PROFESSIONAL SERVICES AGREEMENT

(version 5-1-2020)

This AGREEMENT ("Agreement") is entered by and between **Terracon Consultants, Inc.** ("Professional"), located at **551 League City Parkway, Suite F, League City, TX 77573** and the **City of League City** ("City"), a home-rule municipality, located at 300 W. Walker St., League City, Texas 77573 on the date set forth below.

Terms:

1. **Scope of Services:** Professional will perform the services as set forth in **Exhibit A**, which is attached and incorporated herein, and which can be generally described as **Materials Testing Services**. If there is a conflict between the terms of this Agreement and Exhibit A, the terms of this Agreement will prevail.

2. **Term and Termination:** This Agreement shall commence on **October 27, 2020** and shall expire on **October 27, 2021.** City reserves the right to terminate this Agreement for convenience upon seven (7) days written notice to Professional. Upon such termination, City shall pay Professional, at the rate set out in **Exhibit A**, for services satisfactorily performed up through the date of termination. Notwithstanding any provision in this Agreement to the contrary, City will not be required to pay or reimburse Professional for any services performed or for expenses incurred by Professional after the date of the termination notice that could have been avoided or mitigated by Professional.

3. **Compensation:** Professional shall be paid for the services as set forth in **Exhibit A**. In no event shall the total compensation exceed $**14,720.00** during the term of this Agreement. City shall tender payment (including progress/partial payments) for services only after such services are completed and are deemed to be acceptable under this Agreement, in the sole reasonable discretion of City. Professional must submit to City invoices for all services provided, which invoices must include details and dates of service. Payment by City shall be made within thirty (30) days of receipt of an invoice, except for any portion of the invoiced amount that City disapproves as not compliant under this Agreement, in the sole reasonable discretion of City. If City disapproves any amount submitted for payment by Professional, City shall give Professional specific reasons for disapproval in writing.

4. **Insurance:** Professional **is** required during the Contract Term to maintain insurance as set forth below:
(a) Comprehensive General Commercial Liability insurance covering bodily injury and property damage, with minimum coverage limits—exclusive of defense costs—of $1,000,000 per occurrence and $2,000,000 aggregate;
(b) Professional Liability (errors and omissions/malpractice) insurance with minimum coverage limits—exclusive of defense costs—of $2,000,000 per occurrence; and
(c) If at any point during the Contract Term it is foreseeable that Professional will enter upon City premises:

(i) Worker's Compensation coverage with statutory limits for the State of Texas, and (ii) Commercial Automobile Liability coverage with minimum coverage limits—exclusive of defense costs—of $1,000,000 per occurrence and $2,000,000 aggregate.
All policies must contain a waiver of subrogation against City. Comprehensive General Liability and Commercial Automobile Liability policies must name the City as Additional Insured. Professional shall pay all insurance deductibles and deductibles must not exceed $10,000 unless approved in advance by City.

Professional shall provide City Certificates of Insurance evidencing these insurance requirements prior to the start of work.

5. **Liquidated Damages:** Professional acknowledges that time is of the essence in performing this Agreement. City and Professional (collectively, the "Parties") agree that if Professional is late in performing any service designated as Time Critical on the Scope of Services attached to this Agreement, City will suffer loss, damages, or other harm from Professional's delay. The Parties agree that the amount of loss, damages, or harm likely to be incurred as a result of Professional's delay is incapable or difficult to precisely estimate, and therefore the Parties desire to stipulate the amount of such loss, damages, or harm. Accordingly, Professional shall have deducted from any amounts owed under this Agreement liquidated damages equal to the number of calendar days of the delay(s) times the daily rate, which rate shall be one-tenth of one percent (0.1%) times the compensation shown in the Scope of Services for such Time Critical service. The Parties further agree that: (i) the liquidated damages specified herein are not a penalty but rather bear a reasonable relationship to, and is not plainly or grossly disproportionate to, the probable loss likely to be incurred by City as a result of Professional's delay; (ii) one of the reasons for City and Professional to agree to such amounts is the uncertainty and cost of litigation regarding the question of actual damages; and (iii) City and Professional are sophisticated business parties and negotiated this Agreement at arm's length.

6. **Independent Professional:** Professional is an independent Professional and is not an employee, partner, joint venture, or agent of City. Professional understands and agrees that he/she will not be entitled to any benefits generally available to City employees. Professional shall be responsible for all expenses necessary to carry out the services under this Agreement and shall not be reimbursed by City for such expenses except as otherwise provided in this Agreement.

