

ATTACHMENT C: SAMPLE AGREEMENT

Between

THE CITY OF CLEVELAND

and

THIS AGREEMENT made this ___ day of _____, 20__, between the City of Cleveland ("City"), a municipal corporation of the State of Ohio, through its Director of Public Utilities ("Director"), pursuant to the authority of Ordinance No. __-_____, passed by the Council of the City of Cleveland on _____, 20__, and Resolution No. __-_____, adopted by the Board of Control of the City of Cleveland on _____, 20__, and

_____,
[address] _____, _____, ("Service Provider"), an [_____] Corporation, through its duly authorized officer.

RECITALS

- A. The City of Cleveland Division of Water (CWD) currently serves approximately 425,000 metered accounts, some of which are read directly visually, some with a visual reading of a remote register, and some by automatic meter reading;
- B. The City intends to upgrade such metered accounts to advanced metering infrastructure ("AMI") technology to: (i) reduce long-term operating costs; (ii) improve the effectiveness of its meter reading and customer service operations; (iii) enhance service to its customers; (iv) recover non-revenue water; and (iv) improve distribution system operations;
- C. [for AMI system provider] The City desires to enter into an agreement with Service Provider to provide electronic products (including hardware, software, and communications devices) and related professional services (including design and configuration, training, maintenance and support) in connection with the AMI system (the "Project");
- D. The City desires to supplement the regularly employed staff of the several departments of the City in order to obtain professional services necessary and required to provide installation labor and related professional services in connection with the installation of an AMI system (the "Project");

- E. Service Provider represents and warrants that it is highly qualified and competent to provide the AMI system and to perform such services, and has expertise and knowledge in such matters as are necessary to complete the Project; and
- F. The City and Service Provider have negotiated the terms and conditions by which Service Provider shall provide the AMI system and perform services, and Service Provider represents that it is ready, willing and able to perform as of the Effective Date of this Agreement and thereafter in accordance with the Scope of Work and the terms of this Agreement.

In consideration of the foregoing Recitals (which are incorporated into this Agreement) and the mutual covenants and agreements contained herein, the Parties hereto agree as follows:

SECTION I. DEFINITIONS

- A. "City" means the City of Cleveland.
- B. "Commissioner" means the City's Commissioner of the Division of Water and such other duly authorized representatives as the Commissioner may designate from time to time.
- C. "Director" means the Director of the City's Department of Public Utilities and such other duly authorized representatives as the Director may designate from time to time.
- D. "Service Provider " means _____.
- E. "Subcontractors" means (list of Subcontractors)
_____.
- F. "Project" means all products to be supplied and services to be performed by Service Provider under this Agreement.
- G. "Project Management Consultant" means CH2M HILL. The City may designate CH2M HILL to act as an authorized representative of the Director in specific matters regarding administration, technical direction, inspection, and management of this project. CH2M HILL has the authority to direct Service Provider on behalf of the Director.
- H. "City's Project Manager" means the City's designated employee who may act as an authorized representative of the Director in specific matters regarding administration, technical direction, inspection, and management of this project. The City's Project Manager has the authority to direct Service Provider on behalf of the Director.

SECTION II. SERVICES OF SERVICE PROVIDER

A. General

By execution of this Agreement, the City and Service Provider agree to be bound by this Agreement, the City's RFP (Exhibit "A"), and the Service Provider's Proposal (Exhibit "B"). Service Provider further agrees to provide to the City all products and services necessary and required for the proper completion of the Project, including those identified or reasonably implied in the main body of this Agreement and Exhibits "A" and "B" that are attached to this Agreement and are made a part hereof as if fully rewritten herein, except as changed or modified by any provisions of this Agreement.

B. Scope of Work

Service Provider shall supply all products and services necessary and required for a complete and working AMI system (hereinafter referred to as the "Work"). Service Provider shall perform all necessary, required, and reasonably implied tasks described in Exhibit "A," Exhibit "B," and Exhibit "C." The Project shall not be considered to be completed until all required products have been supplied and all required services performed by Service Provider, subject to the terms and conditions of this Agreement, and all deliverables have been delivered to and reviewed and approved by the City.

