

## MATERIALS TESTING AND INSPECTION'S TERMS AND CONDITIONS FOR GEOTECHNICAL CONSULTING SERVICES

### 1. DEFINITIONS

- 1.1. Contract Documents.** Plans, specifications, and agreements between Client and Contractors, including addenda, amendments, supplementary instructions, and change orders.
- 1.2. Contractor.** The contractor or contractors retained to construct the Project for which Consultant is providing Services under this Agreement.
- 1.3. Day(s).** Calendar day(s) unless otherwise stated.
- 1.4. Hazardous Materials.** The term Hazardous Materials means 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.
- 1.5. Services.** The Services provided by Consultant as set forth in this Agreement, the SCOPE OF SERVICES and SERVICES AND FEES (hereafter referred to as Exhibit A) and any written amendment to this Agreement.
- 1.6. Work.** The labor, materials, equipment and services required to complete the work described in the Contract Documents.

### 2. SCOPE OF SERVICES

Consultant will perform the Services set forth in the attached Exhibit A.

- 2.1. Changes in Scope.** If Consultant provides Client with a writing confirming a change in Exhibit A, it will become an amendment to this Agreement unless Client objects in writing within 5 business days after receipt. All Services performed by Consultant on the Project are subject to the terms and limitations of this Agreement. If Services are performed, but the parties do not reach agreement concerning modifications to Exhibit A or compensation, then the terms and limitations of this Agreement apply to such Services, except for the payment terms. The parties agree to resolve disputes concerning modifications to scope or compensation pursuant to Section 19, "Disputes."
- 2.2. Licenses.** Consultant will procure and maintain business and professional licenses and registrations necessary to provide its Services.
- 2.3. Excluded Services.** Consultant's Services under this Agreement include only those Services specified in Exhibit A.
- 2.3.1. General.** Client expressly waives any claim against Consultant resulting from its failure to perform recommended additional Services that Client has not authorized Consultant to perform, and any claim that Consultant failed to perform services that Client instructs Consultant not to perform.
- 2.3.2. Biological Pollutants.** Consultant's Exhibit A specifically excludes the investigation, detection, prevention or assessment of the presence of Biological Pollutants. The term "Biological Pollutants" includes, but is not limited to, molds, fungi, spores, bacteria, viruses, and/or any of their byproducts. Consultant's Exhibit A will not include any interpretations, recommendations, findings, or conclusions pertaining to Biological Pollutants. Client agrees that Consultant has no liability for any claims alleging a failure to investigate, detect, prevent, assess, or make recommendations for preventing, controlling, or abating Biological Pollutants. Furthermore, Client agrees to defend, indemnify, and hold harmless Consultant from all claims by any third party concerning Biological Pollutants, except for damages caused by Consultant's sole negligence.

### 3. PAYMENTS TO CONSULTANT

- 3.1. Basic Services.** Consultant will perform all Services set forth in the attached Exhibit A for the amount(s) set forth therein.
- 3.2. Additional Services.** Any Services performed under this Agreement, except those Services expressly identified 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.** Consultant 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 Consultant. Client recognizes that changes in scope and schedule, and unforeseen circumstances can all influence the successful completion of Services within the estimated cost. The use of an estimate of fees or of a "not to exceed" limitation is not a guarantee that the Services will be completed for that amount; rather, it indicates that Consultant shall not incur fees and expenses in excess of the estimate or limitation amount without obtaining Client's agreement to do so.
- 3.4. Rates.** Client will pay Consultant at the rates set forth in the Exhibit A.
- 3.4.1. Changes to Rates.** Client and Consultant agree that Exhibit A is subject to periodic review and amendment, as appropriate to reflect Consultant's then-current fee structure. Consultant will give Client at least 30 days advance notice of any changes. Unless Client objects in writing to the proposed amended fee structure within 30 days of notification, the amended fee structure will be incorporated into this Agreement and will then supersede any prior fee structure. If Client timely objects to the amended fee structure, and Consultant and Client cannot agree upon a new fee structure within 30 days after notice, Consultant may terminate this Agreement and be compensated as set forth under Section 18, "Termination."
- 3.4.2. Prevailing Wages.** Unless Client specifically informs Consultant in writing that prevailing wage regulations cover the Project and Exhibit A identifies it as covered by such regulations, Client will reimburse, defend, indemnify and hold harmless Consultant from and against any liability resulting from a subsequent determination that prevailing wage regulations cover the Project, including all costs, fines and attorneys' fees.
- 3.5. 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.

