# Agreement for Construction Material Testing Services

**PROJECT NAME**

**(PROJECT NUMBER)**

This Agreement is made and entered into this day of , 20 , by and between the City of Overland Park, Kansas, hereinafter “City”, and , hereinafter “Consultant.”

## I. Scope of Services and Cost Therefore

The Consultant shall perform construction material testing services (the “Services”) to the City’s full satisfaction and in accordance with the Proposal Instructions, Proposal, Specifications, and Sampling and Testing Frequency Chart, which are attached hereto and incorporated by reference herein as follows:

EXHIBIT A: Proposal Instructions

EXHIBIT B: Proposal

EXHIBIT C: Specifications

EXHIBIT D: Sampling and Testing Frequency Chart

The Consultant shall be paid for this work an amount not to exceed Dollars ($ ).

**II. TERM**

The initial term of this Agreement is for \_\_\_ (\_\_) year(s) commencing on the date set forth above.

## III. Changes to Scope of Services

This Agreement may be amended to provide for additions, deletions, and revisions in the Scope of Services outlined in the Proposal. Prior to commencing any additional services, Consultant must submit a proposal outlining the additional services to be provided. Consultant shall be compensated based upon the submitted unit prices for the additional services which shall be approved through a written Supplemental Agreement.

## IV. Completion of Project

To meet the City’s specific needs, certain defined deliverables, activities, and dependencies have been included in the Proposal. Execution of this Agreement constitutes agreement of the parties on the deliverables and activities in the Proposal. Once these pre-agreed deliverables and metrics have been satisfied, City and Consultant agree that the project is complete. Provisions of Insurance and Indemnification will survive completion of the project and termination of the Agreement.

## V. Payment Terms

City will make payment to Consultant on a unit price basis as shown in the Proposal. It is understood and agreed that estimated quantities of items for unit price work are not guaranteed and payment will be based on actual quantities used for the period. City will make payment to Consultant within thirty (30) days after receipt of each undisputed invoice.

**VI.** **Termination**

Nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of the City to terminate this Agreement, in whole or in part, with or without cause, subject to written notice to Consultant. If the City terminates 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.

**VII. Dispute Resolution**

City and Consultant agree that disputes relative to the Services performed should first be addressed by good faith 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 Services as per this Agreement as if no dispute existed; and provided further that no dispute will be submitted to arbitration without the parties’ express written consent.

**VIII. Independent Contractor**

Consultant is an independent contractor and as such neither Consultant nor its personnel are agents or employees of the City.

**IX. Subcontractors**

Consultant shall not subcontract out any work under this Agreement without written approval of the City. If Consultant subcontracts services under this Agreement, they shall not be relieved of their liability hereunder thereby. Services performed by any subcontractor hired by Consultant will not result in any additional cost to City. Consultant must notify the City of any proposed subcontractors and the City shall have the right of approval thereof. Consultant agrees to the insurance requirements concerning the use of subcontractors as specified herein

**X. Indemnification**

Consultant agrees to defend, indemnify and hold harmless the City and its agents and/or employees from any and all claims, settlements, and judgments including but not limited to those for bodily injury, physical property damage and/or death to the extent actually caused or alleged to be caused by Consultant or any of its agents, servants, employees' or subcontractors negligent performance or failure to perform under this Agreement or their willful misconduct. Neither acceptance of the completed Services, payment, nor termination of this Agreement shall release Consultant of its obligation under this paragraph.

**XI. Insurance Requirements**

A. General: Consultant shall secure and maintain, throughout the duration of this contract, insurance (on an occurrence basis unless otherwise agreed to) of such types and in at least such amounts as required herein. Professional Liability may be written on a "claims made" basis. Consultant shall provide certificates of insurance and renewals thereof on forms provided by the City. The City shall be notified by receipt of written notice from the insurer at least thirty (30) days prior to material modification or cancellation of any policy listed on the Certificate.

All insurance procured for this Agreement by the Consulting Engineer/Architect, including additional insured designations, shall be primary and non-contributory.

B. Notice of Claim Reduction of Policy Limits: Consultant, upon receipt of notice of any claim in connection with the contract, shall promptly notify the City, providing full details thereof, including an estimate of the amount of loss or liability.

Consultant shall monitor and promptly notify the City of any reduction in limits of protection afforded under any policy listed in the Certificate (or otherwise required by the contract) if the Consultant’s limits of protection shall have been impaired or reduced to such extent that the limits fall below the minimum amounts required herein. Consultant shall promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the City.

C. Commercial General Liability:

Limits –

|  |  |
| --- | --- |
| General Aggregate: | $2,000,000 |
| Products / Completed Operations Aggregate: | $2,000,000 |
| Personal & Advertising Injury: | $1,000,000 |
| Each Occurrence: | $1,000,000 |

Policy MUST include the following conditions:

**NAME CITY OF OVERLAND PARK AS “ADDITIONAL INSURED”**

D. Automobile Liability: Policy shall protect the Consultant against claims for bodily injury and/or property damage arising from the ownership or use of any owned, hired and/or non‑owned vehicle.