C. Term

Consultant shall not perform any Work hereunder until receipt of Notice to Proceed. The term of this Agreement shall begin upon receipt of Notice to Proceed and shall, unless extended by the City or unless sooner canceled or terminated pursuant to the provisions hereof, expire one year from that date.

1. Time to complete work. All work required during the term of the Contract shall be completed and submitted not more than 1 year from and including the date the Service Provider receives written Notice to Proceed from the City.
2. Completion of Contract Items. The quantities of works listed in Attachments "C" and "D" are approximately 20 to 25% of the total water services in the City. For purposes of completing all work encompassed by the Contract and the Installation Schedule, and completing additional work ordered by the City in accordance the Contract, the City may in its sole discretion unilaterally extend the term of the Contract for up to one (1) year if the City gives written notice of its intention to extend not later than ninety (90) days prior to the expiration of the Contract. All work

contained in the Contract shall be performed in accordance with all original pricing, terms, and conditions. All work ordered by the City in addition to that originally described in the Contract as initially made a part hereof at the Commencement Date shall be conducted in accordance with the pricing, terms, and conditions specified in the Contract.

3. City's option to renew. The City reserves the option to renew the contract for four (4) additional one-year periods under the terms and conditions herein stated beginning on the anniversary of the commencement of the first year of the Project.

The City's initial letter offering the Service Provider an opportunity to renew the contract does not constitute an award of the option period. Any option acceptance must be confirmed by the City in writing from the Director, before it becomes valid.

4. Changes in Scope of Work. The City may, from time-to-time, make changes in the scope of work of the Service Provider under the Contract as approved by the City's Project Manager.

D. Schedule

The completion of the Project in a timely manner is essential. Service Provider's Project Schedule is attached hereto as Exhibit "C." Service Provider shall perform all work required by this Agreement within the times stipulated in the Project Schedule.

SECTION III. ASSISTANCE OF THE CITY

The City shall assist Service Provider to the extent possible as necessary during the term of this Agreement. The City shall provide access to and copies of all known documents related to the Project at no cost to Service Provider. However, the City does not guarantee the accuracy of any information contained in such documents, and Service Provider shall make no claim against the City if the information contained in such documents shall be discovered to be incorrect or not in conformance with actual conditions.

SECTION IV. PAYMENTS

A. Amount

1. The City shall pay Service Provider for the accomplishment of all Work required hereunder an amount not to exceed _____ Dollars and _____ Cents (\$_____).

2. The compensation paid to Service Provider shall be on a per-unit basis in accordance with the pricing tables table set out Exhibit "D."

B. Time of the Essence

1. All provisions of this Agreement relating to time of performance are of the essence of this Agreement. Therefore, Service Provider shall perform all services required by this Agreement within the schedule for completion contained in the Project Schedule or any Amended Project Schedule as agreed to in writing by the City Project Manager.
2. Liquidated Damages: Notwithstanding anything to the contrary in this Agreement, including Article VIII, in the event Service Provider is given notice of delay or nonperformance and fails to cure in the time specified, it must pay the City as liquidated damages, and not as a penalty, the amount of \$ ONE THOUSAND AND NO/100 DOLLARS (\$1,000.00) per calendar day. The liquidated damages shall begin to accrue from date set for cure until either the City reasonably obtains similar goods or services if the Contract is terminated for default, or until the Service Provider provides the goods or services if the Contract is not terminated for default. Further, liquidated damages shall not accrue if the delay or failure is excusable and not caused by Service Provider. The City shall have the right to deduct any assessed liquidated damages from amounts otherwise due to Service Provider. If payments due the Service Provider are less than the amount of any liquidated damages, Service Provider shall pay the difference to the City.

The Service Provider remains liable for damages caused other than by delay.

Notwithstanding the foregoing provision, in the event Service Provider fails to perform under the terms of the General Provisions or defaults under the terms of the Events of Default provisions, the City reserves its right to find a substitute supplier of goods and/or services, and to recover any resultant damages allowed by law.

