

## CONSULTANT AGREEMENT

THIS CONSULTANT AGREEMENT (the “Agreement”) is effective this \_\_\_\_ day of \_\_\_\_\_, 2023 by and between the TOWN OF KENSINGTON (the “Town”), a municipal corporation of the State of Maryland and \_\_\_\_\_ (“Consultant”).

**WHEREAS**, Consultant desires to act for the Town as an independent licensed engineering contractor to provide engineering services to assist in the request for proposal process for the rehabilitation of Bridge No. M-K-02X01 carrying Frederick Avenue, Bridge No. M-K-03001 carrying Kensington Parkway, and Bridge No. M-K-04001 carrying Kent Street, all crossing over Silver Creek, located in the Town, and to review Proposers' references, evaluate the Proposers' bids, and provide construction project support, management and inspection services (“Project”); and

**WHEREAS**, the Town desires that Consultant provide such services.

**NOW, THEREFORE**, in consideration of the premises and mutual promises herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Appointment.** The Town hereby engages Consultant, as an independent licensed engineering consultant and not as an agent or employee of the Town, to provide civil engineering services for the Project. Consultant hereby accepts such work, subject to the terms and provisions of this Agreement.

2. **Scope of Services.** Pursuant to the Agreement, the Consultant agrees to furnish all the material and perform all of the work in compliance with the requirements and standards contained in the Contract Documents, as defined herein. All work shall be performed in accordance

with generally accepted engineering practices. The following Consultant services are included as part of this Agreement:

Civil engineering services for the Project to assist in the request for proposal process for the Project, and to review Proposers' references, evaluate the Proposers' bids, and provide construction project support, management and inspection services. The services are more particularly described in attached Exhibit A, Consultant's proposal, which is incorporated herein by reference.

The Parties recognize that a state of emergency has existed in Maryland due to the COVID-19 pandemic and the Project may be impacted. In the event of delays to the critical path of the agreed Project Schedule resulting solely from the effects of the COVID-19 pandemic, the actual number of days of delay will be added to the Project Schedule as an equitable adjustment. Expected costs that may be incurred due to the need for social distancing, personal protective equipment, additional office facilities and cleaning have been included in the Contract Price.

**3. Dates of Work.** The Consultant agrees to commence work within ten days of notice to proceed. Within ten (10) days of the Notice-to-Proceed, Consultant shall provide a calendar schedule for each task listed herein for approval by the Town Manager. It is understood by the parties hereto that time is of the essence in the completion of the services under this Agreement, provided that the Consultant's services must in any event be governed by the exercise of sound professional practices and the Consultant shall not be liable for delays beyond its reasonable control.

**4. Contract Price.** The Town agrees to pay the Consultant, as consideration for the Consultant's performance in accordance with applicable professional standards, a sum not to exceed \$\_\_\_\_\_ for the performance of all work under the Agreement. The Contract Price

includes expenses such as travel, printing, copying, binding, telephone, drawings, diagrams and photographs.

Additional services related to this project shall be provided by the Consultant on an as-needed basis as directed by the Town in writing. Such services shall be billed to the Town at the hourly rates established in Exhibit A.

Invoices for payment may be submitted on a monthly basis and, for additional services, must be accompanied by hourly billing and any other documentation required by the Town. In no event shall the amount billed by the Consultant exceed that amount attributed to the work completed as of the date of the bill.

**5. Contract Documents.** This Agreement and the following enumerated documents, which are incorporated by reference as if fully set forth herein, form the Agreement and are termed the Contract Documents:

- Exhibit A Engineer Proposal dated \*\*\*
- Town Request for Proposals
- Required affidavits and certifications
- Insurance certificates and additional insured endorsement
- Agreed schedule of work
- M-K-02X01 2022 Bridge Inspection Report
- M-K-03001 2021 Bridge Inspection Report
- M-K-03001 2021 Scour Critical Bridge Plan of Action
- M-K-04001 2021 Bridge Inspection Report

**6. Other Payments; Expenses; Taxes.** The Town will not be responsible for any cost or expenses of operation of any kind associated with Consultant's provision of services pursuant to this Agreement, except as set out herein. Consultant shall be entitled to no fees, bonuses, contingent payments, or any other amount in connection with the services to be rendered hereunder except as set out herein. The parties hereto further agree that the Town shall have no obligation to reimburse,

pay directly or otherwise satisfy any expenses of the Consultant in connection with the performance of its obligations under this Agreement.