### 4. STANDARD OF PERFORMANCE; DISCLAIMER OF WARRANTIES

- 4.1. Level of Service.** Consultant offers different levels of geotechnical Consulting Services to suit the desires and needs of different clients. Although the possibility of error can never be eliminated, more detailed and extensive Services yield more information and reduce the probability of error, but at increased cost. Client must determine the level of Services adequate for its purposes. Client has reviewed Exhibit A and has determined that it does not need or want a greater level of Services than that being provided.
- 4.2. Standard of Care.** Subject to the limitations inherent in the agreed Exhibit A as to the degree of care, the amount of time and expenses to be incurred, and subject to any other limitations contained in this Agreement, Consultant may perform its Services consistent with that level of care and skill ordinarily exercised by other professional Consultants practicing in the same locale and under similar circumstances at the time the Services are performed.
- 4.3. No Warranty.** No warranty, express or implied, is included or intended by this Agreement.

## 5. ESTIMATE OF CONSTRUCTION COSTS

Client acknowledges that construction and Project development are subject to many influences that are not subject to precise forecasting and are outside of Consultant's control. Client further acknowledges that actual costs incurred may vary substantially from the estimates prepared by Consultant and that Consultant does not warrant or guaranty the accuracy of construction or development cost estimates.

## 6. CONSTRUCTION PHASE SERVICES

If Consultant's Exhibit A includes observation and/or testing during the course of construction, Consultant may:

### 6.1. Construction Observation.

6.1.1. Site Meetings & Visits. Consultant will participate in job site meetings as requested by Client, and, unless otherwise requested by Client, visit the site at times specified in the Exhibit A or, if not specified in the Exhibit A, at intervals as Consultant deems appropriate to the various stages of construction to observe the geotechnical conditions encountered by Contractor and the progress and quality of the geotechnical aspects of the Work. Based on information obtained during such visits and on such observations, Consultant may inform Client of the progress of the geotechnical aspects of the Work. Client understands that Consultant may not be on site continuously; and, unless expressly agreed otherwise, Consultant will not observe all of the Work.

6.1.2. Contractor's Performance. Consultant does not, and cannot, warrant or guarantee that all of the geotechnical Work performed by Contractor meets the requirements of Consultant's geotechnical recommendations or the plans and specifications for such geotechnical Work; nor can Consultant be responsible for Contractor's failure to perform the Work in accordance with the plans, specifications or the recommendations of Consultant.

6.1.3. Contractor's Responsibilities. Consultant will not supervise, direct or have control over the Work nor will Consultant have authority over or responsibility for the means, methods, techniques, sequences or procedures of construction selected by Contractor for the geotechnical aspects of the Project; for safety precautions and programs incident to the Work; nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor furnishing and performing its Work.

6.1.4. Final Report. At the conclusion of Construction Phase Services, Consultant will provide Client with a written report summarizing the tests and observations, if any, made by Consultant.

6.2. Review of Contractor's Submittals. If included in Exhibit A, Consultant will review and take appropriate action on the Contractor's submittals, such as shop drawings, product data, samples, and other required submittals. Consultant will review such submittals solely for general conformance with Consultant's design, and will not include review for the following, all of which will remain the responsibility of the Contractor: accuracy or completeness of details, quantities or dimensions; construction means, methods, sequences or procedures; coordination among trades; or construction safety.

6.3. Tests. Tests performed by Consultant on finished Work or Work in progress are taken intermittently and indicate the general acceptability of the Work on a statistical basis. Consultant's tests and observations of the Work are not a guarantee of the quality of Work and do not relieve other parties from their responsibility to perform their Work in accordance with applicable plans, specifications and requirements.

