

## **MATERIALS TESTING AND INSPECTION'S TERMS AND CONDITIONS FOR CONSTRUCTION MATERIALS ENGINEERING & TESTING SERVICES**

### **1. DEFINITIONS**

- 1.1 Company.** Materials Testing and Inspection, LLC will be hereafter in this agreement as Company.
- 1.2 Client.** The person or entity that employs, engages, or retains Company to provide Services under this Agreement will be hereafter be referred to as Client.
- 1.3 Contractor.** The contractor or contractors, and including its/their subcontractors of every tier, retained to perform construction Work on the Project for which Company is providing Services under this Agreement.
- 1.4 Day(s).** Calendar day(s) unless otherwise stated.
- 1.5 Hazardous Materials.** Any toxic substances, chemicals, radioactivity, pollutants or other materials, in whatever form or state, known or suspected to impair the environment in any way whatsoever. Hazardous Materials include, but are not limited to, those substances defined, designated or listed in any federal, state or local law, regulation or ordinance concerning hazardous wastes, toxic substances or pollution.
- 1.6 Inspection (or Observation).** Visual determination of conformance with specific or, on the basis of Company's professional judgment, general requirements.
- 1.7 Services.** The professional services provided by Company under this Agreement, including all services described in the SCOPE OF SERVICES and SERVICES AND FEES (hereafter referred to as Exhibit A), and any written Task Order or amendment to this Agreement.
- 1.8 Testing.** Measurement, examination, performance of tests, and any other activities to determine the characteristics or performance of materials.
- 1.9 Work.** The labor, materials, equipment and services of Contractor.

### **2. SCOPE OF SERVICES**

- 2.1 Services Provided; Independent Contractor.** Company will provide construction materials engineering and testing services as set forth in the Exhibit A. Company will perform its Services under this Agreement as an independent contractor.
- 2.2 Authority of Company.** Company will report observations and data to the Client. Company will report any observed work to the Client or Client's representative, which, in Company's opinion, does not conform with plans, specifications, and codes applicable to the Project. Company has no right or responsibility to approve, accept, reject, or stop work of any agent of the Client.
- 2.3 Referenced Standards.** Company will perform all standard tests, inspections and observations in general accordance with referenced standards and makes no representation regarding compliance with any other standards.
- 2.4 Variation of Material Characteristics and Conditions.** Observations and standardized sampling, inspection and testing procedures employed by Company will indicate conditions of materials and construction activities only at the precise location and time where and when Services were performed. Client recognizes that conditions of materials and construction activities at other locations may vary from those measured or observed, and that conditions at one location and time do not necessarily indicate the conditions of apparently identical material(s) at other locations and times. Services of Company, even if performed on a continuous basis, should not be interpreted to mean that Company is observing, verifying, testing or inspecting all materials on the Project. Company is responsible only for those data, interpretations, and recommendations regarding the actual materials and construction activities observed, sampled, inspected or tested, and is not responsible for other parties' interpretations or use of the information developed. Company may make certain inferences based upon the information derived from these procedures to formulate professional opinions regarding conditions in other areas.
- 2.5 Changes in Scope.** Client may request changes in Exhibit A. Such changes, including any change in Company's compensation or time of performance, which are mutually agreed upon by Company and Client, will be incorporated in written amendments to this Agreement. No change will be effective unless it is in writing and signed by Client and Company, or if made orally, confirmed by the parties in writing within 10 days.
- 2.6 Excluded Services.** Company's Services under this Agreement include only those Services specified in Exhibit A. Client expressly releases any claim against Company relating to any additional Services that Company recommended, but that Client either did not authorize or instructed Company not to perform.

