

**AGREEMENT  
BETWEEN ENGINEER AND CONSULTANT  
FOR PROFESSIONAL SERVICES  
TASK ORDER EDITION**

THIS IS AN AGREEMENT effective as of December 15, 2021 ("Effective Date") between ms consultants, inc. 115 West Washington Street, Suite 1310, Indianapolis, IN 46204 ("Engineer") and Sims Durkin, 5755 W. 74<sup>th</sup> St., Indianapolis, IN 46278 ("Consultant").

- A. Engineer has entered into an agreement ("Prime Agreement") dated {see each specific Task Order} with {see each specific Task Order} ("Owner") which provides for Engineer to perform and furnish professional services for the Owner on an on-call basis as described therein. A copy of the Prime Agreement (excluding compensation and other confidential information) is incorporated as Attachment 1 to this Agreement.
- B. From time to time Engineer may request that Consultant provide professional services for specific projects ("Consultant's Services"). Each engagement will be documented by a Task Order. This Agreement sets forth the general terms and conditions which shall apply to all Task Orders duly executed under this Agreement.
- C. Consultant is an independent contractor, and is not an employee or partner of, or a joint-venturer with Engineer.
- D. The parties acknowledge that the term "Engineer" is a defined term and that **ms consultants, inc.**, may be providing architectural, engineering, surveying and / or other design professional services under the terms of the Prime Agreement.

Engineer and Consultant further agree as follows:

**ARTICLE I – SERVICES OF CONSULTANT**

1.01 *Scope*

- A. Consultant's Services will be detailed in a duly executed Task Order for each Specific Project. The general format of a Task Order is shown in Exhibit A to this Agreement. Each Task Order will indicate the specific services to be performed and deliverables to be provided.
- B. To the extent the terms of the Prime Agreement apply to Consultant's Services, the Consultant assumes toward Engineer all the same obligations, duties, and responsibilities that Engineer has assumed toward the Owner. If there is an inconsistency between the Prime Agreement and this Agreement, the more stringent requirement shall govern; provided, however, that if the Prime Agreement states that a specific provision must be included in any subagreement, or that a specific provision cannot be waived in a subagreement, then the provision as set forth in the Prime Agreement shall govern.

- C. If Consultant's Services includes geotechnical services, Consultant shall take precautions to limit damage to the Site and shall return the Site to its original condition pursuant to restoration requirements in this Agreement and / or the Prime Agreement.
- D. This Agreement is not a commitment by Engineer to Consultant to issue any Task Orders.
- E. Consultant shall not perform any services without a written and duly authorized Task Order.

#### 1.02 *Records Retention*

- A. Consultant shall maintain on file in legible form, for a period of ten years following completion or termination of its services, or for a longer time if required by the Prime Agreement, all Documents, records (including cost records), and design calculations related to Consultant's Services or pertinent to Consultant's performance under this Agreement. Upon Engineer's request, Consultant shall make such records available for Engineer's review at no additional cost or shall provide a copy of any such item to Engineer at cost.

#### 1.03 *Task Order Procedure*

- A. Consultant and Engineer shall agree on the scope, time for performance, and basis of compensation for each Task Order. With respect to the scope of Consultant's services, each specific Task Order shall either (1) be accompanied by and incorporate a customized Exhibit A, "Consultant's Services for Task Order," prepared for the Specific Project or (2) state the scope of services in the Task Order document itself. Each duly executed Task Order shall be subject to the terms and conditions of this Agreement.

### **ARTICLE 2 – ENGINEER'S RESPONSIBILITIES**

#### 2.01 *General*

- A. Engineer shall have the responsibilities set forth in this Agreement and in each Task Order.
- B. Engineer shall pay Consultant as set forth in each Task Order and pursuant to the applicable terms of Article 4.
- C. Engineer shall furnish to Consultant information relevant to Consultant's Services as such information becomes available.
- D. Engineer shall facilitate the exchange of information among Engineer's Consultants, as necessary for the coordination of their respective services.
- E. Engineer shall be responsible for, and Consultant may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by Engineer to Consultant pursuant to this Agreement and any Task Order. Consultant may use such requirements, programs, instructions, reports, data, and information in performing or furnishing services under this Agreement.

## ARTICLE 3 – SCHEDULE FOR RENDERING SERVICES

### 3.01 Commencement

- A. This Agreement shall be effective and applicable to Task Orders issued hereunder for two years from the Effective Date of the Agreement. Consultant is authorized to begin rendering services under a Task Order as of the Effective Date of the Task Order.
- B. The parties may extend or renew this Agreement, with or without changes, by written instrument establishing a new term.

### 3.02 Time for Completion

- A. Consultant shall complete its obligations within a reasonable time, and shall make decisions and carry out its other responsibilities in a timely manner so as not to delay the Engineer's performance of its services under the Prime Agreement. Specific periods of time for rendering services shall be set forth in each Task Order.  
  