C. Additional Services

If the Service Provider performs additional services that are not required by this Agreement, the City shall not be obligated to pay for such services until the following conditions have been satisfied:

1. Submittal by Service Provider to the Director of written notice prior to the initiation of such additional services, including an estimate of cost and schedule implications and a detailed description of such services;

2. Prior approval of the City's Board of Control of the modification of the within Agreement by the addition of such services and additional compensation, if any;
3. If the additional services increase the total compensation under this Agreement, certification of such additional cost by the City's Department of Finance;
4. A written modification to the within Agreement; and
5. Written notification to Service Provider from the Director directing the Service Provider to perform such additional services prior to commencement of the additional services.

D. Invoices and Payments

1. The City shall pay the Service Provider after submission to and review by the CWD and approval by the Director of a monthly verified invoice itemizing actual work performed by the Service Provider. If the invoice is not acceptable, the City shall pay any portion of the invoice not questioned nor in dispute or will return the invoice to Service Provider and inform Service Provider as to the corrective actions necessary, if any, to qualify the remainder of the invoice for approval.
2. Payment shall be made for actual products supplied and services performed, subject to the satisfactory performance of the system components as specified herein.

F. Acceptance

No approval given or payment made under this Agreement shall be conclusive evidence of the acceptance of performance under this Agreement either wholly or partially, and no payment made hereunder shall be construed to be an acceptance of deficient or unsatisfactory work.

SECTION V. CANCELLATION

This Agreement may be canceled by the City at any time for cause upon written notice to Service Provider of such intent when either the progress or results achieved under this Agreement are unacceptable to the City.

If this Agreement is canceled by the City prior to completion, Service Provider, within ten (10) days of such cancellation, shall submit a certified final progress report of the percentage of Work completed pursuant to Section IV, Payments, by the date of cancellation. The City shall pay Service Provider for the Work completed as certified in this statement and as approved by the Director.

Notwithstanding any other provision of this Agreement, including Exhibit "B," all records, documents, materials, equipment, and working papers prepared or purchased as part of the Work under this Agreement shall become and remain the property of the City, and upon any such cancellation, Service Provider shall turn over to the City all records, documents, working papers, equipment, and other materials which would be necessary, in the judgment of the City, to maintain continuity in progress of the Work by another Service Provider.

SECTION VI. ASSIGNMENT PROHIBITED; SUBCONTRACTORS

Service Provider may not assign, transfer, convey, sell, or pledge its rights or interest in this Agreement or any part thereof, or any right or privilege created hereunder, without first obtaining written consent of the City, as expressed by resolution of its Board of Control. Upon any attempt by Service Provider to do otherwise, this Agreement shall immediately terminate.

All Subcontractors shall at all times be subject to all the provisions of this Agreement. Consultant may not change or substitute subcontractors without first obtaining written consent of the City, as expressed by resolution of its Board of Control. As a prior condition to approval of a Subcontractor, Service Provider shall file a conformed copy of the applicable subcontract with the City.

Subcontracting shall not relieve Service Provider of any of its obligations under this Agreement. Service Provider shall be and remain solely responsible to the City for the acts or faults of any Subcontractor and of such Subcontractor's officers, agents, and employees, each of whom for this purpose is deemed to be an agent or employee of Service Provider to the extent of its subcontract.

SECTION VII. RIGHT TO INSPECT; RIGHT TO AUDIT BOOKS

Any authorized representative of the City shall, at all reasonable times and with reasonable notice, have the right to inspect and examine the drawings, specifications, and other contract documents at Service Provider's office during the period of their preparation. Further, any authorized representative of the City shall, at all reasonable times and with reasonable notice, have the right to audit, inspect, and examine the Service Provider's accounting books and financial records for the Project, including, but not limited to, records of hours expended, personnel utilized, payments of employee salaries and benefits, and records of payments made to Subcontractors.