### **3. PAYMENTS TO COMPANY**

- 3.1 Basic Services.** Company will perform all Services set forth in the Exhibit A for the amount(s) set forth therein. Company will give Client at least 30 days advance notice of any changes to its standard rates. Unless Client objects in writing to the amended fee structure within 30 days of notification, it will be incorporated into this Agreement and will supersede any prior fee structure.
- 3.2 Additional Services.** Any Services performed under this Agreement, except those Services expressly identified otherwise in the attached Exhibit A, will be provided on a time and materials basis unless otherwise specifically agreed to in writing by both parties.
- 3.3 Estimate of Fees.** Company will, to the best of its ability, perform the Services and accomplish the objectives defined in this Agreement within any written cost estimate provided by Company. Client recognizes that unforeseen circumstances along with changes in scope and schedule can influence the successful completion of Services within the estimated cost. The use of an estimate of fees or of a "not to exceed" limitation indicates that Company will not incur fees and expenses in excess of the estimate or limitation amount without obtaining Client's agreement to do so, but is not a guarantee that the Services will be completed for that amount.
- 3.4 Rates.** Client will pay Company at the rates set forth in Exhibit A, which is subject to periodic review and amendment, as appropriate to reflect Company's then-current fee structure. All hourly rates are portal to portal.
- 3.5 Billing Minimum.** Company reserves the right to assess Client, billing minimums per visit in accordance with Exhibit "A".
- 3.6 Cancellations.** Company requires cancellation notification by the dispatch office no later than 5:00 p.m. the day prior to previously scheduled work. Cancellations received after the specified time are subject to billing minimums as defined in Exhibit A or show up time, which is defined as round trip travel plus mileage charges, whichever is greater.
- 3.7 Prevailing Wages.** Unless Client specifically informs Company in writing that prevailing wage regulations cover the Project and in Exhibit A identifies it as covered by such regulations, Client hereby releases and agrees to reimburse Company for any liability and costs it may incur resulting from a subsequent determination that prevailing wage regulations cover the Project, including all costs, fines and attorney's fees.

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**3.8 Payment Timing; Late Charge.** Company will submit invoices to Client periodically, but no more frequently than every two (2) weeks. All invoices are due and payable upon presentation, and any amounts unpaid 30 days after the invoice date will include a late payment charge from the date of the invoice, at 1-1/2% per month or the maximum legal rate, whichever is higher. The failure by Client to pay Company within thirty (30) days of date of invoice will constitute a substantial failure of Client to perform under this Agreement. Client will reimburse Company for all time spent and expenses (including fees of any attorney, collection agency, and/or court costs) incurred in connection with collecting any delinquent amount.

**3.9 Payment Disputes.** If Client objects to any portion of an invoice, Client must so notify Company in writing within 10 days of the invoice date, identify the cause of disagreement, and pay when due the portion of the invoice not in dispute. The parties will immediately make every effort to resolve the disputed portion of the invoice. Payment thereafter will first be applied to accrued interest and then to the unpaid principal amount.

#### 4. PERFORMANCE STANDARD

**4.1 Professional Standards.** Company will perform the Services consistent with that level of care and skill ordinarily exercised by other professionals providing similar services in the same locale and under similar circumstances at the time the Services are performed. No other representation, express or implied, and no warranty or guarantee is included or intended by this Agreement or any report, opinion, document, or other instrument of service.

**4.2 Sampling, Inspection & Test Locations.** Unless specifically stated otherwise, Exhibit A does not include surveying the Site or precisely identifying sampling, inspection or test locations, depths or elevations. Sampling, inspection and test locations, depths and elevations will be based on field estimates and information furnished by Client and its representatives. Unless stated otherwise in the report, such locations, depths and elevations are approximate. Company will take reasonable precautions to limit damage to the Project Site or Work due to the performance of Services, but Client understands that some damage may necessarily occur in the normal course of Services, and this Agreement does not include repair of such damage unless specifically stated in Exhibit A.

**4.3 Sample Disposal.** Company will dispose of all samples after submission of the report covering those samples. Company will provide further storage or transfer of samples only upon Client's prior written request and agreement on appropriate compensation.

**4.4 Buried Utilities & Structures; Property Restoration.** If the Services require borings, test pits or other invasive exploratory work, Client will provide Company with all information in its possession regarding the location of underground utilities and structures. Company will contact an appropriate utility locator and take into consideration utility locations shown on drawings provided to Company by the Client to reduce the risk of damage or injury to underground structures, pipelines and utilities. The Client agrees to hold Company harmless for any damage to underground structures or utilities that are not called to its attention or are not correctly shown on plans or drawings furnished for the purpose of locating such structures and utilities. If Client desires Company to restore the property to its former condition or better, Company will provide the additional Services at an additional cost.

