- a person or entity who is licensed under and provides professional services regulated by Chapters 83A, 89A, 89C, 89E, or 89F of the N. C. General Statutes.

Design professional agreement -- any promise or agreement in, or in connection with, a contract or agreement with a design professional to provide design professional services.

Design professional services -- a service or work performed by a design professional for which licensure is required under Chapters 83A, 89A, 89C, 89E, or 89F of the N. C. General Statutes.

Fault – a breach of contract; negligent, reckless, or intentional act or omission constituting a tort under applicable statutes or common law; or violations of applicable statutes or regulations.

Indemnitees -- City and its officers, officials, independent contractors, agents, and employees, excluding the Contractor.

Subcontractor – any person or entity, of any tier, providing labor or material through the Contractor for use on the project at issue in the applicable design professional agreement.

(b) (Standard Indemnification). (i) The Contractor shall defend, indemnify, and hold harmless Indemnitees from and against all 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 its derivative parties. In performing its duties under this subsection “i,” the Contractor shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. (ii) “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 attorney’s 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.

(c) (Restriction regarding Indemnitees’ Negligence). This contract 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.

(d) (Restriction regarding Fault). Nothing in this contract requires the Contractor to indemnify or hold harmless Indemnitees or any other person or entity against losses, damages, or expenses unless the fault of the Contractor or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

(e) (Restriction regarding Negligence). Nothing in this contract requires the Contractor to defend Indemnitees or any other person or entity against liability or claims for damages, or expenses, including attorney’s fees, proximately caused or alleged caused by the professional negligence, in whole or in part of the Contractor, the City, or their derivative parties, whether the claim is alleged or brought in tort or contract.

(f) (Liability when at Fault). It is agreed without limitation that nothing in this contract shall be interpreted to exclude from any indemnity or hold harmless provisions enforceable under subsection (c) and (d) any attorneys' fees, litigation or arbitration expenses, or court costs actually incurred by the City to defend against third party claims alleged in any court, tribunal, or alternative dispute resolution procedure required of the City by law or by contract, if the fault of the Contractor or its derivative parties is a proximate cause of the attorney's fees litigation or arbitration expenses, or court costs to be indemnified.

(g) (Insurance contracts and Bonds) This Section does not affect an insurance contract, workers’ compensation, or any other agreement issued by an insurer; and those subsections do not apply to lien or bond claims asserted under Chapter 44A of the N.C. General Statutes.

(h) (Other Provisions) When this Section or any subsection or combination of subsections of this Section applies, it applies to every provision in this contract outside of this Section that would require the Contractor to indemnify, hold harmless, or defend Indemnitees regardless of whether the section in question is titled “indemnification,” “warranty,” or otherwise.

(j) (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.

(k) (Compliance with law). It is agreed that this Section shall be applied to the maximum extent allowed by law and limited only as necessary to comply with N.C.G.S. § 22B-1.

Sec. 12. Trade Secrets; Confidentiality. The request for proposals (RFQ) section titled “Trade

Secrets and Confidentiality” shall apply to any Trade Secrets disclosed to the City during the process leading to the parties’ entering into this Contract (including all of the Contractor’s responses to the RFP). This section (titled “Trade Secrets; Confidentiality”) 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. For purposes of this contract, the word “candidate” in the RFP section just cited shall mean the “Contractor.”

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 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. 14. State Law Provisions.

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.

Sec. 15. Ownership of Work Products.

(a) The Contractor hereby assigns to the City, without reservation, all copyrights in all Project-related documents, models, photographs, and other expression created by the Contractor. Among those documents are certain “Work Product,” including the design drawings and the Construction Documents. The City’s obligation to pay the Contractor is expressly conditioned upon the Contractor’s obtaining a valid written comprehensive assignment of copyrights from its consultants in terms identical to those that obligate the Contractor to the City as expressed in this subsection, which copyrights the Contractor, in turn, hereby assigns to the City. The City, in return, hereby grants the Contractor and its subcontractors and subconsultants a revocable, nonexclusive license to reproduce the documents for purposes relating directly to the Contractor’s performance of its obligations under this Agreement for the Contractor’s archival records, and for the Contractor’s reproduction of drawings and photographs in the Contractor’s marketing materials. This nonexclusive license shall terminate automatically upon the occurrence of either a breach of this Agreement by the Contractor or the accused commission by the Contractor of a tort or a crime affecting the City or the project or upon termination of this Agreement. This nonexclusive license is granted to the contractor alone and shall not be assigned by the Contractor to any other person

or entity, except that the non-exclusive license granted in this Agreement to the Contractor for purposes of the Contractor's performance hereunder may be sub-licensed to the Contractor's subcontractors or subconsultants (with the same limitations). Subject to the foregoing, this nonexclusive license shall terminate automatically upon a Consultant's assignment of this nonexclusive license to another or its attempt to do so.