Subject to Ohio Public Records law, Service Provider shall retain all financial and administrative records relating to the AMI Project for a period of three (3) years after the expiration or termination of the Contract, and shall permit the City and its representatives or auditors access to such records. Likewise, Service Provider shall cause all of its Subcontractors to retain all financial and

administrative records relating to the AMI Project for the same three (3)-year time period described in the preceding sentence, and shall permit the City and its representatives or auditors access to such Subcontractor records. Service Provider agrees to make full and prompt restitution to the City of such amounts of money that result from audit exceptions due to Service Provider's noncompliance with generally accepted accounting principles and applicable state and federal laws, the Contract, or the City's rules.

SECTION VIII. INDEMNITY

To the fullest extent permitted by law, Service Provider shall indemnify and hold harmless the City, CH2M HILL, their officers, agents, and employees against all losses, damages, expenses, suits, claims, demands, fines, penalties, awards, liabilities, and costs, including reasonable attorneys fees, to the extent that the liability, or the underlying harm causing the liability, is attributable to, may arise out of, or be based upon, any negligent error or omission in the work of Service Provider or Service Provider's negligent performance under this Agreement, including any damages or claims arising out of any breach of or failure to observe or to perform any covenants, agreements, or warranties made by Service Provider under this Agreement, including injury or death or damage to person or property; negligent or otherwise wrongful act, error or omission of Service Provider, its principals, employees, and subcontractors. At the City's option, Service Provider shall defend or reimburse the City in any litigation and pay on behalf of the City all sums that the City shall become legally obligated to pay as a result of any litigation or claims incurred in connection therewith and satisfy and cause to be discharged such judgments that may be obtained against the City, its officers, agents, and employees to the extent of Service Provider's indemnification obligations as set forth above.

Section VIII, Indemnity and Section IX, Insurance Requirement shall survive the completion of the Work to be performed hereunder and the termination of this Agreement.

SECTION IX. INSURANCE REQUIREMENT

Service Provider and each of its Subcontractors shall, at their expense and at all times during the performance of services hereunder, maintain comprehensive general and professional liability insurance insuring themselves against the indemnification obligations undertaken in Article VIII, Indemnity above. Service Provider shall require its Subcontractors to obtain insurance and shall be responsible for enforcement of its Subcontractor's obligation to obtain insurance to satisfy the requirements hereunder. The policies shall be with companies authorized to do business in Ohio and rated "A" or above by A.M. Best Company or equivalent.

The comprehensive general liability insurance policy shall: be occurrence type; name the City as an additional insured; have limits of not less than Two Million Dollars (\$2,000,000.00) for any one incident; have a "per project" endorsement; and be primary with respect to Service Provider's general liability, notwithstanding any other insurance covering the City.

Service Provider's insurance policy shall include valuable papers coverage in the amount of not less than One Hundred Thousand Dollars (\$100,000.00).

Service Provider's insurance policy shall include automotive liability coverage in the amount of not less than Two Million Dollars (\$2,000,000.00) combined single limit for bodily injury and property damage for each occurrence.

Service Provider's insurance policy shall include Workers' Compensation coverage for all of the Service Providers' employees who are subject to this provision in an amount sufficient to satisfy Ohio statutory requirements; the insurer will provide a waiver of subrogation as to the City; Employer's Liability coverage with limits of one million dollars (\$1,000,000.00) per occurrence must also be provided.

The Proposer shall maintain insurance in full force and effect during the entire period of performance under contract. Failure to do so shall be cause for termination of the Contract.

All policies must have a thirty (30)-day non-cancellation clause giving the City thirty (30) days prior written notice in the event a policy is canceled. At the end of each contract year, the City reserves the right to review insurance requirements and to require more or less coverage depending upon assessment of the risk, the Service Provider's experience, and the availability and affordability of increased liability insurance coverage.

A. Notice of Cancellation

The insurance policy or policies provided hereunder shall provide as follows:

"The Company agrees that thirty (30) days prior to cancellation or reduction of the insurance afforded by this policy, with respect to the Agreement involved, written notice will be sent by certified mail to the Director of Law of the City of Cleveland."