Limits (Same as Commercial General Liability) -

Combined Single Limits, Bodily Injury and Property Damage - Each Accident

Policy MUST include the following condition:

**NAME CITY OF OVERLAND PARK AS “ADDITIONAL INSURED”**

**Note: Consultant expressly agrees to only utilize vehicles properly insured under the requirements of this Agreement while performing the services set forth herein, and to ensure that its subcontractors comply with the same.**

E. Workers' Compensation: This insurance shall protect the Consultant against all claims under applicable state workers' compensation laws. 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 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

F. Professional Liability: Consultant shall maintain throughout the duration of this Agreement Professional Liability Insurance in an amount of not less than One Million Dollars ($1,000,000.00), and shall provide the City with certification thereof.

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

1. Is authorized to do business in the State of Kansas;

2. Carries a Best's policy holder rating of A- or better; and

3. Carries at least a Class VIII financial rating, or

4. Is a company mutually agreed upon by the City and Consultant.

### H. Subcontractors’ Insurance: If part of the Agreement is to be sublet, Consultant shall either:

### 1. Cover all subcontractors in its insurance policies, or

### 2. Require each subcontractor not so covered to secure insurance which will protect subcontractor against all applicable hazards or risks of loss as and in the minimum amounts designated.

### Whichever option is chosen, Consultant shall indemnify and hold harmless the City as to any and all damages, claims or losses, including attorney’s fees, arising out of the acts or omissions of its subcontractors.

**XII. Non-Discrimination And Other Laws**

A. During the performance of this Agreement, the Consultant agrees that:

1. Consultant shall observe the provisions of the Kansas Act Against Discrimination and shall not discriminate against any person in the performance of Services under the present contract because of race, religion, color, sex, disability, 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 fail to comply with the manner in which Consultant report to the Commission in accordance with the provisions of K.S.A. 44-031 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 City;

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 contract and it may be canceled, terminated or suspended, in whole or in part, by the City; and

5. Consultant shall include the provisions of subsections (A)(1) through (4) 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 in the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) as well as all federal, state and 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.

**XIII. Prohibition Against Contingent Fees**

Consultant warrants that it has not employed or retained any person, firm, or corporation, other than a bona fide employee working solely for Consultant, to solicit or secure the awarding of this Agreement based upon an arrangement that the person, firm or corporation would receive any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award of this Agreement. For the breach or violation of the foregoing provision, the City shall have the right to terminate the Agreement without liability and, at its discretion to deduct from the contract price, or otherwise recover the full amount of such fee, commission, percentage, gift or consideration.

**XIV. Miscellaneous Provisions**

A. Parties hereto agree that neither shall assign or transfer their interest in this Agreement without the written consent of the other and further agree that this Agreement binds the parties, their successors, trustees, assignees and legal representatives.

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. It is understood and agreed that the written terms and provisions of this Agreement shall supersede all prior verbal and written statements of any and every official and/or other representative of the City and Consultant and such statements shall not be effective or be construed as entering into, or forming a part of, or altering in any way whatsoever, the written Agreement. In the event that the City issues a purchase order, work order, invoice or similar document relating to Services performed, such purchase order or similar document shall be for the City’s administrative purposes only and will not supplement, supersede, modify or affect any of the terms and conditions set forth herein.

D. This Agreement is entered into under and pursuant to, and is to be construed and enforceable in accordance with, the laws of the State of Kansas. The waiver of or failure to enforce any term or condition of this Agreement shall not be construed as a waiver of any other term or condition. If any provision is held to be unenforceable by a court or other tribunal, the enforceability of the other provisions shall not be affected.

E. Should any provision of this Agreement be determined to be void, invalid, unenforceable or illegal for whatever reason, such provision 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.

**XV. Cash Basis/Budget *(for multi-year agreements)***

Notwithstanding anything contained in the Agreement to the contrary, it is understood and agreed by the parties hereto that City is obligated only to pay periodic payments or monthly installments under the Agreement as may lawfully be made from funds budgeted and appropriated for such purpose during the City’s then current budget Year (i.e. January 1 to December 31) or from funds made available from any lawfully operated, revenue producing source. Should City fail to budget, appropriate or otherwise make available funds for payments due under the Agreement in any budget year, the Agreement shall be deemed terminated on the last day of the then current budget year for which appropriations were received without penalty or expense to the City of any kind whatsoever, except as to the portions of the recurring charges herein agreed upon for which funds have appropriated and budgeted or are otherwise made available. City agrees to notify Consultant 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.

**XVI. Order of Precedence**

If there is any conflict between the terms of this Agreement, excluding exhibits, and anything contained in the exhibits referenced herein or attached hereto, the terms and provisions of this Agreement, excluding exhibits, shall control.

**XVII. Execution of Agreement**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their authorized officials on the day and year first above written.

CITY OF OVERLAND PARK, KANSAS CONSULTANT

Authorized Signatory for City Name

 Title

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney