

hereto entitled "Scope of Work" (hereafter referred to as the "Project"). Attachment "A" is hereby incorporated herein by reference and made a part hereof as if written word for word. However, in case of conflict in the language of Attachment "A" and this Contract, the terms and conditions of this Contract shall be final and binding upon both parties hereto.

III. Payment for Services

Total payment for services described herein shall be a sum not to exceed One Hundred Sixty Thousand and No/100 Dollars (\$160,000).

This total payment for services includes CONSULTANT's reimbursable expenses. Subject to the not-to-exceed amount of this Contract, CONSULTANT will be compensated for the following reimbursable expenses, if any, to the extent such expenses are directly related to CONSULTANT's performance of the Project: printing; photocopying; reproduction of drawings and specifications; postage; courier delivery services; services by Sub-Consultants authorized by CITY; and, any other ordinary expenses reasonably necessary to perform the services contemplated in this Contract. Reimbursable expenses, if any, save and except expenses related to services performed by Sub-Consultants authorized by the CITY, may include up to a 10% mark-up on the actual cost incurred by CONSULTANT. (Expenses arising from or out of services performed by Sub-Consultants shall not have a 10% mark-up added to the actual cost of such services.) Additional expenses, which are extraordinary in nature, shall be approved in advance by CITY in writing signed by the parties. Such extraordinary expenses may be paid as incurred and billed to the CITY pursuant to this Contract over and above the total payment amount identified in this provision. Any extraordinary expenses not approved in writing in advance by the CITY shall remain the sole responsibility of the CONSULTANT.

CONSULTANT will bill CITY on a percent complete basis in accordance with Attachment "B"; provided however that this Contract shall control in the event of any conflict between the language in Attachment "B" and the language in this Contract. If additional services, trips or expenses are requested, CONSULTANT will not provide such additional services until authorized by CITY in writing to proceed. The scope of services shall be strictly limited. CITY shall not be required to pay any amount in excess of the amount identified in the preceding paragraph unless CITY shall have approved in writing in advance (prior to the performance of additional work) the payment of additional amounts.

Each month CONSULTANT will submit to CITY an invoice for actual services performed and reimbursable expenses incurred by CONSULTANT during the previous month. Said invoice shall be accompanied by such documentation or data supporting the percentage complete during the preceding month and the reimbursable expenses for which payment and/or reimbursement is sought as the CITY may require. Each invoice shall also state the percentage of work completed

on the Project through the end of the then submitted billing period, the total of the current invoice amount and a running total balance for the Project to date.

Within thirty (30) days of receipt of each such monthly invoice CITY shall make monthly payments in the amount shown by CONSULTANT's approved monthly statements and other documentation submitted. Such payments shall be subject to the Texas Prompt Payment Act, Texas Government Code §§ 2251.001, *et seq.*

Nothing contained in this Contract shall require CITY to pay for any work that is unsatisfactory as determined by CITY or which is not submitted in compliance with the terms of this Contract, nor shall failure to withhold payment pursuant to the provisions of this section constitute a waiver of any right, at law or in equity, which CITY may have if CONSULTANT is in default, including the right to bring legal action for damages or for specific performance of this Contract. Waiver of any default under this Contract shall not be deemed a waiver of any subsequent default.

IV. **Revisions of the Scope of Services**

CITY reserves the right to revise or expand the scope of services after due approval by CITY as CITY may deem necessary, but in such event CITY shall pay CONSULTANT equitable compensation for such services. In any event, when CONSULTANT is directed to revise or expand the scope of services under this Section of the Contract, CONSULTANT shall provide CITY a written proposal for the entire costs involved in performing such additional services. Prior to CONSULTANT undertaking any revised or expanded services as directed by CITY under this Contract, CITY must authorize in writing the nature and scope of the services and accept the method and amount of compensation and the time involved in all phases of the Project.