If specific periods of time for rendering services are not contained in the Task Order, Consultant's obligation to render services will be for a period which may reasonably be required for the completion of said services consistent with Engineer's scheduling of the overall Specific Project design.
- B. If, through no fault of Engineer or Consultant, such periods of time or dates are changed, or the orderly and continuous progress of Consultant's Services is impaired, or Consultant's Services are delayed or suspended, then Consultant may request an equitable adjustment to Consultant's compensation or time for completion of Consultant's Services in accordance with the terms of this Agreement. Engineer shall adjust the time for completion of Consultant's Services and the rates and amounts of Consultant's compensation under the provisions of this paragraph only if and to the extent to which Owner has modified the corresponding terms of the Prime Agreement.
- C. If Engineer authorizes changes in the scope, extent, or character of Consultant's Services, then Engineer shall adjust equitably the time for completion of Consultant's Services, and the rates and amounts of Consultant's compensation.
- D. Engineer shall make decisions and carry out its other responsibilities in a timely manner so as not to delay the Consultant's performance of its services.
- E. The periods of time and dates specified in any Task Order are of the essence of this Agreement. If Consultant fails, through its own fault, to complete the performance of Consultant's Services within the time set forth, as duly adjusted, then Engineer shall be entitled to recover from Consultant any actual damages incurred by Engineer as a result of Consultant's failure to timely complete performance of Consultant's Services.
- F. Consultant agrees that it will provide sufficient personnel to perform Consultant's Services in accordance with any dates and schedules specified in any Task Order.

## ARTICLE 4 – FEE, INVOICES AND PAYMENTS

### 4.01 *Fee*

- A. Engineer shall pay Consultant for all authorized Basic Services as stated in the Task Order.
- B. The total maximum payment for all tasks which may be authorized for this Agreement is Not Applicable.
- C. Unless otherwise set forth in the Task Order, Additional Services shall be compensated based upon written, signed agreement between Engineer and Consultant. No Additional Services shall be performed without written, signed agreement between Engineer and Consultant. Consultant's failure to obtain the written and signed consent of the Engineer prior to performing Additional Services shall constitute an irrevocable waiver of Consultant's entitlement to additional time or compensation for such Additional Service.

### 4.02 *Invoices*

- A. *Preparation and Submittal of Invoices:* Consultant shall prepare invoices in a format as required by Engineer. The invoice line items shall match the work elements breakdown required by the Owner. Consultant shall submit its invoices to Engineer on a monthly basis together with such supporting documentation as may be reasonably required by the Engineer. Engineer shall submit such invoices to Owner, subject to the terms of Paragraph 4.02.B, and shall endeavor to collect prompt payment from Owner.
- B. *Time for Engineer's Payment of Invoices:* Invoices are due and payable within fifteen (15) calendar days of receipt by Engineer of payment from Owner for Consultant's Services. To the fullest extent permitted by law, receipt by Engineer of payment from Owner for Consultant's Services shall be a condition precedent to any obligation of Engineer to pay Consultant, and no amount shall be due or payable to Consultant for specific services unless Engineer has received payment from Owner for such specific services. Engineer and Consultant acknowledge their mutual lack of control over Owner with respect to payment, and each hereby agrees to accept the risk of Owner's failure, refusal, or inability to pay for their respective services.

### 4.03 *Payments*

- A. *Disputed Invoices:* If Engineer disputes an invoice, either as to amount or entitlement, then Engineer shall promptly advise Consultant of the specific basis for doing so, may withhold the portion so disputed from forwarding to Owner for payment and from payment to Consultant, and must pay the undisputed portion subject to the terms of Paragraph, 4.01.
- B. *Legislative Actions:* If after the Effective Date any governmental entity takes a legislative or regulatory action that imposes additional sales or use taxes, fees, or charges on Consultant's Services or compensation under this Agreement, then the Consultant may invoice such additional sales or use taxes, fees, or charges, requesting reimbursement but only if such additional sales or use taxes, fees, or charges were submitted as an additional cost to the

Engineer and approved by the Owner and Engineer. If Engineer obtains reimbursement for the cost of such invoiced additional sales or use taxes, fees, or charges from Owner, then Engineer shall reimburse Consultant; such reimbursement of Consultant shall be in addition to the compensation to which Consultant is entitled under the terms of this Agreement.

## **ARTICLE 5 – OPINIONS OF COST**

### *5.01 Opinions of Probable Construction Cost*

- A. As applicable, Consultant's opinions (if any) of probable Construction Cost as to the parts of the Work designed or specified by Consultant, or as to which Consultant has agreed to provide such an opinion, are to be made on the basis of Consultant's experience and qualifications and represent Consultant's estimate as an experienced and qualified professional generally familiar with the construction industry. However, because Consultant has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, Consultant cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by Consultant. If Owner or Engineer requires greater assurance as to probable Construction Cost, then Engineer must recommend that Owner retain an independent cost estimator.

### *5.02 Designing to a Construction Cost Limit*

- A. If a Construction Cost limit for Work on a Specific Project designed or specified by Consultant is established between Engineer and Consultant, such Construction Cost limit and a statement of Consultant's rights and responsibilities with respect thereto will be specifically set forth in the Task Order.
- B. As applicable, if at any time during the design of the Specific Project the Consultant's opinion of probable Construction Costs exceeds the Construction Cost limit for the Specific Project, the Consultant shall make appropriate recommendations to the Engineer to adjust the Specific Project's size, quality or budget for the cost of the Specific Project.
- C. As applicable, if at the conclusion of the design of the Specific Project, the Consultant's opinion of probable Construction Costs is exceeded by the lowest bona fide bid or negotiated proposal, the Engineer may direct the Consultant, without additional compensation, to modify the Drawings and Specifications prepared by the Consultant as necessary to comply with the Construction Cost Limit.

