

CONSULTANT ON-DEMAND AGREEMENT

THIS AGREEMENT is made and entered into this ____ day of _____, 2009 by and between the City of Overland Park, Kansas, (hereinafter, the "City") and **OneRain Incorporated** (hereinafter, the "Consultant").

WITNESSETH:

WHEREAS, the City desires to obtain consulting services in support of a project described as follows:

**On-Demand Engineering Services for
Data Collection and Radio Transmission System Upgrade to Flood Warning System
under
Flood Warning Decision Support Project (SD-1160)
and
Stormwater & Traffic Operations Center Integration Project (SD-0954)
May 6, 2009 through May 5, 2011**

(hereinafter, the "Project"); and

WHEREAS, the City has requested that the Consultant submit an engagement letter to outline services Consultant is proposing to provide; and

WHEREAS, the City and the Consultant desire to enter into an agreement setting forth the terms and conditions of their understanding as regards the services.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

SECTION 1. SCOPE OF SERVICES

The Consultant agrees to provide consulting services as set forth in Exhibit A attached hereto and incorporated herein by reference, (hereinafter the "Services").

SECTION 2. PROJECT ADDENDUM

Upon determination by the City of each individual Project which will be implemented by the Consultant under this Agreement, an addendum to this Agreement setting forth Scope of each Project, its associated fee and its duration shall be executed by the Consultant and either the City's Director of Public Works, City Manager, or Mayor and shall be incorporated by reference into this Agreement.

SECTION 3. STATUS

Consultant is an independent contractor and as such is not an agent or employee of the City.

SECTION 4. COMPENSATION

- A. Total Fee: City agrees to pay Consultant a not to exceed fee amount of **two hundred thousand and 00/100 dollars (\$200,000.00)** including reimbursables, for the contract period. Each individual fee will be negotiated prior to commencing each

Project and shall be based on the performance of the scope of services to be outlined in each request by the City.

- B. Reimbursable expenses shall be reimbursed at the actual cost for the following expenses: (1) expense of transportation in connection with the Consultant Services; (2) expenses in connection with authorized out-of-town travel; (3) long-distance communications; (4) other costs as authorized by City.
- C. Manner of Payment: Invoices for fees will be submitted every four weeks and are to be paid within 30 days of receipt.

SECTION 5. TERM

This Agreement shall encompass the period from **May 6, 2009 through May 5, 2011**. Notwithstanding the foregoing, nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of the City to terminate, with or without cause, the services of Consultant at any time, subject to written notice to Consultant. If City shall terminate the Agreement prior to completion of Services, City shall compensate Consultant for all Services satisfactorily completed to date of its receipt of the termination notice. Compensation shall not include anticipatory profit or consequential damages, neither of which will be allowed.

If the parties mutually agree, the term of this Agreement may be extended for a two-year time period. If such an extension is desired by the parties, the parties shall agree to the same prior to March 31, 2011. In no event will the term of this Agreement be extended beyond **May 5, 2013**.

SECTION 6. SUBCONTRACTING OF SERVICES

Consultant shall not subcontract any of the Services to be performed under this Agreement without first obtaining the written approval of City regarding the Services to be subcontracted and the person or firm proposed to accomplish the subcontracted portion of the Services.

SECTION 7. OWNERSHIP OF REPORT

The final report and all documents prepared in connection with the Services shall be the property of the City upon completion of the Services. Consultant will have no responsibility to update its report for events and circumstances' occurring after the report is accepted as final and complete by the City.

SECTION 8. INSURANCE

The Consultant shall maintain throughout the duration of this contract insurance amounts, at a minimum, specified below. All general and automobile liability insurance shall be written on an occurrence basis unless otherwise agreed to in writing by the City.

A. General Liability

General Aggregate:	\$500,000.00
Products-Completed Operations Aggregate:	\$500,000.00
Personal & Advertising Injury:	\$500,000.00
Each Occurrence:	\$500,000.00

Policy must include the following:

- i) Broad Form Contractual/Contractually Assumed Liability
- ii) Independent Contractors

Name City of Overland Park as “Additional Insured”.

B. Automobile Liability: Policy shall protect the Consultant against claims for bodily injury and/or property damage arising from the ownership or use of all owned, hired and/or non-owned vehicles and must include protection for either:

- i) Any Auto
- OR**
- ii) All Owned Autos; Hired Autos; and Non-Owned Autos.

Limits

Each Accident, Combined Single Limits
Bodily Injury and Property Damage: \$500,000

Name City of Overland Park as “Additional Insured”.