## 7. CLIENT'S RESPONSIBILITIES

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

7.1. Cooperation. Assist and cooperate with Consultant in any manner necessary and within its ability to facilitate Consultant's performance under this Agreement.

7.2. Representative. Designate a representative with authority to receive all notices and information pertaining to this Agreement, communicate Client's policies and decisions, and assist as necessary in matters pertaining to the Project and this Agreement. Client's representative will be subject to change by written notice.

7.3. Rights of Entry. Provide access to and/or obtain permission for Consultant to enter upon all property, whether or not owned by Client, as required to perform and complete the Services. Consultant will operate with reasonable care to minimize damage to the Project Site(s). However, Client recognizes that Consultant's operations and the use of investigative equipment may unavoidably alter conditions or affect the environment at the existing Project Site(s). The cost of repairing such damage will be borne by Client and is not included in the fee unless otherwise stated.

7.4. Relevant Information. Supply Consultant with all information and documents in Client's possession or knowledge which are relevant to Consultant's Services. Client warrants the accuracy of any information supplied by it to Consultant, and acknowledges that Consultant is entitled to rely upon such information without verifying its accuracy. Prior to the commencement of any Services in connection with a specific property, Client will notify Consultant of any known potential or possible health or safety hazard existing on or near the Project Site, with particular reference to Hazardous Materials or conditions.

7.5. Subsurface Structures. Correctly designate on plans to be furnished to Consultant, the location of all subsurface structures, such as pipes, tanks, cables and utilities within the property lines of the Project Site(s), and be responsible for any damage inadvertently caused by Consultant to any such structure or utility not so designated. Consultant is not liable to Client for any losses, damages or claims arising from damage to subterranean structures or utilities that were not correctly shown on plans furnished by Client to Consultant.

## 8. CHANGED CONDITIONS

If Consultant discovers conditions or circumstances that it had not contemplated at the commencement of this Agreement ("Changed Conditions"), Consultant will notify Client in writing of the Changed Conditions. Client and Consultant agree to that they will then renegotiate in good faith the terms and conditions of this Agreement. If Consultant and Client cannot agree upon amended terms and conditions within 30 days after notice, Consultant may terminate this Agreement and be compensated as set forth in Section 18, "Termination."

## 9. HAZARDOUS MATERIALS

Client understands that Consultant's Services under this Agreement are limited to geotechnical Consultant and that Consultant has no responsibility to locate, identify, evaluate, treat or otherwise consider or deal with Hazardous Materials. Client is solely responsible for notifying all appropriate federal, state, municipal or other governmental agencies, including the potentially affected public, of the existence of any Hazardous Materials located on or in the Project site, or located during the performance of this Agreement. The existence or discovery of Hazardous Materials constitutes a Changed Condition under this Agreement.

## 10. CERTIFICATIONS

Client agrees not to require that Consultant execute any certification with regard to Services performed or Work tested and/or observed under this Agreement unless: 1) Consultant believes that it has performed sufficient Services to provide a sufficient basis to issue the certification; 2) Consultant believes that the Services performed or Work tested and/or observed meet the criteria of the certification; and 3) Consultant has reviewed and approved in writing the exact form of such certification prior to execution of this Agreement. Any certification by Consultant is limited to an expression of professional opinion based upon the Services performed by Consultant, and does not constitute a warranty or guaranty, either expressed or implied.

## 11. ALLOCATION OF RISK

**11.1. Limitation of Liability.** The total cumulative liability of Consultant, its subconsultants and subcontractors, and all of their respective shareholders, directors, officers, employees and agents (collectively "Consultant 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 Consultant under this Agreement or \$50,000, whichever is greater; provided, however, that such liability is further limited as described below. This limitation applies to all lawsuits, claims or actions that allege errors or omissions in Consultant's Services, whether alleged to arise in tort, contract, warranty, or other legal theory. Upon Client's written request, Consultant and Client may agree to increase the limitation to a greater amount in exchange for a negotiated increase in Consultant's fee, provided that they amend this Agreement in writing as provided in Section 20.