In addition to the notification required of Service Provider's insurance company, Service Provider shall notify the City, in writing, by certified mail to the Director of Law of the City of Cleveland, immediately upon learning of cancellation or reduction of the insurance afforded by its policy.

B. Copy of Insurance Policy

Upon the request of the Director of Law of the City of Cleveland, Service Provider shall forthwith provide the Director of Law an exact copy of the insurance policy or policies required herein.

C. Certificate of Insurance

Upon execution of this Agreement, Service Provider shall submit to the City a certificate(s) of insurance with respect to such policy or policies. Such certificate(s) shall contain the notification provision set forth in paragraph A. above. If the additional insured endorsement required above is not available at the Agreement execution date, Service Provider shall submit to the City a notation of the endorsement together with either a Binder or an Advice of Insurance with respect to such endorsement. Service Provider shall also provide a copy of the endorsement naming the City as an additional insured under Service Provider's comprehensive general liability coverage. The endorsement shall be submitted no later than thirty (30) days after the execution date hereof.

D. Policy

The certificate(s), Binder or Advice required in paragraphs B and C of this Section shall, as to form, coverage and carrier, be satisfactory to the Director of Law. If at any time, the coverage or carrier on any policy shall become unsatisfactory to the Director of Law, Service Provider shall, forthwith, provide a new certificate meeting the requirements of the Director of Law.

E. No Limit of Liability

The limits of insurance specified above shall in no way constitute the upper limits of liability for which Service Provider is responsible under Article VIII, Indemnity above.

SECTION X. STATE INDUSTRIAL COMPENSATION

Service Provider shall be required at all times during the term of this Agreement to subscribe to and comply with the Workers' Compensation laws of the State of Ohio and pay such premiums as may be required thereunder and to save the City harmless from any and all liability from or under said act. It shall also furnish, upon request by the City, a copy of the official certificate or receipt showing the payments referred to above.

SECTION XI. SOCIAL SECURITY ACT

Service Provider shall be and remain an independent contractor with respect to all services performed hereunder and agrees to and does hereby accept full and exclusive liability for the payment of any and all contributions or taxes for social

security, unemployment benefits, pensions, and annuities now or hereafter imposed under any state or federal laws that are measured by the wages, salaries, or other remuneration paid to persons employed by Service Provider on work performed under the terms of this Agreement as may be now or hereafter imposed under any state or federal law, and further agrees to obey all lawful rules and regulations and to meet all lawful requirements that are now or hereafter may be issued or promulgated under said respective laws by any duly authorized state or federal officials; and said Service Provider also agrees to indemnify and save harmless the City of Cleveland from any such contributions or taxes or liability therefore.

SECTION XII. INTEREST OF SERVICE PROVIDER

Service Provider covenants that its principals have made no contributions to the Mayor of the City which would cause Service Provider to be ineligible for the award of an unbid contract under division (I) or (J) of Section 3517.13 of the Ohio Revised Code, and that it has executed and submitted to the City an affidavit to such effect.

Service Provider further covenants that it currently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. Service Provider further covenants that no person having any such interest shall be employed in the performance of this Agreement.

SECTION XIII. DEFAULT AND REMEDIES

A. Default

Service Provider shall be in default of this Agreement upon the happening of any of the following events:

1. If Service Provider fails to observe or perform any of the covenants or agreements to be observed or performed by it hereunder and such failure continues for a period of five (5) days after written notice thereof is given Service Provider by the City;
2. The filing, execution, or occurrence of: (a) a petition or other proceeding by, or a finding against, Service Provider for its dissolution, reorganization, or liquidation, (b) a petition in bankruptcy by Service Provider; (c) an adjudication of Service Provider as bankrupt or insolvent; or (d) an assignment or petition for assignment for the benefit of creditors;

3. If Service Provider abandons or discontinues its operations for the City except when such abandonment or discontinuance be caused by fire, earthquake, war, strike, or other calamity beyond its control; or

4. The performance of any work required under the Contract without proper permits, licenses, and approvals that may be required by law including, but not limited to, federal, state, and local governmental permits and state Contractors' licenses.

Should any default event described in this section occur, the City may terminate, in whole or in part, the Contract.