## **ARTICLE 6 – GENERAL CONSIDERATIONS**

### *6.01 Standards of Performance*

- A. *Standard of Care:* The standard of care for all professional and related services performed or furnished by Consultant under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Consultant makes no warranties, express or implied, under this

Agreement or otherwise, in connection with any services performed or furnished by Consultant.

- B. *Technical Accuracy:* Neither Engineer nor Owner shall be responsible for discovering deficiencies in the technical accuracy of Consultant's Services. Consultant shall correct deficiencies in technical accuracy without additional compensation, unless such corrective action is directly attributable to deficiencies in Engineer-furnished or Owner-furnished information.
- C. *Subconsultants:* Consultant may not retain the services of Subconsultants on this Project without the written and signed consent of the Engineer which shall not be unreasonably withheld.
- D. *Reliance on Others:* Subject to the standard of care set forth in Paragraph 6.01.A, Consultant may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.
- E. *Compliance with Laws and Regulations, and Policies and Procedures:*
  - 1. Engineer and Consultant shall comply with applicable Laws and Regulations.
  - 2. Engineer shall provide to Consultant in writing any and all policies and procedures of Engineer and Owner applicable to Consultant's Services. Consultant shall comply with such policies and procedures, subject to the standard of care set forth in Paragraph 6.01.A, and to the extent compliance is not inconsistent with professional practice requirements.
  - 3. This Agreement is based on Laws and Regulations, and written policies and procedures of Owner and Engineer, as of the Effective Date of the Task Order. Changes after the Effective Date to Laws and Regulations, or to Owner's or Engineer's written policies and procedures, may be the basis for modifications to Engineer's responsibilities or to Consultant's scope of services, times of performance, or compensation.
- F. *Project Team:* The Consultant shall not replace any of the members of its project team listed in a Task Order and / or its proposal for a Specific Project without the consent of the Engineer while such individual is employed by the Consultant, except with another individual who is satisfactory to the Engineer. If the Consultant proposes to change the member of the project team, the Consultant shall submit to the Engineer a written request for the change, including the justification for the change and the name and qualifications for the proposed replacement. The Consultant shall provide promptly any related additional information the Consultant requests.
- G. Except with respect to its Subconsultants, Consultant shall not at any time supervise, direct, control, or have authority over any contractor's work, nor shall Consultant have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor, or the safety precautions and programs

incident thereto, for security or safety at the Site, nor for any failure of a contractor to comply with Laws and Regulations applicable to that contractor's furnishing and performing of its work.

- H. Consultant neither guarantees the performance of any Contractor nor assumes responsibility for any Contractor's failure to furnish and perform the Work in accordance with the Construction Contract.
- I. Consultant shall not provide or have any responsibility for surety bonding or insurance-related advice, recommendations, counseling, or research, or enforcement of construction insurance or surety bonding requirements unless provided for in the Consultant's scope of work.
- J. Consultant shall not be responsible for the acts or omissions of any Contractor, Subcontractor, or Supplier, or of any of their agents or employees or of any other persons (except Consultant's own agents, employees, and Subconsultants) at the Site or otherwise furnishing or performing any Work; or for any decision made regarding the Contract Documents, or any application, interpretation, or clarification of the Contract Documents, other than those made by Consultant or its Subconsultants.
- K. While at the Site, the Consultant, its Subconsultants, and their employees and representatives, shall comply with the applicable requirements of Contractor's, Engineer's, Owner's, and other safety programs of which Consultant has been informed in writing.
- L. Consultant, at its own expense, is responsible for obtaining all data and information necessary for the performance of Consultant's.
- M. Consultant's duties and obligations, as set forth herein, and any liabilities arising hereunder shall at no time be diminished or released by reason of any approval by the Engineer of any reports, studies, drawings, specifications or invoices prepared by the Consultant.

#### 6.02 *Electronic Media*

- A. The electronic media provided / transmitted by either party in connection with the Services and this Specific Project is distributed for the sole use by the receiving party.
- B. The receiving party agrees to keep the electronic media, including, without limitation, any passwords or domain names providing access to the electronic media, strictly confidential and not to disclose it to any other person except to (1) its employees, (2) those who need to know the content of the electronic media in order to perform services or construction solely and exclusively for the Specific Project, or (3) its consultants and contractors whose contracts include similar restrictions on the use of the electronic media.
- C. Unless otherwise granted in a separate license or agreement, the receiving party's use, modification, or further transmission of the electronic media is specifically limited to the analysis, design and construction of the Specific Project. Unauthorized use, reproduction and / or distribution of the electronic media is specifically prohibited.