(b) To the extent that liability arises from misuse of the Work Product by the City or another consultant or designer, the Contractor shall not be responsible for that misuse. If the City uses the Work Products for purposes including additions to and modifications of the project, and for other projects, the City shall indemnify the Contractor for losses, including reasonable attorneys' fees, suffered by the Contractor as a result of the use of the design and these documents for such other purposes. If these documents are used for other purposes, the City shall see that they are modified (i) to indicate that the Contractor did not prepare them for such other purposes and is not responsible for their use in connection with such other purposes and (ii) to delete the Contractor's name and seal from the documents (where permitted or required by law).

(c) Except for the licenses granted in this Section 15, no other license or right shall be deemed granted or implied under this Agreement. No other project-related data, expression, or documents may be reproduced by the Contractor or its subcontractors or subconsultants for any other purposes without the express written permission of the City.

(d) If the City subsequently reproduces project-related documents or creates a derivative work based upon project-related documents created by the Contractor, the City shall (where permitted or required by law) remove or completely obliterate the original professional's seals, logos, and other indications on the documents of the identity of the Contractor and its subcontractors or subconsultants.

Sec. 16. Standard of Care. The standard of care for all professional engineering and related services performed or furnished by Contractor under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing on similar projects whether such projects can be found locally, regionally or nationally. Subject to the foregoing standard of care, Contractor and its consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards. The Contractor warrants the accuracy of Contractor's representations made to City as to Contractor's qualifications and experience during the process in which the City selected the Contractor. The Contractor represents that it is registered, licensed, and authorized to practice engineering in North Carolina.

Sec. 17. Dispute Resolution and Compensation for Contractor's Errors.

(a) Dispute Resolution -- The City and Contractor agree to negotiate each dispute between them in good faith during the 30 days after providing the other party with a notice of dispute. If negotiations are unsuccessful in resolving the dispute, then the City and Contractor may agree to mediation. If mediation is used and is unsuccessful, then the parties may exercise their rights at law. If, however, such dispute arises after the City has engaged a general contractor for construction work and during the construction administration phase, if any, the City and Contractor may avail themselves of the dispute resolution process adopted by the State Building Commission pursuant to G.S. § 143-135.26(11) and G.S. § 143-128(f1).

(b) Compensation for Contractor Design Errors -- If (i) the Contractor creates plans or specifications containing an error that causes actual construction of a portion of the work that needs to be changed solely because of the Contractor's error, and, (ii) the City elects to apply this Section 17(b), the Contractor shall pay the City all costs of correcting the error, including an amount to compensate the City for time spent by City's employees because of the error without regard to what other services those employees might have done for the City had the error not occurred.

- (i) (Unforeseen Conditions) An error shall not be grounds for payment under this Section 17(b) if the error occurred because of physical conditions were:
not in fact known to the Contractor,
not in fact known to the Contractor's consultants,
not readily apparent to the Contractor, and
not readily apparent to the Contractor's consultants.
- (ii) (Cost of Employees' Time) The cost of the employees' time will be calculated as follows: the time spent by any salaried employee of the City because of the error shall be compensated at an hourly rate equal to the employee's gross salary (using standards to determine gross salary for federal income tax purposes) during the applicable fiscal year of the City divided by the number of hours worked by that employee for the City during that fiscal year.
- (iii) (Limits on Double Payments) If this Section 17(b) is applied to compensate the City for an error, the Contractor shall not owe the City any other compensation to remove the erroneously built work and replace it with correct work. However, the payment of such compensation or the application of this Section 17(b) shall not affect liability to the Contractor for personal injury or damage to property. (In the preceding sentence, "damage to property" excludes the damage suffered by the City for the cost of replacing the erroneously installed work for which this paragraph provides compensation, but it includes all other general, special, consequential, or other kinds of damage resulting from the error.)
- (iv) (Limit on Use of Payment against Contractor) A payment by the Contractor pursuant to this Section 17(b) shall be considered a compromise, and the City shall not introduce the fact of the payment in any legal action or proceeding except to the extent that compromises are admissible.
- (v) (Nonpayment Hereunder Not to Prevent Other Claims) If this Section 17(b) is not applied by the City so as to compensate the City for an error, this Section 17(b) shall not be used to construe this Agreement so as to reduce any remedy that is available to the City because of that error. For example, to the extent an error is not compensated for because of the amount exceeds the insurance deductible, the City will not be deemed to have waived a claim for any damages arising from the error.