B. System Nonperformance or Unsatisfactory Performance

Should the AMI system fail to perform to the levels proposed by Service Provider and accepted by City, or should performance statistics indicate that such failure is impending, City shall notify Service Provider in writing of such condition. Within ten (10) business days of such notice, Service Provider shall propose a plan to remedy to this condition. Should the plan result in unacceptable additional costs or otherwise be unacceptable to the City, the City shall declare the Service Provider in default, and shall be entitled to seek remedies under this Agreement.

C. Remedies

Upon the happening of any one or more of the events as set forth in paragraph A and B of this Section, or upon any other default or breach of this Agreement, the City may, at its option, exercise concurrently or successively any one or more of the following rights and remedies:

1. Without waiving such default to pay any sum required to be paid by Service Provider to others than the City and which Service Provider has failed to pay under the terms and conditions of this Agreement, Service Provider shall repay to the City, on demand, any amount so paid by the City, with interest thereon at eight percent (8%) per annum from the date of such payment and all expenses connected therewith;
2. Enjoin any breach or threatened breach by Service Provider of any covenants, agreements, terms, provisions, or conditions hereof;
3. Sue for the performance of any obligation, promise, or agreement devolving upon Service Provider for performance or for damages for the nonperformance or unsatisfactory thereof, all without terminating this Agreement; and/or

4. Terminate this Agreement.

D. Rights and Remedies Not Exclusive

All rights and remedies granted to the City herein and any other rights and remedies that the City may have at law and/or in equity are hereby declared to be cumulative and not exclusive and the fact that the City may have exercised any remedy without terminating this Agreement shall not impair the City's rights thereafter to terminate or to exercise any other remedy herein granted or to which it may be otherwise entitled.

SECTION XIV. NOTICE AND PAYMENTS

All notices that may be proper or necessary to be serviced and payment to be made hereunder shall be sent by regular mail, postage prepaid, to the following addressees or to such other address as either party may hereafter designate for such purpose.

To the City:

Fred Roberts

(Notices)

Division of Water

1201 Lakeside Avenue

Cleveland, Ohio 44114

(Invoices)

Division of Water

Budget Unit

1201 Lakeside Avenue

Cleveland, Ohio 44114

To Service Provider:

SECTION XV. EQUAL OPPORTUNITY

This Agreement is a "contract," and Service Provider is a "contractor" within the meaning of Chapter 187 of the Codified Ordinances of Cleveland, Ohio 1976. During the term, Service Provider shall comply with all terms, conditions, and requirements imposed on a "contractor" in the Equal Opportunity Clause, Section 187.11 C.O., attached hereto as Exhibit "E" and made a part hereof. A copy of such Clause shall be made a part of every subcontract or agreement

entered into for goods or services, and shall be binding on all persons, firms, and corporations with whom Service Provider may deal.

SECTION XVI. PERFORMANCE BOND

Service Provider shall secure performance of this Agreement with a bond from a surety company authorized to do business in the State of Ohio, and approved by the City, in the form and content prescribed by and acceptable to the Director of Law, with good and sufficient sureties and in an amount equal to at least fifty percent (50%) of the contract price on the current year's work (to be re-evaluated every year). A check is not acceptable in place of a performance bond. The City of Cleveland reserves the right to require a performance bond in various amounts or to modify the performance bond requirement whenever it is determined to be in the best interest of the City of Cleveland to do so.

The performance bond shall be submitted to the City's Department of Law along with the original signed copies of this Agreement.

Consultant shall maintain bond in full force and effect during the entire period of performance under Contract. The performance bond will not be released until all the provisions of the contract have been fulfilled.

SECTION XVII. DISPUTES

Service Provider and the City covenant to cooperate with one another in all reasonable respects necessary to consummate the transactions contemplated by the Contract, and will each take all reasonable actions within the scope of their respective authorities to secure the cooperation of their officers, agents, and other third parties.