- D. Potential errors may exist due to electronic or mechanized modifications of the electronic media that are not reflected on hard copies or deterioration inherent in the subject media. The receiving party shall exercise due care to review the electronic media for errors and further agrees to hold harmless, release and discharge the Engineer from any liability as to the accuracy or completeness of the electronic media.
- E. It is the Consultant's obligation to maintain the appropriate hardware and software necessary to access and manipulate the electronic media transmitted to it by the Engineer.

#### 6.03 *Use of Documents*

- A. All Documents, including computer generated forms of the Documents, shall become and remain the property of the Engineer upon demand, termination or completion of the Services and subject to the receipt by Consultant of payment due and owing under the terms of this Agreement.
- B. Engineer acknowledges that (1) such Documents are not intended or represented to be suitable for use on the Specific Project unless completed by Consultant, or for use or reuse by Engineer, Owner, or others on extensions of the Specific Project, on any other project, or for any other use or purpose, without written verification or adaptation by Consultant; (2) any such use or reuse, or any modification of the Documents by Engineer, without written verification, completion, or adaptation by Consultant, as appropriate for the specific purpose intended, will be at Engineer's risk and without liability or legal exposure to Consultant, its Subconsultants, or their officers, directors, members, partners, agents, and employees; and (3) Engineer shall indemnify and hold harmless Consultant, its Subconsultants, and their officers, directors, members, partners, agents, and employees, from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from any use, reuse, or modification by Engineer of the Documents without written verification, completion, or adaptation by Consultant.
- C. If, in addition to performing Consultant's Services under this Agreement, Consultant at Engineer's or Owner's request verifies the suitability of the Documents, completes them, or adapts them for extensions of the Specific Project or for any other purpose, then Engineer or Owner shall compensate Consultant at rates or in an amount to be agreed upon by Engineer or Owner and Consultant.
- D. Consultant or one of its Subconsultants shall sign or seal, and Consultant shall deliver in printed form, or such medium as specified by the Engineer, each final Document that is required to be furnished to Engineer under this Agreement.

#### 6.04 *Insurance*

- A. Consultant shall procure and maintain insurance as set forth in this Paragraph 6.04. Consultant shall cause Owner and Engineer to be listed as additional insureds on any applicable general liability insurance policy carried by Consultant.



B. Consultant shall procure and maintain at its own expense, throughout the entire term of this Agreement, the following insurance with companies having an AM Best rating of A- or greater:

1. Commercial General Liability. Commercial General Liability Insurance with a minimum combined single limit of liability of \$1,000,000 per occurrence for bodily injury and / or property damage with a \$1,000,000 annual aggregate. This shall include products / completed operations coverage and shall also include Broad Form Contractual Insurance specifically covering this Agreement.
2. Business Automobile Liability. Business Automobile Liability Insurance covering all owned, hired and non-owned vehicles and equipment used by Consultant with a minimum combined single limit of liability of \$1,000,000 for bodily injury, death and / or property damage.
3. Workers' Compensation / Employers' Liability. Workers' Compensation Insurance which shall fully comply with the statutory requirements of all applicable state and federal laws.
4. Excess Coverage. Excess coverage with respect to policies specified in Subparagraphs 6.04(B) (1, 2 and 3) with a minimum combined single limit of \$2,000,000.
5. Professional Liability. Professional Liability Insurance in an amount not less than \$2,000,000 per claim / annual aggregate on a claims-made basis.

The Task Order may supersede insurance limits based on task and specific client/

- C. Consultant and Engineer shall each deliver to the other certificates of insurance evidencing the coverages indicated in this Agreement. Such certificates shall be furnished prior to commencement of Consultant's Services and at renewals thereafter during the life of the Agreement.
- D. At any time, Engineer may request that Consultant or its Subconsultants, at Engineer's sole expense, provide additional insurance coverage, increased limits, or revised deductibles that are more protective than those specified in this Agreement. If so requested by Engineer, and if commercially available, Consultant shall obtain and shall require its Subconsultants to obtain such additional insurance coverage, different limits, or revised deductibles for such periods of time as requested by Engineer, and this Agreement will be supplemented to incorporate these requirements.
- E. All policies of insurance shall contain a provision or endorsement that the coverage afforded will not be canceled or reduced in limits by endorsement, and that renewal will not be refused, until at least 30 days prior written notice has been given to Owner and Engineer and to each other additional insured (if any) to which a certificate of insurance has been issued.

- F. Consultant shall cause Engineer and the Owner to each be named as additional insured as to all insurance coverage required hereunder except workers' compensation and professional liability.
- G. For all coverages other than Worker's Compensation, Consultant hereby grants a waiver of any right to subrogation which any insurer of Consultant may acquire against Engineer by virtue of the payment of any loss under such insurance. Consultant agrees to obtain any endorsement that may be necessary to facilitate this waiver of subrogation, but this provision applies regardless of whether or not Engineer has received a waiver of subrogation endorsement from insurer.