It is expressly understood and agreed by CONSULTANT that any compensation not specified in Paragraph III herein above may require McKinney City Council approval and is subject to the current budget year limitations.

V. **Term**

This Contract shall begin on the date first written above, and shall terminate when CITY has approved the Project as being final or otherwise terminates this Contract as provided herein.

VI.
Contract Termination Provision

This Contract may be terminated at any time by CITY for any cause by providing CONSULTANT thirty (30) days written notice of such termination. Upon receipt of such notice, CONSULTANT shall immediately terminate working on, placing orders or entering into contracts for supplies, assistance, facilities or materials in connection with this Contract and shall proceed to promptly cancel all existing contracts insofar as they are related to this Contract.

VII.
Ownership of Documents

All materials and documents prepared or assembled by CONSULTANT under this Contract shall become the sole property of CITY and shall be delivered to CITY without restriction on future use. CONSULTANT may retain in its files copies of all drawings, specifications and all other pertinent information for the work. CONSULTANT shall have no liability for changes made to any materials or other documents by others subsequent to the completion of the Contract.

VIII.
Insurance Requirements

A. Before commencing work, the consultant shall, at its own expense, procure, pay for and maintain during the term of this Contract the following insurance written by companies approved by the state of Texas and acceptable to the City of McKinney. The consultant shall furnish to the City of McKinney Purchasing Manager certificates of insurance executed by the insurer or its authorized agent stating coverages, limits, expiration dates and compliance with all applicable required provisions. Certificates shall reference the project/contract number and be addressed as follows:

City of McKinney
c/o EBIX BPO
P.O. Box 257, Ref. 72-483
Portland, MI 48875-0257
Fax: 517-647-7900

1. Commercial General Liability insurance, including, but not limited to Premises/Operations, Personal & Advertising Injury, Products/Completed Operations, Independent Contractors and Contractual Liability, with minimum combined single limits of \$1,000,000 per-occurrence, \$1,000,000 Products/Completed Operations Aggregate and \$1,000,000 general aggregate. Coverage must be written on an occurrence form. The General Aggregate shall apply on a per project basis.

2. Workers' Compensation insurance with statutory limits; and Employers' Liability coverage with minimum limits for bodily injury: a) by accident, \$100,000 each accident, b) by disease, \$100,000 per employee with a per policy aggregate of \$500,000.
3. Business Automobile Liability insurance covering owned, hired and non-owned vehicles, with a minimum combined bodily injury and property damage limit of \$1,000,000 per occurrence.
4. Professional Liability Insurance to provide coverage against any claim which the consultant and all consultants engaged or employed by the consultant become legally obligated to pay as damages arising out of the performance of professional services caused by error, omission or negligent act with minimum limits of \$2,000,000 per claim, \$2,000,000 annual aggregate.

NOTE: If the insurance is written on a claims-made form, coverage shall be continuous (by renewal or extended reporting period) for not less than *thirty-six (36) months* following completion of the contract and acceptance by the City of McKinney.

B. With reference to the foregoing required insurance, the consultant shall endorse applicable insurance policies as follows:

1. A waiver of subrogation in favor of City of McKinney, its officials, employees, and officers shall be contained in the Workers' Compensation insurance policy.
2. The City of McKinney, its officials, employees and officers shall be named as additional insureds on the Commercial General Liability policy, by using endorsement CG2026 or broader; and, the City of McKinney shall be provided a defense to any and all claims and causes of action arising out of or related to this Agreement as may be provided pursuant to CONSULTANT's general liability insurance policies. In this regard, CONSULTANT shall assist CITY to obtain any defense provided by the CONSULTANT's general liability insurance policies.

