

# CITY OF KELSO – PROFESSIONAL SERVICES TERMS AND CONDITIONS

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1. **Contract Documents.** The Contract Documents include, but are not limited to, the Services Contract, requests for qualifications/proposals, scope of work, and professional services terms and conditions (PWTC). The Contract Documents contain all of the agreements of the Parties with respect to any matter covered or mentioned in the Contract Documents and no prior contracts shall be effective for any purpose.

2. **Consultant's Obligation.** The Consultant warrants that it has the requisite training, skill and experience necessary to provide the Services and is appropriately accredited and licensed by all applicable agencies and governmental entities.

All duties of the Consultant or designees shall be performed in accordance with all applicable Federal, State, and City laws as now existing or hereafter adopted or amended.

The Consultant shall control and direct the performance of the work. The Owner reserves the right to inspect, review and approve the work to assure that the Services have been completed as specified prior to payment.

All Services to be performed by the Consultant or his designees shall be performed pursuant to the direction of the City Manager or designee in a manner consistent with the care and skill ordinarily exercised in the profession under similar conditions and performed to the Owner's reasonable satisfaction, within the time period prescribed by this Contract.

3. **Owner's Obligation.** In consideration of the faithful performance of the Services and compliance with the terms and conditions required by the Contract Documents to the satisfaction of the Owner, the Owner agrees to pay the Consultant in the manner and in the times provided in the Contract Documents and in accordance with the ordinances of the City of Kelso and the laws of the State of Washington. The final amount to be paid, however, is variable upon the amount of work done and/or materials furnished pursuant to unit prices, if any, fixed in the Consultant's Proposal or Scope of Work and as modified by any or all approved change orders or Contract amendments.

4. **Compensation.** Payment by the Owner for the Services will only be made after the Services have been performed and an itemized billing statement has been submitted in the form specified by the Owner and approved by the appropriate Owner representative, which shall specifically set forth the Services performed, the name of the person performing such Services, and the hourly labor charge rate for such person. Payment shall be made on a monthly basis thirty (30) days after receipt of such billing statement.

The Consultant shall be solely responsible for the payment of any taxes imposed by any lawful jurisdiction as a result of performance and payment under this Contract.

If sufficient funds are not appropriated or allocated for payment under this Contract for any future fiscal period, the Owner will not be obligated to make payments for Services or amounts incurred after the end of the current fiscal period, and this Contract will terminate upon completion of all remaining Services for which funds are allocated. No penalty or expense shall accrue to the Owner in the event this provision applies.

5. **Independent Contractor.**

**A.** It is the intention and understanding of the Parties that the Consultant shall be an independent contractor. The Consultant or his or her employees or agents performing under this Contract are not employees or agents of the Owner. The Consultant will not hold himself or herself out as nor claim to be an officer or employee of the Owner. The Consultant will not make any claim of right, privilege, or benefit which would accrue to an employee under law. The Owner shall neither be liable for nor obligated to pay sick leave, vacation pay or any other benefit of employment, nor to pay any social security or other tax which may arise as an incident of employment. The Consultant shall pay all income and other taxes as due. Industrial or any other insurance which is purchased for the benefit of the Consultant shall not be deemed to convert this Contract to an employment contract.

**B.** It is recognized that the Consultant may or will be performing professional services during the term for other parties and that the Owner is not the exclusive user of the Consultant's services; provided, however, that the performance of other professional services shall not conflict with

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or interfere with the Consultant's ability to perform the Services. The Consultant agrees to resolve any conflict in favor of the Owner.

**6. Indemnification and Hold Harmless.** The Consultant shall defend, indemnify and hold the Owner, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or resulting from the acts, errors or omissions of the Consultant in the performance of the Contract, except for injuries and damages caused by the sole negligence of the Owner.

Should a court of competent jurisdiction determine that the Contract is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Consultant and the Owner, its officers, officials, employees, and volunteers, the Consultant's liability hereunder shall be only to the extent of the Consultant's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Consultant's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of the Contract.

**7. Consultant's Insurance.**

A. **Insurance Term** - The Consultant shall procure and maintain for the duration of the Contract, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Consultant, its agents, representatives, or employees. For Purchased Services contracts the insurance, as required in this Section, shall be maintained without interruption from commencement of the Consultant's work through the term of the Contract and for thirty (30) days after the Physical Completion date, unless otherwise indicated herein.

