

## CONSULTANT ON-DEMAND AGREEMENT

THIS AGREEMENT is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2011 by and between the City of Overland Park, Kansas, (hereinafter, the "City") and **David Ford Consulting Engineers, Inc.** (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  
Flood Warning Decision Support  
July 1, 2011 through July 1, 2013**

(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. CITY RESPONSIBILITIES**

City shall provide to the Consultant information and criteria regarding City's requirements for each addendum to this Agreement. The City will provide Consultant access deemed necessary by the Chief Information Officer after consultation with the Consultant to computer files and systems for implementation of the scope. City designates Lorraine Basalo as the Project contact.

### **SECTION 4. STATUS**

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

## **SECTION 5. COMPENSATION**

- A. Total Fee: City agrees to pay Consultant a not to exceed fee amount of **one hundred thousand and 00/100 dollars (\$100,000.00)** including reimbursable expenses, for the Initial Term. If the Agreement is renewed for the Extension Term, the City agrees to pay Consultant a not to exceed fee amount of **one hundred thousand and 00/100 dollars (\$100,000.00)** including reimbursable expenses, for the Extension Term. 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 of undisputed invoice.

## **SECTION 6. TERM**

This Agreement shall encompass the period from July 1, 2011 through July 1, 2013 (the "Initial Term"). 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.

## **SECTION 7. EXTENSION OF AGREEMENT**

If the parties mutually agree, the term of this Agreement may be extended for a two-year term (the "Extension Term") and the terms of this Agreement will remain the same. If an extension is agreeable to both parties, the parties shall agree to the same prior to May 30, 2013. The Agreement shall not be extended beyond the period ending on July 1, 2015.

## **SECTION 8. 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 9. OWNERSHIP OF REPORT**

The final reports 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 reports for events and circumstances occurring after the reports are accepted as final and complete by the City.

**SECTION 10. INSURANCE**

The Consultant shall maintain throughout the duration of this Agreement 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 11. 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 12. 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 13. AFFIRMATIVE ACTION/OTHER LAWS**

- A. Consultant agrees that:
  - 1. Consultant shall observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 *et seq.*) and shall not discriminate against any person in the performance of work under the Agreement because of race, religion, color, sex, national origin, ancestry or age.

2. In all solicitations or advertisements for employees, Consultant shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission ("Commission").
  3. If Consultant fails to comply with the manner in which Consultant reports to the Commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, Consultant shall be deemed to have breached the present contract and it may be canceled, terminated or suspended, in whole or in part, by the Customer.
  4. If Consultant is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the Commission which has become final, 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 Customer, without penalty.
  5. Consultant shall include the provisions of paragraphs (1) through (4) above in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or Consultant.
- B. Consultant further agrees that Consultant shall abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 *et seq.*) and the applicable provision of the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*) as well as all other federal, state and local laws, ordinances and regulations applicable to this project and to furnish any certification required by any 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 therewith.

#### **SECTION 14. 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 Consultant 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 15. 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 16. CASH BASIS/BUDGET**

The City is obligated only to make payments under this Agreement as may be lawfully made from funds budgeted and appropriated for the purposes as set forth in this Agreement during the City's current budget year. In the event the City does not so budget and appropriate the funds, the parties shall be relieved from all obligations, without penalty, under this Agreement. City agrees to notify Contractor of such termination, which shall not constitute a default under the Agreement, at least sixty (60) days prior to the end of the City's then current budget year.

## **SECTION 17. 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

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

**David Ford Consulting Engineers, Inc.**

\_\_\_\_\_  
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**

The general scope of work is in accordance with the applicable elements of the Johnson County flood warning/forecasting system implementation plan and City requirements. The Projects will include Engineering Services for Flood Warning Decision Support Services.

1. Provide and maintain automated threat recognition system tools;
2. Provide site-specific water level forecasting services;
3. Modifications to the watershed models as new stream gages are added to the system;
4. Post-assessment evaluation of forecasting services for significant storms through simulation, and evaluation of significant storms and recalibration of models based on results; and
5. Coordinate with the City's web contractor and City on integration of the modeling systems into the website, client server systems for City and National Weather Service access to modeling, and value added products.