C. Workers' Compensation and Employer's Liability: This insurance shall protect the Consultant against all claims under applicable state workers' compensation laws. The Consultant shall also be protected against claims for injury, disease or death of employees which, for any reason may not fall within the provisions of a workers' compensation law. The policy limits shall not be less than the following:

Workers' Compensation:	Statutory
Employer's Liability:	
Bodily Injury by Accident	\$100,000 each accident
Bodily Injury by Disease	\$500,000 policy limit
Bodily Injury by Disease	\$100,000 each employee

D. Professional Liability: The Consultant shall maintain throughout the duration of this Agreement Professional Liability Insurance in an amount not less than Five Hundred Thousand Dollars (\$ 500,000.00), and shall provide the City with certification thereof.

E. Industry Ratings: The City will only accept coverage from an insurance carrier who offers proof that it:

- 1) Is licensed to do business in the State of Kansas;
- 2) Carries a Best's policyholder rating of B+ or better;

AND

- 3) Carries at least a Class X financial rating.

OR

Is a company mutually agreed upon by the City and Consultant. Certification of insurance coverage shall be on the City's standard Certificate of Insurance form or on forms acceptable to the City.

- F. Subcontractor's Insurance: If a part of this Contract is to be sublet, Consultant shall either:
- a) Cover all subcontractors under its insurance policies;
or
 - b) Require each subcontractor not so covered to secure insurance which will protect against applicable hazards or risks of loss as and in the minimum amounts designated herein.

SECTION 9. INDEMNITY

- A. Definition: For purposes of indemnification requirements, the term "Loss" shall have the meaning set forth as follows:

"Loss" means any and all loss, damage, liability or expense, of any nature whatsoever, whether incurred as a judgment, settlement, penalty, fine or otherwise (including attorney's fees and the cost of defense), in connection with any action, proceeding, demand or claim for injury, including death, to any person or persons or damages to or loss of, or loss of the use of, property of any person, firm or corporation, including the parties hereto, which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of this contract whether arising before or after the completion of the work required hereunder.

- B. Indemnity: For purposes of this Agreement, Consultant hereby agrees to indemnify, defend and hold harmless the City, its employees and agents from any and all Loss where Loss is caused or incurred or alleged to be caused or incurred in whole or in part as a result of the negligence or other actionable fault of the Consultant, its affiliates, subsidiaries, employees, agents and subcontractors/assignees and their respective servants, agents and employees.

It is agreed as a specific element of consideration of this Agreement that this indemnity shall apply notwithstanding the joint, concurring or contributory or comparative fault or negligence of the City or any third party and, further notwithstanding any theory of law including, but not limited to, a characterization of the City's or any third party's joint, concurring or contributory or comparative fault or negligence as either passive or active in nature; provided, however, that the Consultant's obligation hereunder shall not include amounts attributable to the fault or negligence of the City or any third party for whom the Consultant is not responsible.

In the case of any claims against the City, its employees or agents indemnified under this Agreement, by an employee of the Consultant, its affiliates, subsidiaries, or assignees, the indemnification obligation contained in this Agreement shall not be limited by any limitation on amount or type of damages, compensation or benefits payable by or for the Consultant, its affiliates, subsidiaries, or assignees, under workers' compensation acts, disability benefit acts, or other employee benefit acts.

SECTION 10. DISPUTE RESOLUTION

City and Consultant agree that disputes relative to the project should first be addressed by negotiations between the parties. If direct negotiations fail to resolve the dispute, the party initiating the claim that is the basis for the dispute shall be free to take such steps as it deems necessary to protect its interests; provided, however, that notwithstanding any such dispute Consultant shall proceed with the work as per this Agreement as if no dispute existed; and provided further that no dispute will be submitted to arbitration without the City's express written consent.