It is expressly understood and acknowledged by the parties hereto that the fees payable hereunder shall be paid in the gross amount, without reduction for any Federal or State withholding or other payroll taxes, or any other governmental taxes or charges. The parties hereto further recognize that Consultant, as an independent contractor of the Town, is responsible for directly assuming and remitting any applicable Federal or State withholding taxes, estimated tax payments, Social Security payments, unemployment compensation payments, and any other fees, taxes, and expenses whatsoever. In the event that Consultant is deemed not to be an independent contractor by any local, state or federal governmental agency, Consultant agrees to indemnify and hold harmless the Town for any and all fees, costs and expenses, including, but not limited to, attorneys fees incurred thereby.

7. **Insurance.** Consultant will purchase and maintain during the entire term of this Agreement comprehensive general liability insurance, automobile liability insurance, professional errors and omissions insurance, and workers' compensation insurance with limits of not less than those set forth below. On each policy except for workers compensation and professional errors and omissions, Consultant will name the Town of Kensington its officers, officials, agents, servants, and employees as additional insureds.

A. Comprehensive General Liability Insurance

- (1) Personal injury liability insurance with a limit of \$2,000,000 each occurrence/aggregate;
- (2) Property damage liability insurance with limits of \$500,000.00 each occurrence/aggregate.

All insurance shall include completed operations and contractual liability coverage.

B. Professional Errors and Omissions Insurance. The Consultant shall maintain a policy with limits of not less than \$1,000,000.00 each claim/aggregate.

C. Automobile Liability Coverage Automobile fleet insurance \$1,000,000.00 for each occurrence/ aggregate; property damage - \$500,000.00 for each occurrence/aggregate.)

D. Workers' Compensation Insurance. Consultant shall comply with the requirements and benefits established by the State of Maryland for the provision of Workers' Compensation insurance. All Corporations are required to provide Workers' Compensation Certificates of Insurance.

Consultant covenants to maintain insurance, in these amounts, which will insure all activities undertaken by Consultant on behalf of the Town under this Agreement throughout the term of the Agreement. Copies of the certificates of insurance and additional insured endorsements for all required coverage shall be furnished to the Town within ten (10) days following the execution of this Agreement and prior to commencement of any work. The Certificate shall demonstrate that the Consultant has complied with the requirements of this section and be in a form acceptable to the Town. The Town shall receive 30 days prior written notice of any reduction or elimination of the insurance coverage required herein.

A policy which allows the costs associated with investigating, management or defense of any claim, or any other cost incurred by the insured or the insurance carrier, to be deducted from the policy limits is not acceptable. Required insurance shall be purchased and maintained with a company or companies lawfully authorized to do business in the State of Maryland. Insurance companies providing coverage herein shall have an AM Best rating of A-VII or better.

The Consultant shall be responsible for the maintenance of this insurance, whether the work is performed directly by the Consultant; by any subcontractor; by any person employed by the Consultant or any subcontractor; or by anyone for whose acts the Consultant may be liable.

Provision of any insurance required herein does not relieve Consultant of any of the responsibilities or obligations assumed by the consultant in the Agreement awarded, or for which the Consultant may be liable by law or otherwise. Provision of such insurance is not intended in any way to waive the Town's immunities or any damage limits applicable to municipal government as provided by law.

**8. Indemnification.** The Consultant shall indemnify and save harmless the Town, its officers, officials, and employees, from third-party claims, damages, costs, liabilities, and expenses recoverable by law, including reasonable attorneys' fees, to the extent caused by the negligent or willful act or omission on the part of the Consultant, its agents, servants, employees and subcontractors.