Sec. 18. 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) EBOP. 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

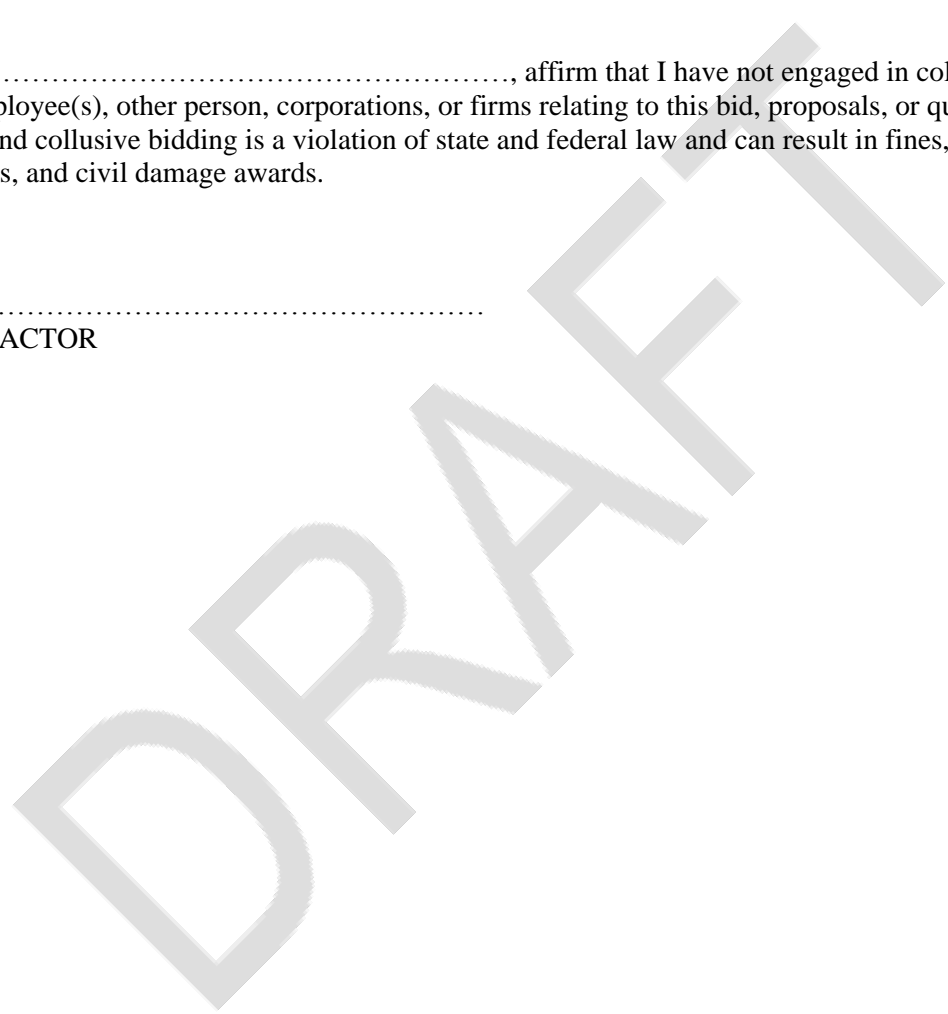
City Manager or a deputy or assistant City Manager without City Council action.

NON-COLLUSION STATEMENT BY CONTRACTOR

The City of Durham prohibits collusion, which is defined as a secret agreement for a deceitful or fraudulent purpose.

I,, affirm that I have not engaged in collusion with any City employee(s), other person, corporations, or firms relating to this bid, proposals, or quotations. I understand collusive bidding is a violation of state and federal law and can result in fines, prison sentences, and civil damage awards.

.....
CONTRACTOR



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 certificate, if applicable _____

ATTEST: [COMPANY LEGAL NAME]

_____ By: _____
_____ Secretary Title: _____

(Affix Corporate Seal)

State of _____ ACKNOWLEDGMENT BY CORPORATION

County of _____

I, _____, notary public, certify that _____ personally appeared before me this day and stated that he or she is _____ President of _____, a corporation, and that by authority duly given and as the act of the corporation, he or she signed the foregoing contract or agreement with the City of Durham and the corporate seal was affixed thereto. This the ____ day of _____, 20____.

My commission expires:

_____ Notary Public