#### 6.05 *Suspension and Termination*

- A. *Suspension:*
  - 1. By Engineer: Engineer may suspend a Task Order for up to 60 days upon seven days written notice to Consultant.
- B. *Termination:* The obligation to provide further services under a Task Order may be terminated:
  - 1. For cause,
    - a. By either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the terms of the Task Order through no fault of the terminating party. Engineer's failure to pay Consultant pursuant to the terms of the Task Order is a substantial failure to perform and a cause for termination by Consultant.
    - b. Notwithstanding the foregoing, a Task Order will not terminate under Paragraph 6.05.B.1.a if the party receiving such notice begins, within seven days of receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt thereof; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but not exceed, 60 days after the date of receipt of the notice.
  - 2. For convenience,
    - a. By Engineer effective upon Consultant's receipt of notice from Engineer.
- C. *Effective Date of Termination:* The terminating party under Paragraph 6.05.B may set the effective date of termination at a time up to 30 days later than otherwise provided to allow Consultant to demobilize personnel and equipment from the Site, to complete tasks whose

value would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Specific Project materials in orderly files.

D. *Payments Upon Termination:*

1. In the event of any termination under Paragraph 6.05, and subject to the payment terms of Article 4, Consultant will be entitled to invoice Engineer and to receive payment due and owing for all services performed or furnished in accordance with the Task Order, this Agreement and all Reimbursable Expenses incurred through the effective date of termination less any applicable set-offs.

6.06 *Controlling Law*

- A. This Agreement is to be governed by the law of the state where the Specific Project is located without regard to its conflict of laws rules.

6.07 *Successors, Assigns, and Beneficiaries*

- A. Consultant and Engineer are hereby bound and the successors, executors, administrators, and legal representatives of Consultant and Engineer (and to the extent permitted by Paragraph 6.07.B the assigns of Consultant and Engineer) are hereby bound to the other party to this Agreement and to the successors, executors, administrators, and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements, and obligations of this Agreement.
- B. Consultant may not assign, sublet, or transfer any rights under or interest (including, but without limitation, monies that are due or may become due) in this Agreement without the written consent of the Engineer, except to the extent that any assignment, subletting, or transfer is mandated or restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.
- C. Unless expressly provided otherwise in this Agreement or the Prime Agreement:
  1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Consultant or Engineer to: (a) Owner; (b) any Contractor; (c) any Subcontractor or Supplier; (d) any other third-party individual or entity; or (e) to any surety for or employee of any of them.
  2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Engineer and Consultant and not for the benefit of any other party.

6.08 *Dispute Resolution*

- A. Consultant and Engineer agree to negotiate all disputes between them in good faith prior to invoking other dispute resolution procedures of this Agreement, or exercising their rights at

law. Disputes not resolved by negotiation shall be subject to mediation as a condition precedent to binding dispute resolution. Mediations shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement unless an alternative process is agreed upon by the parties. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

- B. All disputes between the parties arising out of a Task Order that are not resolved by mediation shall be subject to litigation in a state court of competent jurisdiction in the county where the Specific Project is located. Every such suit shall be commenced not later than one year from the date when the cause of action first accrued or six (6) months after Consultant last performed work or services on the Specific Project, whichever shall occur first.
- C. *Settlement Offers:* If the Consultant initiates a claim, the Engineer may make settlement offers to settle the claim at any time up to the date of the trial. Such settlement offers shall be subject to Rule 408 (Compromise and Offers of Compromise) of the Federal Rules of Evidence. If at any stage of the litigation, including any appeals, the Consultant's claim is dismissed or found to be without merit, or if the damages awarded to the Consultant on its claim do not exceed the Engineer's last settlement offer, the Consultant shall be liable to the Engineer and shall reimburse the Engineer for all of the Engineer's attorneys' fees and expenses, arising out of or related to such claim since the date of such last settlement offer.

#### 6.09 *Environmental Condition of Site*

- A. Engineer has forwarded to Consultant copies of all documents in Engineer's possession, including disclosures from Owner to Engineer, regarding the existence of all known and suspected Asbestos, PCBs, Petroleum, Hazardous Waste, Radioactive Material, hazardous substances, and other Constituents of Concern located at or near the Site, including type, quantity, and location.
- B. If Consultant encounters an undisclosed Constituent of Concern, then Consultant shall notify Engineer and Owner; and Consultant may notify appropriate governmental officials if Consultant reasonably concludes that doing so is required by applicable Laws or Regulations.
- C. It is acknowledged by both parties that Consultant's scope of services does not include any services related to Constituents of Concern. If Consultant or any other party encounters an undisclosed Constituent of Concern, or if investigative or remedial action, or other professional services, are necessary with respect to disclosed or undisclosed Constituents of Concern, then Consultant may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of This Part of the Specific Project affected thereby until Owner: (1) retains appropriate specialist consultants or contractors to identify and, as appropriate, abate, remediate, or remove the Constituents of

Concern; and (2) warrants that the Site is in full compliance with applicable Laws and Regulations.

- D. If the presence at the Site of undisclosed Constituents of Concern adversely affects the performance of Consultant's services under a Task Order, then the Consultant shall have the option of (1) accepting an equitable adjustment in its compensation or in the time of completion, or both; or (2) terminating the Task Order for cause on 30 days notice, in accord with the provisions of Paragraph 6.05.
- E. Engineer and Consultant acknowledge that Consultant is performing professional services for Engineer, and Engineer is performing professional services for Owner, and that neither Engineer nor Consultant is or shall be required to become an "owner," "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, which are or may be encountered at or near the Site in connection with any of Consultant's or Engineer's activities or services under a Task Order or this Agreement.