Should disputes relating to the Contract arise between the parties, the parties agree to utilize the following dispute resolution process prior to pursuing other available remedies:

1. The aggrieved party shall send written notice to the other party describing the dispute;
2. Within three (3) days after the other party receives such notice, a meeting or telephone conference shall be held between the City's Project Manager and Service Provider's Project Manager to attempt to resolve the dispute.

SECTION XVII. MISCELLANEOUS

Service Provider agrees that no representation or warranties of any type shall be binding upon the City, unless expressly authorized in writing herein.

Amendment to Contract. The Contract may be amended or modified by, and only by, a written instrument executed by the parties in accordance with the authorizing legislation.

Protection of the Water Distribution System. The parties acknowledge that delivery of AMI Project services may require modifications to the City's water distribution system. Service Provider will take all commercially reasonable steps, as defined by AWWA Standards and the highest quality practices then employed by the water industry, necessary to protect parts of the public water distribution system affected by its work from contamination by non potable liquids, solids, gases, or mixtures of substances.

Invalid, Illegal, or Unenforceable Contract Provisions. In the event that any provision of the Contract shall, for any reason, be determined to be invalid, illegal, or unenforceable in any respect, the parties hereto shall negotiate in good faith and agree as to such amendments, modifications, or supplements of or to the Contract, that to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the parties as reflected in the Contract Documents, and those provisions of the Contract that are so amended, modified, supplemented, or otherwise affected by such action, shall remain in full force and effect.

Survivability of Certain Contract Provisions. Any and all provisions set forth in the Contract that, by its or their nature, would reasonably be expected to be performed after the termination of the Contract shall survive and be enforceable after such termination. Any and all liabilities, actual or contingent, that shall have arisen in connection with the Contract, shall survive any termination of the Contract. Any express statement of survival contained in any section of the Contract shall not be construed to affect the survival of any other section, which shall be determined pursuant to this section.

Waiver. No waiver by either party of any provision in the Contract shall be deemed a waiver of any other provision in the Contract or of any subsequent breach by either party of the same or any other provision.

Consultant Permits, Licenses, and Approvals. Service Provider shall at all times obtain and maintain all permits, licenses, and approvals required by law and needed to fulfill its obligations under the Contract. To the extent to which the City deems reasonable or feasible, the City shall cooperate with Service Provider's performance of this obligation.

Change in Service Provider's Ownership Structure. Service Provider shall provide written notice to the City of:

1. Any merger or consolidation involving Service Provider or the sale, assignment, transfer, or conveyance of twenty percent (20%) or more of any outstanding shares (if transferred in block, and if such transfer results in a change of the composition of the Board of Directors of Service Provider) of the Service Provider; or
2. Any sale or transfer of more than twenty percent (20%) of Service Provider's assets, within fifteen (15) days after such event. Upon any such event, Service Provider shall, at the City's request, demonstrate to the City's reasonable satisfaction that Service Provider remains able to continue to perform its obligations under the Contract by showing that Service Provider has either:
 - i. the financial capability to continue to perform the Contract, or
 - ii. no worse financial capability to perform hereunder than it had immediately prior to such merger, change in ownership, or transfer of assets. For purposes of this section, neither an acquisition by Service Provider, nor Service Provider's issuance of its shares, nor transfer of its assets in exchange for the full value thereof in an arm's length transaction, shall be presumed to adversely affect Service Provider's financial capability to perform under the Contract.

Service Provider understands and agrees that its failure to provide evidence to the City in accordance with the provisions of this section shall constitute an Event of Default under the Contract.

Consultant Indemnification against Patent, Copyright, or Trade Secret Violations or Infringements. During the term of the Contract, Service Provider warrants and represents that the licensed software and the configuration of the deliverables furnished by Service Provider, (the "Material") do not and will not infringe upon or violate any U.S. or Canadian patent or copyright or any trade secret or other proprietary right of any third party. Service Provider shall, at its sole cost and expense, indemnify, defend, save, and hold harmless the City from and against any and all suits, causes of action, damages, fines, penalties, claims, costs, attorneys' fees, demands, judgments, settlements, and other liabilities whatsoever arising out of such infringements and violations.