7. **Intellectual Property:** This Agreement shall be an Agreement for services and the parties intend and consider any work created as a result of this Agreement, including any and all documentation, images, products or results, to be a work (the "Work") for hire under federal copyright law. Ownership of the Work shall belong to and remain the exclusive property of City. The Work may be edited at any time within City's discretion. If the Work would not be considered a work-for-hire under applicable law, Professional hereby assigns, transfers, and conveys any and all rights, title and interest to City, including without limitation all copyrights, patents, rights of reproduction, rights to ownership, and right to secure registrations, renewals, reissues and extensions thereof. As the sole copyright holder of the Work, City maintains and asserts the rights to use, reproduce, make derivative works from, and/or edit the Work in any form of medium, expression or technology now known or hereafter developed, at any time within City's discretion. Professional shall not sell, disclose or obtain any other compensation for the services provided herein or the Work. If the Work is one to which the provisions of 17 U.S.C. § 106A apply, Professional hereby waives and appoints City to assert on Professional's behalf Professional's moral rights or any equivalent rights regarding the form or extent of any alteration to the Work (including, without limitation, removal or destruction) or the making of any derivative works based on the Work, including, without limitation, photographs, drawings or other visual reproductions of the work, in any medium, for City's purposes.

8. **Confidentiality:** During the course of the services to be provided under this Agreement, Professional may become privy to confidential information of City. Professional agrees to treat as confidential the information or knowledge that becomes known to Professional during performance of this Agreement and to not use, copy, or disclose such information to any third party unless authorized in writing by City. This provision does not restrict the disclosure of any information that is required to be disclosed under applicable law. Professional shall promptly notify City of any misuse or unauthorized disclosure of City's confidential information and upon expiration of this Agreement shall return to City all confidential information in Professional's possession or control. Professional shall further comply with all information security policies of City that may apply and shall not make any press releases, public statements or advertisement referring to the services provided under this Agreement or the engagement of Professional without the prior written approval of City.

9. **Warranties and Representations:** Professional warrants and agrees that Professional shall perform its services and conduct all operations in conformity with all applicable federal, state, and local laws, rules, regulations, and ordinances. For any service performed on premises owned or controlled by City, Professional warrants and agrees that Professional will perform said services in compliance with all City rules, including but not limited to, prohibitions related to tobacco use, alcohol, and other drugs.

10. **Licenses/Certifications:** Professional represents and warrants that it will obtain and maintain in effect, and pay the cost of, all licenses, permits or certifications that may be necessary for Professional's performance of this Agreement. If Professional is a business entity, Professional warrants, represents, covenants, and agrees that it is duly organized, validly existing and in good standing under the laws of the state of its formation; and is duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary power and has received all necessary approvals to execute and deliver the Agreement and is authorized to execute this Agreement according to its terms on behalf of Professional.

11. **Performance/Qualifications:** Professional agrees and represents that Professional has the personnel, experience, and knowledge necessary to qualify Professional for the particular duties to be performed under this Agreement. Professional warrants that all services performed under this Agreement shall be performed consistent with generally prevailing professional or industry standards.

12. **Conflict of Interest:** Professional warrants, represents, and agrees that Professional presently has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with Professional's performance of the services hereunder. Professional further warrants and affirms that no relationship or affiliation exists between Professional and City that could be construed as a conflict of interest with regard to this Agreement.

13. **INDEMNIFICATION: PROFESSIONAL SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS CITY , AND EACH OF ITS OFFICIALS, OFFICERS, AGENTS AND EMPLOYEES FROM AND AGAINST ALL CLAIMS, ACTIONS, SUITS, DEMANDS, PROCEEDINGS, COSTS, DAMAGES AND LIABILITIES, INCLUDING WITHOUT LIMITATION ATTORNEYS' FEES AND REASONABLE LITIGATION COSTS, ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM ANY ACTS OR OMISSIONS OF PROFESSIONAL OR ANY AGENT, EMPLOYEE, SUBPROFESSIONAL, OR SUPPLIER OF PROFESSIONAL IN THE EXECUTION OR PERFORMANCE OF THIS CONTRACT, TO THE EXTENT THE CLAIM ARISES FROM NEGLIGENCE, WILLFUL ACT, BREACH OF CONTRACT OR VIOLATION OF LAW.**

14. **Force Majeure:** Neither party shall be liable to the other for (i) any delay in performance; (ii) any other breach; (iii) any loss or damage; or (iv) any contribution to or aggravation of any of the foregoing; arising solely from uncontrollable forces such as fire, theft, storm, war, or any other cause that could not have been reasonably avoided by the party's exercise of due diligence.