#### 6.10 *Indemnification and Mutual Waiver*

- A. *Indemnification by Consultant:* To the fullest extent permitted by law, Consultant shall indemnify and hold harmless Engineer, Owner, and their officers, directors, members, partners, agents, consultants, and employees from reasonable claims, costs, losses, and damages arising out of or relating to the Specific Project, but only to the extent caused by any breach of contract, negligent act or omission of Consultant, its Subconsultants, or their officers, directors, members, partners, agents, or employees.
- B. *Percentage Share of Negligence:* To the fullest extent permitted by law, a party's total liability to the other party and anyone claiming by, through, or under the other party for any cost, loss, or damages caused in part by the negligence of the party and in part by the negligence of the other party or any other negligent entity or individual, shall not exceed the percentage share that the party's negligence bears to the total negligence of Consultant, Engineer, and all other negligent entities and individuals.
- C. *Mutual Waiver:* To the fullest extent permitted by law, but only to the extent that Engineer and Owner have agreed to a corresponding mutual waiver, Consultant and Engineer waive against each other, and the other's officers, directors, members, partners, agents, insurers, consultants, and employees, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to a Task Order, this Agreement or the Specific Project.

#### 6.11 *Miscellaneous Provisions*

- A. *Notices:* Any notice required under this Agreement shall be in writing, addressed to the appropriate party at its address listed in the preamble to this Agreement and given personally, by facsimile, by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.

- B. *Survival*: All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason.
- C. *Severability*: Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Engineer and Consultant, which agree that this Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.
- D. *Waiver*: A party's non-enforcement of any provision shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.
- E. *Accrual of Claims*: To the fullest extent permitted by law, all causes of action arising under this Agreement shall be deemed to have accrued, and all statutory periods of limitation shall commence, no later than the date of Substantial Completion.
- F. *Confidential and Proprietary Information*. Consultant agrees that the technical methods, design details, techniques and pricing data contained in any material submitted by the Engineer pertaining to this Specific Project or this Agreement shall be considered confidential and proprietary, and shall not be released or otherwise made available by Consultant to any third-party without the express written consent of the Engineer unless such information (a) was known by the Consultant prior to receiving the confidential information from the Engineer; (b) becomes rightfully known to the Consultant from a third-party source not under an obligation to the Engineer to maintain confidentiality; (c) is or becomes publicly available through no fault of or failure to act by the Consultant in breach of this Agreement; or (d) is required to be disclosed in a judicial or administrative proceeding, or is otherwise requested or required to be disclosed by law or regulation.
- G. *Tax Deductions*. Consultant shall not prepare or participate in the preparation of any application for a tax deduction under 26 U.S. Code § 179D as related to the Specific Project without the signed, written consent of Engineer, which may be withheld for any reason. Consultant agrees that any cash proceeds of a tax deduction received by Consultant in violation of this paragraph shall be delivered to Engineer immediately, but no later than 30 days after Consultant's receipt of same.
- H. *Construction*: The parties acknowledge that each party has reviewed this Agreement and voluntarily entered into this Agreement. Accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be employed in the interpretation of this Agreement, or any amendments or exhibits to it.
- I. *Counterparts*: This Agreement may be executed in any number of counterparts each of which when so executed and delivered will be an original hereof, and it will not be necessary in making proof of this Agreement to produce or account for more than one counterpart hereof. This Agreement may be executed and delivered by facsimile or via electronic mail.

- J. *Applicability to Task Orders:* The terms and conditions set forth in this Agreement apply to each Task Order as if set forth in the Task Order, unless specifically modified. In the event of conflicts between this Agreement and a Task Order, the conflicting provisions of the Task Order shall take precedence for that Task Order. The provisions of this Agreement shall be modified only by a written instrument. Such amendments shall be applicable to all Task Orders issued after the effective date of the amendment if not otherwise set forth in the amendment.

## ARTICLE 7 – DEFINITIONS

### 7.01 *Defined Terms*

- A. Wherever used in this Agreement (including the Exhibits hereto and any Task Order) and printed with initial capital letters, the terms listed below have the meanings indicated, and are applicable to both the singular and plural thereof:
1. *Addenda* – Written or graphic instruments issued prior to the opening of bids which clarify, correct, or change the Bidding Documents.
  2. *Additional Services* – The services to be performed for or furnished to Engineer by Consultant beyond those identified as Basic Services in a Task Order.
  3. *Agreement* – This written contract for professional services between Engineer and Consultant including those attachments and exhibits listed in Article 8 and any duly executed amendments.
  4. *Application for Payment* – The form acceptable to Engineer which is to be used by Contractor during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Contract Documents.
  5. *Asbestos* – Any material that contains more than one percent asbestos and is friable or is releasing asbestos fibers into the air above current action levels established by the United States Occupational Safety and Health Administration.
  6. *Basic Services* – The services to be performed for or furnished to Engineer by Consultant in accordance with a specific Task Order, as specified in the Task Order (but not including Additional Services performed or furnished pursuant to an amendment to the specific Task Order)..
  7. *Bidding Documents* – The advertisement or invitation to bid; instructions to bidders; bid form with any supplements; bid security of acceptable form, if any; and the proposed Contract Documents (including all Addenda).
  8. *Change Order* – A document recommended by Engineer which is signed by Contractor and Owner and authorizes an addition, deletion, or revision in the Work, or an

adjustment in the Contract Price or the Contract Times, issued on or after the effective date of the Construction Contract.