#### 5. CONTRACTOR'S PERFORMANCE

Company is not responsible for Contractor's means, methods, techniques or sequences during the performance of its Work. Company will not supervise or direct Contractor's Work, nor be liable for any failure of Contractor to complete its Work in accordance with the Project's plans, specifications and applicable codes, laws and regulations. Client understands and agrees that Contractor, not Company, has sole responsibility for the safety of persons and property at the Project Site.

#### 6. CLIENT'S RESPONSIBILITIES

In addition to payment for the Services performed under this Agreement, Client agrees to:

**6.1 Access.** Grant or obtain free access to the Project Site for all equipment and personnel necessary for Company to perform its Services under this Agreement.

**6.2 Representative.** Designate a representative for notices and information pertaining to the Services, communicate Client's policies and decisions, and assist as necessary in matters pertaining to the Project and this Agreement. Client may change its representative by written notice.

**6.3 Information.** Supply to Company all information and documents relevant to the Services. Company may rely upon such information without independently verifying its accuracy. Client will notify Company of any known potential or possible health or safety hazard regarding the materials to be tested, including its intended use, chemical composition, relevant MSDS, manufacturers' specifications and literature, and any previous test results.

**6.4 Project Information.** Client agrees to provide Company within 7 days after written request, a correct statement of the recorded legal title to the property on which the Project is located and the Client and/or Owner's interest therein.

#### 7. CHANGED CONDITIONS

If Company discovers conditions or circumstances that it did not contemplate ("Changed Conditions") at the time of this Agreement, it will give Client written notice of the Changed Conditions. Client and Company will then negotiate an appropriate amendment to this Agreement. If they cannot agree upon an amendment within 30 days after the notice, Company may terminate this Agreement and be compensated as set forth in Section 12, "Suspension & Delay; Termination."

#### 8. CERTIFICATIONS

Client will not require Company to execute any certification regarding Services performed or Work tested or observed unless: 1) Company believes that it has performed sufficient Services to provide a sufficient basis to issue the certification; 2) Company believes that the Services performed and Work tested or observed meet the criteria of the certification; and 3) Company has reviewed and approved in writing the exact form of such certification prior to execution of this Agreement. Any certification by Company is limited to the expression of a professional opinion based upon the Services performed by Company, and does not constitute a warranty or guarantee, either express or implied. Client agrees not to condition the resolution of any dispute upon Company signing a certification.

#### 9. ALLOCATION OF RISK

**9.1 Limitation of Remedy.** The total cumulative liability of Company, its subconsultants and subcontractors, and all of their respective shareholders, directors, officers, employees and agents (collectively "Company Entities") to Client arising from Services under this Agreement, including attorney's fees due under this Agreement, will not exceed the gross compensation received by Company under this Agreement or \$50,000, whichever is greater. This limitation applies to all lawsuits, claims or actions that allege errors or omissions in Company's Services, whether alleged to arise in tort, contract, warranty, or other legal theory. Upon Client's written request, Company and Client may agree to increase the limitation to a greater amount in exchange for a negotiated increase in Company's fee, provided that the parties amend this Agreement in writing, as provided in Section 14.3 "Modification of This Agreement."

**9.2 Indemnification of Client.** Subject to the terms and limitations of this Agreement, Company will indemnify and hold harmless Client, its shareholders, officers, directors, employees, and agents from and against any and all claims, suits, liabilities, damages, expenses (including without limitation reasonable attorney's fees and defense costs) and other losses (collectively "Losses") to the extent caused by Company's negligence in performance of this Agreement.

**9.3 Indemnification of Company.** Client will indemnify and hold harmless Company Entities from and against any and all claims, suits, liabilities, damages, expenses (including without limitation reasonable attorney's fees and defense costs) and other losses (collectively "Losses") except to the extent caused by the sole negligence of Company Entities. In addition, except to the extent caused by Company's negligence, Client will defend, indemnify and hold harmless Company

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Entities from and against any and all Losses arising from or related to the existence, disposal, release, discharge, treatment or transportation of Hazardous Materials, or the exposure of any person to Hazardous Materials, or the degradation of the environment due to the presence, discharge, disposal, release of or exposure to Hazardous Materials.