Nothing contained in Section XII of this Agreement shall be interpreted or applied as limiting, reducing, or eliminating any obligation or duty that CONSULTANT's insurance carrier may owe to CITY as an additional insured, pursuant to endorsement CG2026 or broader under the CONSULTANT's general liability insurance policies required by this Agreement, to provide the CITY with a defense and/or indemnify the CITY for any claim or cause of action, whether one or more, regardless of the proportionate responsibility or liability of the CONSULTANT or the CITY. Neither shall anything

contained in this Section VIII be interpreted or applied as providing or otherwise entitling either CONSULTANT, CONSULTANT's insurance carrier or any other party any right or ability to recover over against CITY any amounts of money attributable to damages, costs, expenses and/or attorneys' fees based on or arising out of a finding of comparative or proportionate responsibility or liability as against the CITY it being understood and agreed that CITY in no way intends by this Agreement to waive its sovereign immunity regarding any claim, suit or cause of action.

- 3.. All insurance policies shall be endorsed to the effect that City of McKinney will receive at least thirty (30) days notice in advance of the cancellation effective date of any policy of insurance that is cancelled by the insurance company for any reason other than nonpayment of premium.
 4. All insurance policies shall be endorsed to the effect that City of McKinney will receive at least ten (10) days notice in advance of the cancellation effective date of any policy of insurance that is cancelled by the insurance company for nonpayment of premium or by CONSULTANT for any reason.
- C. All insurance shall be purchased from an insurance company that meets a financial rating of B+VI or better as assigned by A.M. Best Company or equivalent.
- D. The CONSULTANT shall notify CITY in writing at least thirty (30) days prior to CONSULTANT cancelling or making any material change to any coverage(s) provided in, or through, the insurance policies required under this Section VIII. Failure by CONSULTANT to provide CITY the notice required hereunder may, in the sole discretion of CITY, be deemed a material breach of this Agreement.

IX. Right to Inspect Records

CONSULTANT agrees that CITY shall have access to and the right to examine any directly pertinent books, documents, papers and records of CONSULTANT involving transactions relating to this Contract. CONSULTANT agrees that CITY shall have access during normal working hours to all necessary CONSULTANT facilities and shall be provided adequate and appropriate work space in order to conduct audits in compliance with the provisions of this section. CITY shall give CONSULTANT reasonable advance notice of intended audits.

CONSULTANT further agrees to include in subcontract(s), if any, a provision that any subcontractor or engineer agrees that CITY shall have access to and the right to examine any directly pertinent books, documents, papers and

records of such engineer or sub-contractor involving transactions to the subcontract, and further, that CITY shall have access during normal working hours to all such engineer or sub-contractor facilities and shall be provided adequate and appropriate work space, in order to conduct audits in compliance with the provisions of the paragraph. CITY shall give any such engineer or sub-contractor reasonable advance notice of intended audits.

X.
Successors and Assigns

CITY and CONSULTANT each bind themselves and their successors, executors, administrators and assigns to the other party to this contract and to the successors, executors, administrators and assigns of such other party in respect to all covenants of this Contract. Neither CITY nor CONSULTANT shall assign or transfer its interest herein without the prior written consent of the other.

XI.
CONSULTANT's Liability

Acceptance of the final plans by the CITY shall not constitute nor be deemed a release of the responsibility and liability of CONSULTANT, its employees, associates, agents or consultants for the accuracy and competency of their designs, working drawings, specifications or other documents and work; nor shall such acceptance be deemed an assumption of responsibility by CITY for any defect in the designs, working drawings, specifications or other documents and work; nor shall such acceptance be deemed an assumption of responsibility by CITY for any defect in the designs, working drawings, specifications or other documents and work prepared by said CONSULTANT, its employees, associates, agents or sub-consultants.