9. *Constituent of Concern* – Any substance, product, waste, or other material of any nature whatsoever (including, but not limited to, Asbestos, Petroleum, Radioactive Material, and PCBs) which is or becomes listed, regulated, or addressed pursuant to (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq. (“CERCLA”); (b) the Hazardous Materials Transportation Act, 49 U.S.C. §§1801 et seq.; (c) the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (“RCRA”); (d) the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; (e) the Clean Water Act, 33 U.S.C. §§1251 et seq.; (f) the Clean Air Act, 42 U.S.C. §§7401 et seq.; and (g) any other federal, state, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.
10. *Construction Contract* – The entire and integrated written agreement between Owner and Contractor concerning the Work.
11. *Construction Cost* – The cost to Owner of the construction of those portions of the Specific Project designed or specified by Engineer or Engineer’s Consultants (including Consultant). Construction Cost does not include costs of services of Consultant, Engineer, other Engineer’s Consultants, or other design professionals and consultants; the cost of land, rights-of-way, or compensation for damage to property; Owner’s costs for legal, accounting, insurance counseling, or auditing services; interest or financing charges incurred in connection with the Specific Project; or the cost of other services to be provided by others to Owner.
12. *Consultant’s Resident Representative (CRR)* – The authorized representative of Consultant, assigned to assist Consultant at the Site during the Construction Phase. The CRR will be Consultant’s agent or employee and under Consultant’s supervision. As used herein, the term CRR includes any assistants of the CRR agreed to by Engineer. If applicable, the duties and responsibilities of the CRR are as set forth in exhibits to this Agreement.
13. *Contract Documents* – The items so designated in the Construction Contract, including the Drawings, Specifications, construction agreement, and general and supplementary conditions. Only printed or hard copies of the items listed in the Construction Contract are Contract Documents. Approved Shop Drawings, other Contractor submittals, and the reports and drawings of subsurface and physical conditions are not Contract Documents.
14. *Contract Price* – The monies payable by Owner to Contractor for completion of the Work in accordance with the Contract Documents and as stated in the Construction Contract.



15. *Contract Times* – The number of days or the dates stated in the Construction Contract to: (a) achieve stated milestones, if any; (b) achieve Substantial Completion; and (c) complete the Work so that it is ready for final payment as evidenced by Engineer's written recommendation of final payment.
16. *Contractor* – An individual or entity with which Owner enters into a Construction Contract. Usage herein refers to single or multiple Contractors.
17. *Defective Work* – Work that is unsatisfactory, faulty, or deficient, in that it does not conform to the Contract Documents, or does not meet the requirements of any inspection, reference standard, test, or approval referred to in the Contract Documents, or has been damaged prior to Engineer's recommendation of final payment to Contractor.
18. *Documents* – Data, reports, Drawings, Specifications, Record Drawings, and other deliverables, whether in printed or electronic media format, provided or furnished by Consultant to Engineer pursuant to this Agreement.
19. *Drawings* – The part of the Contract Documents that graphically shows the scope, extent, and character of the Work to be performed by Contractor.
20. *Effective Date* – The date indicated in the Task Order on which it becomes effective, but if no such date is indicated, the date on which the Task Order is signed and delivered by the last of the two parties to sign and deliver.
21. *Engineer* – The individual or entity named as such in this Agreement.
22. *Engineer's Consultants* – Individuals or entities including Consultant having a contract with Engineer to furnish services, materials, or equipment with respect to the Specific Project as Engineer's independent professional associates, consultants, subcontractors, or vendors.
23. *Field Order* – A written order issued by Engineer which requires minor changes in the Work but which does not involve a change in the Contract Price or the Contract Times.
24. *Hazardous Waste* – The term Hazardous Waste shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (42 USC Section 6903) as amended from time to time.
25. *Laws and Regulations; Laws or Regulations* – Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental entities, bodies, agencies, authorities, and courts having jurisdiction.
26. *PCBs* – Polychlorinated biphenyls.
27. *Petroleum* – Petroleum, including crude oil or any fraction thereof, which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds

per square inch absolute), such as oil, petroleum, fuel oil, oil sludge, oil refuse, gasoline, kerosene, and oil mixed with other non-hazardous waste and crude oils.