**9. Licenses, Applicable Laws.** Consultant will be responsible for obtaining any and all licenses pertaining to performance of work under the Agreement. All services and materials provided by Consultant shall conform to all applicable laws and regulations, subject to professional standards.

**10. Materials and Standard of Work.** All work performed and material provided pursuant to this Agreement shall be in conformance with standards and specifications applicable in the industry. All work shall be performed in a neat and workmanlike manner by trained and experienced personnel. Defective or unsuitable materials or workmanship may be rejected and shall be made good by the Consultant at Consultant's expense, notwithstanding that such deficiencies have been previously accepted; provided, however, the Consultant shall not be liable for

deficiencies in information furnished by the Town or others for whom the Consultant was not legally liable.

**11. Subcontracting.** The Consultant may not subcontract any other work required under this Agreement without the consent of the Town. If the Consultant wishes to subcontract any of the said work, it must provide subcontractor names, addresses, and telephone numbers and a description of the work to be done. The Consultant is not relieved of primary responsibility for full and complete performance of any work identified to the subcontractor. There shall be no contractual relationship between the Town and the subcontractor.

**12. Accurate Information.** The Consultant certifies that all information provided in response to requests for information is true and correct to the best of its knowledge and belief. Any intentionally false or misleading information is grounds for the Town to terminate this Agreement.

**13. Errors in Specifications.** The Consultant shall take no advantage of any known error or omission in the specifications, but the Consultant shall be entitled to rely upon the specifications. The Town shall make such corrections and interpretations as may be deemed necessary and that decision shall be final.

**14. Construction and Legal Effect.** This Agreement, including all Contract Documents, constitutes the entire understanding between the parties. No modification or addition to this Agreement shall have any effect unless made in writing and signed by both parties hereto.

**15. No Assignment.** This Agreement shall not be assigned or transferred by Consultant, whether by operation of law or in any other manner, without prior consent in writing from the Town. In the event of insolvency of either party, this Agreement shall terminate immediately at the election of the other party.

**16. Termination for Default.** Notwithstanding anything to the contrary herein, this Agreement may be terminated upon the failure of the Consultant to deliver work, supplies, materials or services in a timely manner, to correct defective work or materials, to act in good faith, or to carry out the work in accordance with Contract Documents, each of which shall constitute a breach of this Agreement. In such event, the Town may give notice to the Consultant to cease work until the cause for such order has been eliminated. Should the Consultant fail to correct, or commence and reasonably continue to correct, such default within 24 hours in an emergency situation, and otherwise within 72 hours, after receipt of notification, the Town may terminate this Agreement. This provision shall not limit the Town in exercising any other rights or remedies it may have.

**17. Termination for Convenience.** The performance of work or delivery of services under this Agreement may be terminated in whole or in part at any time upon written notice when the Town determines that such termination is in its best interest. The Town will be liable only for labor, materials, goods, and services furnished up to the effective date of such termination.

**18. Notices.** All notices shall be sufficient if delivered in person or sent by certified mail to the parties at the following addresses:

Matt Hoffman  
Town Manager  
Town of Kensington  
3710 Mitchell Street  
Kensington, MD 20895

**19. Enforcement Provisions.** The failure of the Town or Consultant, at any time, to enforce any of the provisions of this Agreement, or any right with respect thereto, will in no way be construed to be a waiver of such provisions or right, or in any way to affect the validity of this Agreement. The exercise by either party of any rights under this Agreement shall not preclude or prejudice the subsequent exercise of the same or any other rights under this Agreement.



**20. Governing Law.** This Agreement shall be governed by the laws of the State of Maryland, excluding its conflict of law rules, as if this Agreement were made and to be performed entirely within the State of Maryland.

**21. Severability.** If any term or provision of this Agreement shall be held invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each term and provision of this Agreement shall be enforced to the fullest extent permitted by law.

**22. Set-Off.** In the event that Consultant shall owe an obligation of any type whatsoever to the Town at any time during the term hereof or after termination of the relationship created hereunder, the Town shall have the right to offset any amount so owed by the Consultant against any compensation due the Consultant from the Town.