XII.
INDEMNIFICATION

CONSULTANT DOES HEREBY COVENANT AND CONTRACT TO WAIVE ANY AND ALL CLAIMS, RELEASE, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS CITY COUNCIL, OFFICERS, EMPLOYEES, AND AGENTS, IN BOTH THEIR PUBLIC AND PRIVATE CAPACITIES, FROM AND AGAINST ALL LIABILITY, CAUSES OF ACTION, CITATIONS, CLAIMS, COSTS, DAMAGES, DEMANDS, EXPENSES, FINES, JUDGMENTS, LOSSES, PENALTIES OR SUITS, WHICH IN ANY WAY ARISE OUT OF, RELATE TO, OR RESULT FROM CONSULTANT'S PERFORMANCE UNDER THIS CONTRACT AND WHICH ARE CAUSED BY THE INTENTIONAL WRONGFUL ACTS OR NEGLIGENT ACTS OR OMISSIONS OF CONSULTANT OR CONSULTANT'S SUBCONTRACTORS AND THE OFFICERS, AGENTS OR EMPLOYEES OF EITHER CONSULTANT OR CONSULTANT'S SUBCONTRACTORS (THE "INDEMNIFIED ITEMS") SUBJECT TO THE LIMITATIONS IN TEXAS LOCAL GOVERNMENT CODE § 271.904 AND TEXAS CIVIL PRACTICE AND REMEDIES CODE, § 130.002(B).

BY WAY OF EXAMPLE, THE INDEMNIFIED ITEMS MAY INCLUDE PERSONAL INJURY AND DEATH CLAIMS AND PROPERTY DAMAGE CLAIMS, INCLUDING THOSE FOR LOSS OF USE OF PROPERTY, AS WELL AS INTELLECTUAL PROPERTY INFRINGEMENT OR FAILURE TO PAY A SUBCONTRACTOR OR SUPPLIER.

INDEMNIFIED ITEMS SHALL INCLUDE REASONABLE ATTORNEYS' FEES IN PROPORTION TO THE CONSULTANT'S LIABILITY AND COSTS, COURT COSTS, AND SETTLEMENT COSTS. INDEMNIFIED ITEMS SHALL ALSO INCLUDE ANY EXPENSES, INCLUDING REASONABLE ATTORNEYS' FEES AND EXPENSES, INCURRED BY AN INDEMNIFIED INDIVIDUAL OR ENTITY IN ATTEMPTING TO ENFORCE THIS INDEMNITY.

XIII.
Independent Contractor

CONSULTANT's status shall be that of an Independent Contractor and not an agent, servant, employee or representative of CITY in the performance of this Contract. No term or provision of or act of CONSULTANT or CITY under this Contract shall be construed as changing that status. CONSULTANT will have exclusive control of and the exclusive right to control the details of the work performed hereunder, and shall be liable for the acts and omissions of its officers, agents, employees, contractors, subcontractors and engineers and the doctrine of respondeat superior shall not apply as between CITY and CONSULTANT, its officers, agents, employees, contractors, subcontractors and engineers, and nothing herein shall be construed as creating a partnership or joint enterprise between CITY and CONSULTANT.

XIV.
Default

If at any time during the term of this Contract, CONSULTANT shall fail to commence the work in accordance with the provisions of this Contract or fail to diligently provide services in an efficient, timely and careful manner and in strict accordance with the provisions of this Contract or fail to use an adequate number or quality of personnel to complete the work or fail to perform any of its obligations under this Contract, then CITY shall have the right, if CONSULTANT shall not cure any such default after thirty (30) days written notice thereof, to terminate this Contract. Any such act by CITY shall not be deemed a waiver of any other right or remedy of CITY. If after exercising any such remedy due to CONSULTANT's nonperformance under this Contract, the cost to CITY to complete the work to be performed under this Contract is in excess of that part of the Contract sum which has not theretofore been paid to CONSULTANT hereunder, CONSULTANT shall be liable for and shall reimburse CITY for such excess. CONSULTANT'S liability under this provision shall be limited to the total dollar amount of this Contract.