Nothing contained in this Agreement shall be deemed to constitute the City and Service Provider as partners in a partnership or joint venture for any purpose whatsoever.

All terms and words used in this Agreement, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number singular or plural, and any other gender, masculine, feminine, or neuter, as the context or sense of this Agreement or any paragraph or clause herein may require, the same as if such words have been fully and properly written in the number and gender.

The headings of sections and paragraphs, if any, to the extent used herein are used for reference only, and in no way define, limit, or describe the scope or intent of any provision hereof.

In the event that any term(s) or provision(s) of this Agreement shall be held invalid, illegal, or unenforceable, for any reason, by any court of competent jurisdiction, such invalidity, illegality, or unenforceability should not affect any other term or provision hereof and this Agreement shall be interpreted and construed as if such term(s) or provision(s) had never been contained herein, to the extent the same has been held to be invalid, illegal, or unenforceable.

This Agreement may be executed in any number of counterparts, each of which, when so executed and delivered, shall be deemed an original, but such counterparts together shall constitute but one and the same instrument.

Governing Law. The Contract shall be governed by and construed in accordance with the laws of the State of Ohio. The Service Provider expressly understands and agrees that any dispute arising out of the Contract be litigated in the State of Ohio.

Proof of Payment to Service Provider's Subcontractors and Suppliers. Service Provider shall, beginning with its second invoice, provide proof of payment to its Subcontractors and suppliers, in form and content approved by the City's Project Manager.

Successors and Assigns; No Third Party Beneficiaries. The Contract shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns. There are no third-party beneficiaries to the Contract.

Laws to be observed by Service Provider. The Service Provider shall observe and comply with all laws, rules, regulations, standards, and ordinances of the City, State, and Federal government applicable to the Contract and the work to be performed under it.

Prevailing Wage. The Service Provider shall observe and comply with all of the City's Prevailing Wage laws and procedures in accordance with the laws of

the state of Ohio (Specifically, Chapter 4115 of the Ohio Revised Code). In the event that the Service Provider or its subcontractors fail to comply with the City's prevailing wage procedures (including reporting requirements), the City may withhold invoice payment until the noncompliance is rectified.

Merger of Prior Contracts and Discussions. The Contract (including all Exhibits and Schedules attached hereto), the RFP, and the proposal contain all of the terms and conditions agreed to by the parties, and no other contract, document, or agreement, oral or otherwise, regarding the subject matter of the Contract shall be deemed to exist or to bind any party hereto or to vary any of the terms contained in the Contract. The Contract supersedes all prior agreements and understandings between the parties hereto relating to the subject matter hereof.

No course of prior dealings between the parties and no usage of trade shall be relevant or admissible to supplement, explain, or vary any of the terms of the Contract. Acceptance of, or acquiescence in, a course of performance rendered under this or any prior agreement shall not be relevant or admissible to determine the meaning of the Contract even though the accepting or acquiescing party has knowledge of the nature of the performance and any opportunity to make objection.

In the event of a conflict between provisions among this Agreement and its exhibits, these documents shall be given priority in the following order: (1) the main body of this Agreement; (2) the exhibits to this Agreement other than the City's RFP and Service Provider's Proposal; (3) the City's RFP; and (4) Service Provider's Proposal.

The following documents attached hereto are hereby incorporated with and made a part of this Agreement:

Exhibit "A" – Scope of Services

Exhibit "B" - City's Request for Proposal

Exhibit "C" -Service Provider's Proposal

Exhibit "D" - Project Schedule

Exhibit "E" - Fee Table

Exhibit "F" - Equal Opportunity Clause

Ordinance No. _____

Board of Control Resolution No. _____

IN WITNESS WHEREOF, the parties have caused this instrument to be executed as of the date and year first above written.

CITY OF CLEVELAND

By: _____

Director of Public Utilities

[Service Provider]

By: _____

Print: _____

Title: _____

Taxpayer Identification Number

The legal form and correctness of the within instrument are hereby approved.

ROBERT J. TRIOZZI

Director of Law

By: _____

Assistant Director of Law

Date: _____