### 11.2. Indemnification.

**11.2.1. Indemnification of Client.** Subject to the provisions and limitations of this Agreement, Consultant agrees to 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 costs of defense), or other losses (collectively "Losses") to the extent caused by Consultant's negligent performance of its Services under this Agreement.

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

**11.3. Consequential Damages.** Neither Client nor Consultant 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.

**11.4. Continuing Agreement.** The indemnity obligations and the limitations of liability established under this Agreement will survive the expiration or termination of this Agreement. If Consultant provides Services to Client that the parties do not confirm through execution of an amendment to this Agreement, the obligations of the parties to indemnify each other and the limitations on liability established under this Agreement apply to such Services as if the parties had executed an amendment.

## 12. INSURANCE

**12.1. Consultant's Insurance.** Consultant will obtain, if reasonably available, the following coverages:

12.1.1. Statutory Workers' Compensation/Employer's Liability Insurance;

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

12.1.3. 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,

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

**12.2. Contractor's Insurance.** Client shall require that all Contractors and subcontractors for the Project name Consultant as an additional insured under their General Liability and Automobile Liability insurance policies. If Client is not the Project owner, Client will require the Project owner to require the owner's Contractor to purchase and maintain General Liability, Builder's Risk, Automobile Liability, Workers' Compensation, and Employer's Liability insurance with limits no less than as set forth above, and to name Consultant and its subcontractors and subconsultants as additional insureds on the General Liability insurance.

**12.3. Certificates of Insurance.** Upon request, Consultant 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 herein shall contain a waiver of subrogation.

## 13. OWNERSHIP AND USE OF DOCUMENTS

**13.1. Client Documents.** All documents provided by Client will remain the property of Client. Consultant will return all such documents to Client upon request, but may retain file copies of such documents.

**13.2. Consultant's Documents.** Unless otherwise agreed in writing, all documents and information prepared by Consultant or obtained by Consultant from any third party in connection with the performance of Services, including, but not limited to, Consultant's reports, boring logs, maps, field data, field notes, drawings and specifications, laboratory test data and other similar documents (collectively "Documents") are the property of Consultant. Consultant has the right, in its sole discretion, to dispose of or retain the Documents.

**13.3. Use of Documents.** All Documents prepared by Consultant are solely for use by Client and will not be provided by either party to any other person or entity without Consultant's prior written consent.

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

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

**13.4. Electronic Media.** Consultant may agree at Client's request to provide Documents and information in an electronic format. Client recognizes that Documents or other information recorded on or transmitted as electronic media are subject to undetectable alteration due to (among other causes) transmission, conversion, media degradation, software error, or human alteration. Accordingly, all Documents and information provided by Consultant in electronic media are for informational purposes only and not as final documentation. Unless otherwise defined in Exhibit A, Consultant's electronic Documents and media will conform to Consultant's standards. Consultant will provide any requested electronic Documents for a 30-day acceptance period, and Consultant will correct any defects reported by Client to Consultant during this period. Consultant makes no warranties, either express or implied, regarding the fitness or suitability of any electronic Documents or media.

**13.5. Unauthorized Reuse.** No party other than Client may rely, and Client will not represent to any other party that it may rely on Documents without Consultant's express prior written consent and receipt of additional compensation. Client will not permit disclosure, mention, or communication of, or reference to the Documents in any offering circular, securities offering, loan application, real estate sales documentation, or similar promotional material without Consultant's express prior written consent. Client waives any and all claims against Consultant resulting in any way from the unauthorized reuse or alteration of Documents by

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itself or anyone obtaining them through Client. Client will defend, indemnify and hold harmless Consultant from and against any claim, action or proceeding brought by any party claiming to rely upon information or opinions contained Documents provided to such person or entity, published, disclosed or referred to without Consultant's prior written consent.