SECTION 11. AFFIRMATIVE ACTION/OTHER LAWS

- A. Equal Employment Opportunity: During the performance of this contract, the Consultant agrees as follows:
1. The Consultant shall comply with the Kansas Act against discrimination and shall not discriminate against any employee because of race, religion, color, sex or national origin and will abide by the provisions of the Age Discrimination in Employment Act of 1967, as amended. The Consultant will take affirmative action to ensure that applicants are employed and that applicants are treated during employment without regard to their race, religion, color, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment advertisement; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Consultant agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the requirements of these nondiscrimination provisions.
 2. The Consultant will, in all solicitations or advertisements for employees placed by or on behalf of the Consultant, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex or national origin and shall include the phrase "equal opportunity employer" or a similar phrase approved by the Kansas Commission on Civil Rights.
 3. If the Consultant fails to comply with the manner in which the Consultant reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Consultant shall be deemed to have breached the present Agreement and it may be canceled, terminated or suspended, in whole or in part, by the City.
 4. If the Consultant is found to have violated the Kansas Act against discrimination under a final decision or order of the Kansas Commission on Civil Rights, the Consultant shall be deemed to have breached the Contract, and it may be canceled, terminated or suspended, in whole or in part, by the City.
 5. The Consultant will include all of Subsections 1 through 4 in every subcontract or purchase order, so that such provisions will be binding upon each subcontractor or vendor.
- B. Other Laws: The Consultant agrees to abide by all other federal, state or local laws, ordinances and regulations applicable to this Project and to furnish any certification

required by any federal, state or local governmental agency in connection with same.

SECTION 12. FEDERAL LOBBYING ACTIVITIES

(Only applies to projects receiving federal funds via the City)

31 USCA Section 1352 requires all subgrantees, contractors, subcontractors and consultants who receive federal funds via City to certify that they will not use federal funds to pay any person for influencing or attempting to influence a federal agency or Congress in connection with the award of any federal contract, grant, loan or cooperative agreements. In addition, contract applicants, recipients and subrecipients must file a form disclosing any expenditures they make for lobbying out of non-federal funds during the contract period.

Necessary forms are available from the City's Project Manager and should be returned to City with other final contract documents. It is the responsibility of Consulting Engineer/Architect to obtain executed forms from any of its subcontractors who fall within the provision of the Code and to provide City with the same.

SECTION 13. COVENANT AGAINST CONTINGENT FEES

Consultant warrants that he/she has not employed or retained any company or person, other than a bona fide employee working for Consultant, to solicit or secure this Agreement, and that he/she has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gifts, or any other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, City may terminate this Agreement without liability or may, in its discretion, deduct from the Compensation or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

Section 14. GENERAL PROVISIONS

- A. This Agreement contains the complete agreement between the parties and shall, as of the effective date hereof, supersede all other agreements between the parties. The parties stipulate that neither of them has made any representation with respect to the subject matter of this Agreement except such representations as are specifically set forth in this document and each of the parties acknowledges that it has relied on its own judgment in entering into this Agreement.
- B. Any modification of this Agreement or additional obligation assumed by either party in connection herewith shall be binding only if evidenced in writing signed by each party or an authorized representative of each party.
- C. If any provision, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, the remainder of this Agreement, or portion thereof, shall be deemed severable, shall not be affected, and shall remain in full force and effect.
- D. It is the intention of the parties that this Agreement and the performance hereunder, and all suits and special proceedings under this Agreement, be construed in accordance with and under and pursuant to the laws of the State of Kansas and that, in any action, special proceeding or other proceeding that may be brought arising out of, in connection with, or by reason of this contract, the laws of the State

of Kansas shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted.

- E. The titles to sections of this Agreement are solely for the convenience of the parties and shall not be used to explain, modify, simplify, or aid in the interpretation of the provisions of this Agreement.
- F. Should any provision of this Agreement be determined to be void, invalid, unenforceable or illegal for whatever reason, such provision(s) shall be null and void; provided, however, that the remaining provisions of this Agreement shall be unaffected thereby and shall continue to be valid and enforceable

SECTION 15. EXECUTION OF AGREEMENT

The parties hereto have caused this Agreement to be executed on the day and year first above written.

OneRain Incorporated

Authorized Signatory

Title

CITY OF OVERLAND PARK, KANSAS

Carl Gerlach
Mayor

ATTEST:

Marian Cook,
City Clerk

APPROVED AS TO FORM:

Tammy M. Owens
Senior Assistant City Attorney

Exhibit A - Services

Engineering Services to Upgrade the Data Collection and Radio Transmission System for the Flood Warning System:

1. Transition of the radio transmission system upgrade from the test-phase implementation of ALERT 2 in parallel with ALERT network to the production phase of moving to ALERT 2 concentrating repeaters (SD-1160).
2. Upgrade of data collection system to Contrail Base Station application for fault tolerance and control of data collection and dissemination activities (SD-0954).
3. Real-time age-adjusted radar rainfall data (GARR, both gridded and as basin-average values) and 2 hour rainfall forecast for viewing and modeling to be provided in the required format and additional custom formats (SD-1160).

The general scope of work is in accordance with applicable elements of the Johnson County flood warning/forecasting system implementation and KDOT ITS Set Aside Agreement for stormwater and traffic operations integration.