**9.4 No Personal Liability.** Client and Company intend that Company's Services will not subject Company's individual employees, officers or directors to any personal liability. Therefore, and notwithstanding any other provision of this Agreement, Client agrees as its sole and exclusive remedy to direct or assert any claim, demand or suit only against the business entity identified as "Company" on the first page of this Agreement.

**9.5 Consequential Damages.** Neither Client nor Company will be liable to the other for any special, consequential, incidental or penal losses or damages including but not limited to losses, damages or claims related to the unavailability of property or facilities, shutdowns or service interruptions, loss of use, profits, revenue, or inventory, or for use charges, cost of capital, or claims of the other party and/or its customers.

**9.6 Continuing Agreement.** The provisions of this Section 9, "Allocation of Risk," will survive the expiration or termination of this Agreement. If Company provides Services to Client that the parties do not confirm through execution of an amendment to this Agreement, the provisions of this Section 9 will apply to such Services as if the parties had executed an amendment.

## 10. INSURANCE

**10.1 Company's Insurance.** If reasonably available, Company will maintain the following coverages:

10.1.1 Statutory Workers' Compensation/Employer's Liability Insurance;

10.1.2 Commercial General Liability Insurance with a combined single limit of \$1,000,000;

10.1.3 Automobile Liability Insurance, including liability for all owned, hired and non-owned vehicles with minimum limits of \$1,000,000 for bodily injury per person, \$1,000,000 property damage, and \$1,000,000 combined single limit per occurrence; and,

10.1.4 Professional Liability Insurance in amounts of at least \$1,000,000 per claim and annual aggregate.

**10.2 Client's Insurance.** As appropriate, Client will obtain Builder's Risk or other property insurance to protect it from injury or damage to the Project, and which waives all rights of subrogation against Company. Proceeds from such insurance will be held by Client as trustee and will be payable to Company as its interests appear.

**10.3 Certificates of Insurance.** Upon request, Company and Client will each provide the other with certificate(s) of insurance evidencing the existence of the policies required herein. Except for Professional Liability and Workers' Compensation Insurance, all policies required under this Agreement shall contain a waiver of subrogation.

## 11. OWNERSHIP AND USE OF DOCUMENTS

**11.1 Company Documents.** Unless otherwise agreed in writing, all documents and information prepared by Company including, but not limited to, reports, boring logs, maps, field data, field notes, drawings and specifications, test data and other similar instruments of service (collectively "Documents") are the property of Company. Company has the right, in its sole discretion, to dispose of or retain the Documents.

**11.2 Client Documents.** All documents provided by Client will remain the property of Client. Company will return all such documents to Client upon request, but may retain copies for its files.

**11.3 Use of Documents.** Except as otherwise agreed to by Client and Company, all Documents prepared by Company are solely for use by Client and will not be provided by either party to any other person or entity without Company's prior written consent.

11.3.1 *Use by Client.* Client has the right to reuse the Documents for purposes reasonably connected with this Project for which the Services are provided, including without limitation design and licensing requirements of the Project.

11.3.2 *Use by Company.* Company retains the right of ownership with respect to any patentable concepts or copyrightable materials arising from Services and the right to use the Documents for any purpose.

**11.4 Electronic Media.** Company may agree at Client's request to provide Documents and information in an electronic format as a courtesy. However, the paper original issued by Company will remain the final product of the Services. Company makes no warranties, either express or implied, regarding the fitness or suitability of any electronic Documents or media.

**11.5 Unauthorized Use.** No party other than Client may rely on the Documents without Company's prior written consent and receipt of additional compensation. Client waives any and all claims against Company resulting from the unauthorized use or alteration of Documents by Client or any party obtaining them through Client. Client will defend, indemnify and hold harmless Company from and against any claim, action or proceeding brought by any party claiming to rely upon information or opinions contained in Documents without having obtained Company's prior written consent.

## 12. SUSPENSION & DELAY; TERMINATION

**12.1 Suspension & Delay.** Client may, upon 10 days written notice at any time, suspend Company's Services. Company may terminate this Agreement if Client suspends the Services for more than 60 days, in which case Client will pay Company as provided in Section 12.4. If Client suspends the Services, or if Client or others delay Company's Services, Client and Company agree to equitably adjust the time for completion of the Services and Company's compensation for the additional labor, equipment, and other charges associated with maintaining its workforce for Client's benefit during the delay or suspension, and any charges incurred by Company for demobilization and subsequent remobilization.