CITY's remedies for CONSULTANT's default or breach under this Contract shall be limited to one or more of the following remedies which may be exercised separately or in combination at CITY's sole exclusive choice:

- (a) Specific performance of the Contract;
- (b) Re-performance of this Contract at no extra charge to CITY; or,
- (c) Monetary damages in an amount not to exceed the greater of:
 - (1) The amount of any applicable insurance coverage CONSULTANT is required to purchase and maintain under this Contract plus any deductible amount to be paid by CONSULTANT in conjunction with said coverage regardless of whether CONSULTANT has actually purchased and maintained said coverage; or,
 - (2) The total dollar amount of this Contract.

The terms of Sections XII entitled Indemnification, and XVII entitled Confidential Information shall survive termination of this Contract.

XV. Changes

CITY may, from time to time, require changes in the scope of services to be performed under this Contract. Such changes as are mutually agreed upon by and between CITY and CONSULTANT shall be incorporated by written modification to this Contract.

XVI. Conflict of Interest

CONSULTANT covenants and agrees that CONSULTANT and its associates and employees will have no interest, and will acquire no interest, either direct or indirect, which will conflict in any manner with the performance of the services called for under this Contract. All activities, investigations and other efforts made by CONSULTANT pursuant to this Contract will be conducted by employees, associates or subcontractors of CONSULTANT.

In addition, CONSULTANT shall comply with the requirements of Texas Government Code § 2252.908 by completing and submitting Form 1295 to the Texas Ethics Commission ("Commission") at the time CONSULTANT submits this signed Contract to CITY, and as follows:

Form 1295 Filing Process: The Commission has made available on its website a new filing application that must be used to file Form 1295. The CONTRACTOR must use the application to enter the required information

on Form 1295 and print a copy of the completed form, which will include a certification of filing that will contain a unique certification number. An authorized agent of the CONTRACTOR must sign the printed copy of the form and have the form notarized. The completed Form 1295 with the certification of filing must be filed with the CITY.

The CITY must notify the Commission, using the Commission's filing application, of the receipt of the filed Form 1295 with the certification of filing not later than the 30th day after the date the Contract binds all parties to the Contract. The Commission will post the completed Form 1295 to its website within seven business days after receiving notice from the CITY.

Form 1295 Availability: Certificate of Interested Parties Form is available from the Texas Ethics Commission website at the following address:

https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm

For questions regarding and assistance in filling out Form 1295, please contact the Texas Ethics Commission at 512-463-5800.

XVII. **Confidential Information**

CONSULTANT hereby acknowledges and agrees that its representatives may have access to or otherwise receive information during the furtherance of its obligations in accordance with this Contract, which is of a confidential, non-public or proprietary nature. CONSULTANT shall treat any such information received in full confidence and will not disclose or appropriate such Confidential Information for its own use or the use of any third party at any time during or subsequent to this Contract. As used herein, "Confidential Information" means all oral and written information concerning City of McKinney, its affiliates and subsidiaries, and all oral and written information concerning CITY or its activities, that is of a non-public, proprietary or confidential nature including, without limitation, information pertaining to customer lists, services, methods, processes and operating procedures, together with all analyses, compilation, studies or other documents, whether prepared by CONSULTANT or others, which contain or otherwise reflect such information. The term "Confidential Information" shall not include such materials that are or become generally available to the public other than as a result of disclosure of CONSULTANT, or are required to be disclosed by a governmental authority.

XVIII.
Mailing Address

All notices and communications under this CONTRACT to be mailed to CITY shall be sent to the address of CITY's agent as follows, unless and until CONSULTANT is otherwise notified:

City of McKinney
Mr. Paul Grimes
City Manager
PO Box 517
McKinney, TX 75069.

Notices and communications to be mailed or delivered to CONSULTANT shall be sent to the address of CONSULTANT as follows, unless and until CITY is otherwise notified:

KSA ENGINEERS, INC.
Michael Mallonee
Senior Project Manager
8875 Synergy Drive
McKinney, TX 75070

Any notices and communications required to be given in writing by one party to the other shall be considered as having been given to the addressee on the date the notice or communication is posted, faxed or personally delivered by the sending party.