28. *Project* – The total undertaking to be accomplished for Owner by engineers, contractors, and others, including planning, study, design, and construction.
29. *Radioactive Material* – Source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1945 (42 USC Section 2011 et seq.) as amended from time to time.
30. *Record Drawings* – The Drawings arising from Consultant's Services, as issued for construction, on which the Consultant or Engineer, as the case may be, upon completion of the Work, has shown changes based on Contractor's record copy of Drawings, Specifications, Addenda, Change Orders, Work Change Directives, Field Orders, and written interpretations and clarifications, as delivered by Contractor to Engineer, and which were annotated by Contractor to show changes made during construction.
31. *Reimbursable Expenses* – The expenses incurred directly by Consultant in connection with the performing or furnishing of Basic and Additional Services for which Engineer shall pay Consultant if so indicated in this Agreement.
32. *Resident Project Representative* – The authorized representative of Engineer assigned to assist Engineer at the Site during the Construction Phase. As used herein, the term Resident Project Representative or "RPR" includes any assistants or field staff of Resident Project Representative agreed to by Owner.
33. *Samples* – Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.
34. *Shop Drawings* – All drawings, diagrams, illustrations, schedules, and other data or information that are specifically prepared or assembled by or for Contractor and submitted by Contractor to Engineer to illustrate some portion of the Work. Shop Drawings, whether approved or not, are not Drawings and are not Contract Documents.
35. *Site* – As the context may indicate:
  - a. Lands or areas designated by Engineer on which Consultant is to perform field services and with which Consultant is concerned in providing its services.
  - b. Lands or areas to be indicated in the Contract Documents as being furnished by Owner upon which the Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by Owner which are designated for the use of Contractor.

36. *Specifications* – That part of the Contract Documents consisting of written requirements for materials, equipment, systems, standards, and workmanship as applied to the Work, and certain administrative requirements and procedural matters applicable thereto.
37. *Specific Project*—The total specific undertaking to be accomplished for Owner by engineers, contractors, and others, including planning, study, design, construction, testing, commissioning, and start-up, and of which the services to be performed or furnished by Consultant under a specific Task Order are a part.
38. *Subconsultants* – Individuals or entities having a contract with Consultant to perform or furnish services, materials, or equipment with respect to the Specific Project as Consultant’s independent professional associates, consultants, subcontractors, or vendors.
39. *Subcontractor* – An individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work at the Site.
40. *Substantial Completion* – The time at which the Work (or a specified part thereof) has progressed to the point at which in the opinion of Engineer (with concurrence of Consultant as to the specific portions of the Work designed or specified by Consultant, or for which Consultant has undertaken responsibility for determining the status of completion), the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms “substantially complete” and “substantially completed” as applied to all or part of the Work refer to Substantial Completion thereof.
41. *Supplier* – A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by Contractor or Subcontractor.
42. *Task Order*—A document executed by Engineer and Consultant, including amendments if any, stating the scope of services, Consultant’s compensation, times for performance of services and other relevant information for a Specific Project.
43. *Work* – The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or furnishing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.
44. *Work Change Directive* – A written statement to Contractor, issued by Owner on or after the effective date of the Construction Contract, ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed, or to emergencies.

## ARTICLE 8 – ATTACHMENTS, EXHIBITS, AND OTHER PROVISIONS

### 8.01 *Attachment Included*

- A. The Prime Agreement (exclusive of compensation and other confidential terms) is incorporated in this Agreement and included as Attachment I.

### 8.02 *Exhibits Included*

- A. Exhibit A, Suggested Task Order.

### 8.03 *Total Agreement*

- A. This Agreement, together with the Attachment and Exhibits identified in Paragraphs 8.01.A and 8.02, constitutes the entire agreement between Engineer and Consultant and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a duly executed written instrument.
- B. An executed Task Order under this Agreement (including any incorporated exhibits or attachments) constitutes the entire agreement between Engineer and Consultant with respect to the Specific Project, and supersedes all prior written or oral understandings. Such a Task Order may only be amended, supplemented, modified, or canceled by a written instrument duly executed by both parties.

### 8.04 *Designated Representatives*

- A. With the execution of this Agreement, Consultant and Engineer shall each designate a specific individual to act as the party's representative under this Agreement. Such an individual shall have authority to transmit instructions, receive information, and render decisions relative to the Project on behalf of the respective party that the individual represents. Each Task Order shall likewise designate representatives of the two parties with respect to that Task Order.

### 8.05 *Consultant's Certifications*

- A. Consultant certifies that it has not engaged in corrupt, fraudulent, or coercive practices in competing for or in executing the Agreement. For the purposes of this Paragraph 8.05:
  - 1. "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value likely to influence the action of a public official in the selection process or in the Agreement execution;
  - 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the selection process or the execution of the Agreement to the detriment of Engineer or Owner, or (b) to deprive Engineer or Owner of the benefits of free and open competition;

3. "Coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the selection process or affect the execution of the Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the Effective Date of which is indicated on page 1.

Engineer: ms consultants, inc

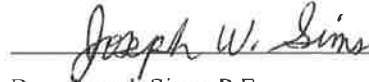


By: Daniel R. Cutshaw, P.E.

Title: Vice President - Indiana

Date Signed: 5-11-2022

Consultant: Sims Durkin



By: Joseph Sims, P.E.

Title: President

Date Signed: 4-29-22

Designated Representative (Paragraph 8.04.A):

Name: Brian M. Sahm

Title: Senior Electrical Engineer

Phone Number: 317-517-6875

E-mail Address: BSahm@MSconsultants.com

Designated Representative (Paragraph 8.04.A):

Name: ALLEN D. BRACEY PE

Title: Vice-President

Phone Number: 919-215-8164

E-Mail Address: allen.bracey@  
sims-durkin.com