**12.2 Termination for Convenience.** Company and Client may terminate this Agreement for convenience upon 10-days written notice delivered or mailed to the other party.

**12.3 Termination for Cause.** In the event of material breach of this Agreement, the non-breaching party may terminate this Agreement if the breaching party fails to cure the breach within 10 days following delivery of the non-breaching party's written notice of the breach to the breaching party. The termination notice must state the basis for the termination. The Agreement may not be terminated for cause if the breaching party cures the breach within the 10-day period.

**12.4 Payment on Termination.** Following termination other than for Company's breach of this Agreement, Client will pay Company for the Services performed prior to the termination notice date, and for any necessary Services and expenses incurred in connection with the termination of the Project, including but not limited to, the costs of completing analysis, records and reports necessary to document job status at the time of termination and costs associated with termination of subcontractor contracts in accordance with Company's then-current Exhibit A.

**12.5 Force Majeure.** In the event that Company is prevented from completing performance of its obligations under this Agreement by adverse weather or other occurrence beyond the control of Company, then Company will be excused from any further performance of its obligations and undertakings. In the event of a force majeure delay that does not result in termination of the Agreement, the schedules will be equitably adjusted.

### 13. DISPUTES

**13.1 Mediation.** All disputes between Company and Client are subject to mediation. Either party may demand mediation by serving a written notice stating the essential nature of the dispute, the amount of time or money claimed, and requiring that the matter be mediated within 45 days of service of notice. No action or suit may be commenced unless the parties fail to conduct the mediation within 45 days after service of notice; or mediation occurred but did not resolve the dispute; or a statute of limitation would elapse if suit was not filed prior to 45 days after service of notice.

**13.2 Choice of Law; Venue.** This Agreement will be construed in accordance with and governed by the laws of the state in which the Project is located.

**13.3 Statutes of Limitations.** Any applicable statute of limitations will be deemed to commence running on the earlier of the date of substantial completion of Company's Services under this Agreement or the date on which claimant knew, or should have known, of facts giving rise to its claims.

### 14. MISCELLANEOUS

**14.1 Assignment and Subcontracts.** During the term of this Agreement and following its expiration or termination for any reason, neither party may assign this Agreement or any right or claim under it, in whole or in part, without the prior written consent of the other party, except for an assignment of proceeds for financing purposes. Any assignment that fails to comply with this paragraph will be void and of no effect. Company may subcontract for the services of others without obtaining Client's consent if Company deems it necessary or desirable for others to perform certain Services.

**14.2 Integration and Severability.** This Agreement reflects the parties' entire agreement with respect to its terms and limitations and supersedes all prior agreements, written and oral. If any portion of this Agreement is found void or voidable, such portion will be deemed stricken and the Agreement reformed to as closely approximate the stricken portions as law allows. These terms and conditions survive the completion of the Services under and the termination of the Agreement, whether for cause or for convenience.

**14.3 Modification of This Agreement.** This Agreement may not be modified or altered, except by a written agreement signed by authorized representatives of both parties and referring specifically to this Agreement.

**14.4 Notices.** Any and all notices, requests, instructions, or other communications given by either party to the other must be in writing and either hand delivered to the recipient or delivered by first-class mail (postage prepaid) or express mail (billed to sender) at the addresses given in this Agreement.

**14.5 Headings.** The headings used in this Agreement are for convenience only and are not a part of this Agreement.

**14.6 Waiver.** The waiver of any term, condition or breach of this Agreement will not operate as a subsequent waiver of the same term, condition, or breach.

**14.7 Precedence.** These TERMS & CONDITIONS take precedence over any inconsistent or contradictory provisions contained in any other agreement term, proposal, purchase order, requisition, notice to proceed, or other document regarding Company's Services.

**14.8 Incorporation of Provisions Required By Law.** Each provision and clause required by law to be inserted in this Agreement is included herein, and the Agreement should be read and enforced as though each were set forth in its entirety herein.