15. **Notices:** Any notice given under this Agreement by either party to the other may be effected either by personal delivery in writing or by mail, registered or certified postage prepaid with return receipt requested. Mailed notices shall be addressed to the addresses of the Parties as they appear in the contract. Notices delivered personally shall be deemed communicated at the time of actual receipt. Mailed notices shall be deemed communicated three (3) days after mailing.

16. **Texas Family Code Child Support Certification:** Pursuant to Section 231.006 of the Texas Family Code, Professional certifies that it is not ineligible to receive the award of or payments under the Agreement and acknowledges that the Agreement may be terminated, and payment may be withheld if this certification is inaccurate.

17. **State Auditor:** Professional understands that acceptance of funds under the Agreement constitutes acceptance of the authority of the Texas State Auditor's Office, or any successor agency (collectively, the "Auditor"), to conduct an audit or investigation in connection with those funds. Professional agrees to cooperate with the Auditor in the conduct of the audit or investigation, including without limitation providing all records requested. Professional will include this provision in all contracts with permitted subprofessionals.

18. **Jurisdiction:** Any disputes under this Agreement shall be brought in a court of competent jurisdiction in Galveston, Texas and governed by Texas law.

19. **Alternative Dispute Resolution:** To the extent that Chapter 2260, Texas Government Code, is applicable to this Contract and is not preempted by other applicable law, the dispute resolution process provided for in Chapter 2260 and the related rules adopted by the Texas Attorney General Pursuant to Chapter 2260, shall be used by City and Professional to attempt to resolve any claim for breach of contract made by Professional that cannot be resolved in the ordinary course of business. The Director of Finance of City shall examine Professional's claim and any counterclaim and negotiate with Professional in an effort to resolve such claims. This provision shall not be construed as a waiver by City of its right to seek redress in the courts.

20. **Entire Agreement:** This Agreement contains the entire understanding between the Parties and supersedes all prior agreements, arrangements, and understanding, oral or written between the Parties relating to this Agreement. This Agreement may not be modified except by mutual written agreement of the Parties executed subsequent to this Agreement.

21. **Eligibility to Receive Payment:** Professional certifies that, as a matter of state law, it is not ineligible to receive the Agreement and payments pursuant to the Agreement and acknowledges that the Agreement may be terminated, and payment withheld if this representation is inaccurate.

22. **Payment of Debt/Delinquency to State:** Professional certifies that it is not indebted to the City of League City and is current on all taxes owed to the City of League City. Professional agrees that any payments owing to Professional under the Agreement may be applied directly toward any debt or delinquency that Professional owes the City of League City regardless of when it arises, until such debt or delinquency is paid in full.

23. **Products and Materials Produced in Texas:** If Professional will provide services under the Agreement, Professional covenants and agrees that in performing its duties and obligations under the Agreement, it will purchase products and materials produced in Texas when such products and materials are available at a price and delivery time comparable to products and materials produced outside of Texas.

24. **Risk of Loss:** If applicable, all work performed by Professional pursuant to the Agreement will be at Professional's exclusive risk until final and complete acceptance of the work by City. In the case of any loss or damage to the work prior to City's acceptance, bearing such loss or damage will be Professional's responsibility.

25. **Publicity:** Professional shall not use City's name, logo or likeness in any press release, marketing materials or other public announcement without receiving City's prior written approval.

26. **Legal Construction/Severability:** In the event that any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision, and this Agreement shall be construed as

if such invalid, illegal or unenforceable provisions had never been contained in it. To this end, the provisions of this Agreement are declared to be severable. The Parties may mutually agree to renegotiate the Agreement to cure such illegality/invalidity or unconstitutionality if such may be reasonably accomplished.

27. **Limitations:** The Parties are aware that there are constitutional and statutory limitations on the authority of City to enter into certain terms and conditions of the Agreement, including, but not limited to, those terms and conditions relating to liens on City's property; disclaimers and limitations of warranties; disclaimers and limitations of liability for damages; waivers, disclaimers and limitations of legal rights, remedies, requirements and processes; limitations of periods to bring legal action; granting control of litigation or settlement to another party; liability for acts or omissions of third parties; payment of attorneys' fees; dispute resolution; indemnities; and confidentiality (collectively, the "Limitations"). Any terms and conditions related to the Limitations will not be binding on City except to the extent authorized by the laws and Constitution of the State of Texas.

28. **Sovereign Immunity:** The Parties agree that neither the execution of the Agreement by City nor any other conduct, action or inaction of any City representative relating to the Agreement constitutes a waiver of sovereign immunity by City.