**23. Counterparts.** The parties may execute this Agreement in counterparts, which each such document shall, in the aggregate and when signed by both parties, constitute one and the same instrument; and, thereafter, each counterpart shall be deemed an original instrument as against any party who has signed it. This Agreement shall not be valid or enforceable unless and until duly executed by a duly authorized officer of each party. The Parties may sign in writing or by electronic signature. An electronic signature will have the same effect as an original signature.

**24. Ownership and Use of Documents.** All documents, materials or data developed as a result of this Agreement are the Town's property. The Town has the right to use and reproduce any documents, materials, and data, including confidential information, used in the performance of, or developed as a result of, this Agreement. The Town may use this information for its own purposes, including reporting to state and federal agencies. Any modification or reuse of such documents, materials, or data, without the written consent of the Consultant, shall be at the user's sole risk and without

liability to the Consultant. The Consultant warrants that, to the best of its knowledge, information, and belief, it has title to or right of use of all documents, materials or data used or developed in connection with this Agreement.

**25. Changes.** The Town may unilaterally increase or decrease (“Change”) the work, materials and services to be performed. The Change must be in writing and within the general scope of the Agreement. The Agreement will be modified to reflect any time or money adjustment the Consultant is entitled to receive or to provide to the Town. Consultant must bring to the Project Manager, in writing, any claim about an adjustment in time or money resulting from a change, within 30 days from the date the Town issued the change in work, or the claim is waived. The Consultant must proceed with the prosecution of the work as changed, even if there is an unresolved claim. No charge for any extra work, time or material will be allowed, except as provided in this section.

**26. Confidentiality.** The Town may disclose Consultant’s information to the extent required by the Maryland Public Information Act (“MPIA”) or other applicable law. Consultant shall mark any information that it wishes to remain “confidential” or “proprietary” before providing the information to the Town. In the event that, pursuant to the MPIA or other process, the Town receives a request for information that has been so marked by Consultant, and the Town agrees that the information may be exempt from disclosure under Maryland law, then the Town will not disclose the information and will notify the Consultant of the request. Consultant shall bear the costs of asserting any right to non-disclosure of its information. This Agreement is not a confidential document. The Consultant shall keep confidential all information provided by the Town, or to which the Consultant has access as part of the provision of services under this Agreement.

**27. Patents, Copyrights and Royalties.** Whenever any article, material, appliance, process composition, means or things called for by these specifications is covered by Letter of

Patent, copyright or license, or other property or privacy right the Consultant must secure, before using or employing such materials, the authorizations and approvals related to its use in writing from the owner or licensee of such letters of patent, copyright or license , or other property or privacy right, and file the same with the Town. The Consultant will indemnify and hold harmless the Town related to Consultant's infringing or otherwise improper or unauthorized use to the extent that the Consultant performs, commits, specifies or directs an infringement on a patent, copyright, license or trade secret or other private property right; provided, however, the Consultant shall not be liable for infringements specified or directed by the Town or others for whom the Consultant is not legally liable. In the event that an injunction shall be obtained against the Town's use of items by reason of infringement of any patent, copyright, license or trade secret or other property or privacy right, the Consultant will, at its expense, procure for the Town the right to continue using the items, replace or modify the same so that it becomes non-infringing.

**28. Performance During Dispute.** Unless otherwise directed by the Town, the Consultant shall continue performance under this Agreement while matters in dispute are being resolved

**29. Third Party Beneficiary.** This Agreement is entered into solely for the benefit of the Town and the Consultant. No third party will be deemed a beneficiary of this Agreement, and no third party will have the right to make any claim or assert any right under this Agreement.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement under seal the day and year first above written.

WITNESS:

TOWN OF KENSINGTON

\_\_\_\_\_  
Susan Engels, Clerk-Treasurer

By: \_\_\_\_\_  
Matthew J. Hoffman, Town Manager

WITNESS:

CONSULTANT

\_\_\_\_\_

By: \_\_\_\_\_  
Name:

Title:

Approved as to form and legal sufficiency

\_\_\_\_\_  
Suellen M. Ferguson,  
Attorney for the Town of Kensington