XIX.
Applicable Law

The CONTRACT is entered into subject to the McKinney City Charter and ordinances of CITY, as same may be amended from time to time, and is subject to and is to be construed, governed and enforced under all applicable State of Texas and federal laws. CONSULTANT will make any and all reports required per federal, state or local law including, but not limited to, proper reporting to the Internal Revenue Service, as required in accordance with CONSULTANT's income. Situs of this Contract is agreed to be Collin County, Texas, for all purposes, including performance and execution.

XX.
Severability

If any of the terms, provisions, covenants, conditions or any other part of this Contract are for any reason held to be invalid, void or unenforceable, the remainder of the terms, provisions, covenants, conditions or any other part of this

Contract shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

XXI.
Remedies

No right or remedy granted herein or reserved to the parties is exclusive of any other right or remedy herein by law or equity provided or permitted; but each shall be cumulative of every other right or remedy given hereunder. No covenant or condition of this Contract may be waived without written consent of the parties. Forbearance or indulgence by either party shall not constitute a waiver of any covenant or condition to be performed pursuant to this Contract.

XXII.
Entire Agreement

This Contract embodies the complete agreement of the parties hereto, superseding all oral or written previous and contemporaneous agreements between the parties relating to matters herein, and except as otherwise provided herein cannot be modified without written agreement of the parties.

XXIII.
Non-Waiver

It is further agreed that one (1) or more instances of forbearance by CITY in the exercise of its rights herein shall in no way constitute a waiver thereof.

XXIV.
Headings

The headings of this Contract are for the convenience of reference only and shall not affect any of the terms and conditions hereof in any manner.

XXV.
Venue

The parties to this Contract agree and covenant that this Contract will be enforceable in McKinney, Texas; and that if legal action is necessary to enforce this Contract, exclusive venue will lie in Collin County, Texas.

XXVI.
No Third Party Beneficiary

For purposes of this Contract, including its intended operation and effect, the parties (CITY and CONSULTANT) specifically agree and contract that: (1) the Contract only affects matters/disputes between the parties to this Contract, and is in no way intended by the parties to benefit or otherwise affect any third person

or entity notwithstanding the fact that such third person or entity may be in contractual relationship with CITY or CONSULTANT or both; and (2) the terms of this Contract are not intended to release, either by contract or operation of law, any third person or entity from obligations owing by them to either CITY or CONSULTANT.

IN WITNESS WHEREOF, the parties hereto have set their hands by their representatives duly authorized on the day and year first written above.

CITY OF MCKINNEY

By: _____
PAUL G. GRIMES
City Manager

Date Signed: _____

ATTEST:

SANDY HART, TRMC, MMC
City Secretary
DENISE VICE, TRMC
Assistant City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney

KSA ENGINEERS, INC.,
a Texas corporation

By: _____
MITCHELL L. FORTNER, P.E.
President_____

Date Signed: _____

THE STATE OF TEXAS §
COUNTY OF COLLIN §

BEFORE ME, the undersigned authority, in and for said County, Texas, on this day personally appeared PAUL G. GRIMES, City Manager of the **CITY OF MCKINNEY**, a Texas Municipal Corporation, known to me to be the person who's name is subscribed to the foregoing instrument, and acknowledged to me that he has executed the same on the City's behalf.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, THIS THE _____ DAY OF _____, 20_____.

Notary Public Collin County, Texas
My commission expires _____

THE STATE OF TEXAS §
COUNTY OF _____ §

This instrument was acknowledged before me on the _____ day of _____, 20_____, by MITCHELL L. FORTNER, P.E., in his capacity as President of **KSA ENGINEERS, INC.**, a Texas Corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same on behalf of and as the act of **KSA ENGINEERS, INC.**

GIVEN UNDER MY HAND AND SEAL OF OFFICE, THIS THE _____ DAY OF _____, 20_____.

Notary Public _____ County, Texas
My commission expires _____

Attachment "A"

Scope of Work

Attachment "B"