29. **Authority:** Professional warrants and represents that Professional has full power and authority to enter into and perform this Agreement and to make the grant of rights contained herein. The person signing on behalf of City represents that he/she has authority to sign this Agreement on behalf of City.

30. **Non-Waiver:** The Parties specifically agree that neither the occurrence of an event giving rise to a breach of contract claim nor the pendency of a claim constitute grounds for the suspension of performance by Professional. No covenant or condition of this Agreement may be waived except by written consent of the waiving party. Forbearance or indulgence by one party in any regard whatsoever shall not constitute a waiver of the covenant or condition to be performed by the other party.

31. **Prohibition on Boycotting Israel:** Pursuant to Section 2270.002 of the Texas Government Code, by executing this Agreement Professional verifies that Professional: (1) does not boycott Israel; and (2) will not boycott Israel during the term of this Agreement.

32. **Prohibition Against Business with Iran, Sudan or Foreign Terrorists Organizations:** Professional warrants, covenants, and represents that Professional is not engaged in business with Iran, Sudan, or any company identified on the list referenced in Section 2252.152 of the Texas Government Code.

(signature block on next page)

Executed on _____. *(date to be filled in by City Secretary)*

TERRACON CONSULTANTS, INC - "Professional"

_____
Noosha Smith

CITY OF LEAGUE CITY – "City"

_____
John Baumgartner, City Manager

Attest:

_____
Diana Stapp, City Secretary

Approved as to Form:

_____
Office of the City Attorney

Exhibit A

Scope of Services/Description of Products/Payment Schedule
(**5** number of pages, including this page)

See Next Page

October 12, 2020

Mr. Scott Tuma
City of League City
300 W Walker St.
League City, Texas 77573

Subject: **Cost Estimate for Materials Services**
Dickinson Pump Station Improvements
League City, Texas
Terracon Cost Estimate Number P91201187

Dear Mr. Tuma:

Terracon Consultants, Inc. **(Terracon)** is pleased to provide this Cost Estimate for Materials Services. We understand we have been selected based on our qualifications to provide materials testing services for the referenced Project. In this letter we have presented our understanding of the scope of the project, the proposed services, and the budget estimate.

A. PROJECT INFORMATION

The project consists of the removal of an existing tank and appurtenances and constructing a new 400,000 Gallon steel ground storage tank. The tank subgrade preparation consists of 60 inches of select fill material, compacted to 98% of ASTM D698, and the top 12 inches to be treated with lime. The tank foundation is a concrete ring wall. A generator pad and associated site piping and utility lines are included.

Please note we have not included any testing or inspections for the steel tank structure. If coating or connections inspections are required , Terracon will submit a supplement to this document.

Construction Plans prepared by Cobb Fendley, dated February 2020, were reviewed in preparation for this Cost Estimate and Scope of Services.

B. SCOPE OF SERVICES

Services will be provided when scheduled by the Contractor or the City's representative.

1. Earthwork

- Sample backfill and treated material. Prepare and test the samples for the Atterberg Limits, Moisture-Density Relationship, and -200 sieve.
- Perform field density tests using the nuclear method to determine the moisture content and percent compaction of the soils.
- Cast strength specimen for cement stabilized sand (CSS) and test for compressive strength at 48 hours.

2. Concrete

- Sample the fresh concrete for paving and perform required tests, including slump, air content, concrete temperature, and cast test specimens during placements.
- Perform compressive tests of concrete test cylinders cast in the field.

Please note Terracon will require the approved concrete mix designs to provide these services.

3. Project Management

- Attend construction meetings, if requested
- Review concrete mixes submitted to Terracon, if requested
- Coordinate field and laboratory testing,
- Communicate with Terracon field technicians, Contractor, and Owner's site representative,
- Review laboratory and field test reports,
- Review our budget and invoice.

Scheduling Retests:

It is the responsibility of your representative to schedule retests in a like manner to scheduling our original services. Terracon shall not be held responsible for retests not performed because of a failure to schedule our services or any subsequent damage caused because of a lack of retesting.

Additional Services:

Terracon will issue a short Supplement to the Agreement form, or Supplement Cost Estimate, that outlines the additional work to be performed and the associated fees. Please authorize us to begin this additional work by returning a signed copy of the Supplement.