#### 14. SAMPLES AND CUTTINGS

**14.1. Sample Retention.** If Consultant provides laboratory testing or analytic Services, Consultant will preserve such soil, rock, water, or other samples as it deems necessary for the Project, but no longer than 45 days after issuance of any Documents that include the data obtained from these samples. Client will promptly pay and be responsible for the removal and lawful disposal of all contaminated samples, cuttings, Hazardous Materials, and other hazardous substances.

**14.2. Monitoring Wells.** Client will take custody of all monitoring wells and probes installed during any investigation by Consultant, and will take any and all necessary steps for the proper maintenance, repair or closure of such wells or probes at Client's expense.

#### 15. RELATIONSHIP OF THE PARTIES

Consultant will perform Services under this Agreement as an independent contractor.

#### 16. ASSIGNMENT AND SUBCONTRACTS

Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other party, except for an assignment of proceeds for financing purposes. Consultant may subcontract for the services of others without obtaining Client's consent if Consultant deems it necessary or desirable for others to perform certain Services.

#### 17. SUSPENSION AND DELAYS

**17.1. Procedures.** Client may, at any time by 10 days written notice suspend performance of all or any part of the Services by Consultant. Consultant may terminate this Agreement if Client suspends Consultant's Services for more than 60 days and Client will pay Consultant as set forth under Section 18, "Termination." If Client suspends Consultant's Services, or if Client or others delay Consultant's Services, Client and Consultant agree to equitably adjust: (1) the time for completion of the Services; and (2) Consultant's compensation in accordance with Consultant's then current Exhibit A for the additional labor, equipment, and other charges associated with maintaining its workforce for Client's benefit during the delay or suspension, or charges incurred by Consultant for demobilization and subsequent remobilization.

**17.2. Liability.** Consultant is not liable to Client for any failure to perform or delay in performance due to circumstances beyond Consultant's control, including but not limited to pollution, contamination, or release of hazardous substances, strikes, lockouts, riots, wars, fires, flood, explosion, "acts of God," adverse weather conditions, acts of government, labor disputes, delays in transportation or inability to obtain material and equipment in the open market.

#### 18. TERMINATION

**18.1. Termination for Convenience.** Consultant and Client may terminate this Agreement for convenience upon 30 days written notice delivered or mailed to the other party.

**18.2. Termination for Cause.** In the event of material breach of this Agreement, the party not breaching the Agreement may terminate it upon 10 days written notice delivered or mailed to the other party. The termination notice shall 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.

**18.3. Payment on Termination.** Following termination other than for Consultant's material breach of this Agreement, Client will pay Consultant for 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 Consultant's then current Exhibit A.

#### 19. DISPUTES

**19.1. Mediation.** All disputes between Consultant and Client are subject to mediation. Either party may demand mediation by serving a written notice stating the essential nature of the dispute, amount of time or money claimed, and requiring that the matter be mediated within 45 days of service of notice.

**19.2. Precondition to Other Action.** No action or suit may be commenced unless the mediation did not occur within 45 days after service of notice; or the 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.

**19.3. 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. Unless the parties agree otherwise, any mediation or other legal proceeding will occur in the state in which the Project is located.

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

#### 20. MISCELLANEOUS

**20.1. Integration and Severability.** This Agreement reflects the entire agreement of the parties with respect to its terms and supersedes all prior agreements, whether written or oral. If any portion of this Agreement is void or voidable, such portion will be deemed stricken and the Agreement reformed to as closely approximate the stricken portions as the law allows.

**20.2. 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.

**20.3 Mutual Non-Solicitation.** Except as otherwise expressly agreed to by the parties in writing, during the term of this Agreement and for a period of one (1) year following its termination or expiration, the parties agree not to directly or indirectly or through third parties solicit or hire any of the other party's (including its Affiliates) current or previous Key Personnel, or senior employees, or senior consultants, or anyone from Consultant who worked on-site at Company under this Agreement unless a period of twelve months has elapsed from the last date that the employee or consultant worked under this Agreement.

**20.4. 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.

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

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