Project Schedule:

Field testing services will be provided on a "call-out" basis when scheduled by your representative. A minimum of 24-hours' notice is required to schedule our services, although we will attempt to meet requests in a shorter time frame. To schedule our services please contact our dispatcher at (281) 557-2900. The dispatch hours are from 07:00 a.m. to 5:00 p.m. Messages left after business hours will be checked the following business day. Terracon will only provide testing when called by your representative. The extent of our observations and documentation will be limited to the items observed during the site visits. Terracon shall not be held responsible for tests not performed because of a failure to schedule our services or any subsequent damage caused because of a lack of testing.

C. COMPENSATION

Our estimated total budget to perform the testing is $14,720, as shown in the table below.

Please note that this is only a budget estimate and not a not-to-exceed price. Our fees will be based on the unit rates provided in the attached table. You will be invoiced on units used. Services not included in this Cost Estimate, which may be requested or provided throughout the job, will be billed at Terracon rates, available upon request. Overtime is defined as all hours more than eight per day, and all hours worked on weekends and holidays.

A 4-hour minimum charge will be applied to site visits other than sample or cylinder pickups. All labor, equipment and transportation charges are billed on a portal to portal basis from our office. These fees Do Not Include Retesting or Cancellations on site. Terracon will track costs associated with retests and cancellations and provide it to the City.

Budget Estimate				
Dickinson Pump Station Improvements				
Service	**Quantity**	**Unit**	**Unit Rate**	**Estimate**
1.0 Field (Earthwork, Utility Backfill, Concrete, Generator Pad, and Misc. Structures)				
Engineering Technician	130	hour	$ 50.00	$ 6,500.00
Engineering Technician, OT	13	hour	$ 75.00	$ 975.00
Nuclear Gauge	18	day	$ 60.00	$ 1,080.00
Vehicle Charge (including pick ups)	30	day	$ 60.00	$ 1,800.00
			sub-total	**$ 10,355.00**
2.0 Laboratory				
Moisture Density Relationship	5	each	$ 175.00	$ 875.00
Atterberg Limits	4	each	$ 65.00	$ 260.00
Atrterberg Linits for select fill verification	10	each	$ 65.00	$ 650.00
Cylinder Tests (4 cyl/set)	20	each	$ 18.00	$ 360.00
Lime Determination	1	each	$ 450.00	$ 450.00
Compressive Strength of CSS specimens(48-hr)	1	set	$ 150.00	$ 150.00
			sub-total	**$ 2,745.00**
3.0 Project Management & Administration				
Administrative	6	hour	$ 75.00	**$ 450.00**
Project Manager	6	hour	$ 195.00	**$ 1,170.00**
			Total	**$ 14,720.00**

D. SITE ACCESS AND SAFETY

Client shall secure all necessary site related approvals, permits, licenses, and consents necessary to commence and complete the services and will execute any necessary site access agreement. Terracon will be responsible for supervision and site safety measures for its own employees and shall not be responsible for the supervision or health and safety precautions for any third parties, including Client's contractors, subcontractors, or other parties present at the site. In addition, Consultant retains the right to stop work without penalty at any time Consultant believes it is in the best interests of Consultant's employees or subcontractors to do so to reduce the risk of exposure to the coronavirus. Client agrees it will respond quickly to all requests for information made by Consultant related to Consultant's pre-task planning and risk

assessment processes. Client acknowledges its responsibility for notifying Consultant of any circumstances that present a risk of exposure to the coronavirus or individuals who have tested positive for COVID-19 or are self-quarantining due to exhibiting symptoms associated with the coronavirus.

E. TESTING AND OBSERVATION

Client understands that testing and observation are discrete sampling procedures, and that such procedures indicate conditions only at the depths, locations, and times the procedures were performed. Terracon will provide test results and opinions based on tests and field observations only for the work tested. Client understands that testing and observation are not continuous or exhaustive and are conducted to reduce – not eliminate – project risk. Client agrees to the level or amount of testing performed and the associated risk. Client is responsible (even if delegated to contractor) for notifying and scheduling Terracon so Terracon can perform these services. Terracon shall not be responsible for the quality and completeness of Client's contractor's work or their adherence to the project documents, and Terracon's performance of testing and observation services shall not relieve contractor in any way from its responsibility for defects discovered in its work or create a warranty or guarantee. Terracon will not supervise or direct the work performed by contractor or its subcontractors and is not responsible for their means and methods.

AUTHORIZATION:

Agreement for Services will be issued by the City of League City.

Thank you for your continued trust in Terracon. We look forward to working with you on this Project. Please call us at 281-557-2900 if you have any questions or comments regarding this document.

Sincerely,
Terracon Consultants, Inc.
(Registration No. F-3272)

Noosha P. Smith, P.E.
Regional Manager

Edwin Martinez, EIT
Materials Department Manager