B. **No Limitation** - Consultant's maintenance of insurance, its scope of coverage and limits as required herein shall not be construed to limit the liability of the Consultant to the coverage provided by such insurance, or otherwise limit the Owner's recourse to any remedy available at law or in equity.

C. **Minimum Scope of Insurance** - Consultants required insurance shall be of the types and coverage as stated below:

1. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be at least as broad as Insurance Services Office (ISO) form CA 00 01.

2. Commercial General Liability

a. For Purchased Services Contracts, CGL insurance shall be at least as broad as ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, independent contractors, products-completed operations, stop gap liability, personal injury and advertising injury, and liability assumed under an insured contract. The Commercial General Liability insurance shall be endorsed to provide a per project general aggregate limit using ISO form CG 25 03 05 09 or an equivalent endorsement. There shall be no exclusion for liability arising from explosion, collapse or underground property damage. The Owner shall be named as additional an insured under the Consultant's Commercial General Liability insurance policy with respect to the work performed for the Owner using ISO Additional Insured endorsement CG 20 10 10 01 and Additional Insured-Completed Operations endorsement CG 20 37 10 01 or substitute endorsements providing at least as broad coverage.

b. For Personal/Professional Services/A&E Contracts, GCL insurance shall be at least as broad as ISO occurrence form CD 00 01 and shall cover liability arising from premises, operations, stop gap liability, independent contractors and personal injury and advertising injury. The Owner shall be named as an additional insured under the Consultant's Commercial General Liability insurance policy with respect to the work performed for the Owner using an additional insured endorsement at least as broad as ISO endorsement form CG 20 26.

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3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

4. For Professional/Personal Services, Professional A&E Contracts, Professional Liability insurance appropriate to the Consultant's profession.

D. **Minimum Amounts of Insurance** - Consultant shall maintain the following insurance limits:

1. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.

2. Commercial General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate and \$2,000,000 products-completed operations aggregate limit.

3. Professional Liability insurance shall be written with limits no less than \$1,000,000 per claim and \$2,000,000 policy aggregate limit.

E. **Owner Full Availability of Consultant Limits** - If the Consultant maintains higher insurance limits than the minimums shown above, the Owner shall be insured for the full available limits of Commercial General and Excess or Umbrella liability maintained by the Consultant, irrespective of whether such limits maintained by the Consultant are greater than those required by the Contract or whether any certificate of insurance furnished to the Owner evidences limits of liability lower than those maintained by the Consultant.

F. **Other Insurance Provision** - The Consultant's Automobile Liability and Commercial General Liability insurance policies are to contain, or be endorsed to contain that they shall be primary insurance as respect the Owner. Any insurance, self-insurance, or self-insured pool coverage maintained by the Owner shall be excess of the Consultant's insurance and shall not contribute with it.

G. **Acceptability of Insurers** - Insurance is to be placed with insurers with a current A.M. Best rating of not less than A: VII.

H. **Verification of Coverage** - Consultant shall furnish the Owner with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsements, evidencing the insurance requirements of the Consultant before commencement of the work. Upon request by the Owner, the Consultant shall furnish certified copies of all required insurance policies, including endorsements, required in the Contract and evidence of all subconsultants' coverage.

I. **Subconsultants' Insurance** - The Consultant shall cause each and every Subconsultant to provide insurance coverage that complies with all applicable requirements of the Consultant-provided insurance as set forth herein, except the Consultant shall have sole responsibility for determining the limits of coverage required to be obtained by Subconsultants. The Consultant shall ensure that the Owner is an additional insured on each and every Subconsultant's Commercial General liability insurance policy using an endorsement at least as broad as ISO Additional Insured endorsement CG 20 10 10 01 for ongoing operations and CG 20 37 10 01 for completed operations.

J. **Notice of Cancellation** - The Consultant shall provide the Owner and all Additional Insureds for this work with written notice of any policy cancellation within two business days of their receipt of such notice.

K. **Failure to Maintain Insurance** - Failure on the part of the Consultant to maintain the insurance as required shall constitute a material breach of contract, upon which the Owner may, after giving five business days' notice to the Consultant to correct the breach, immediately terminate the Contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the Owner on demand, or at the sole discretion of the Owner, offset against funds due the Consultant from the Owner.

9. **Nondiscrimination.** In the performance of all Services under this Contract, the Consultant, or its employees, agents, sub-consultants or representatives, shall not discriminate against any person because of sex, age (except

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minimum age and retirement provisions), race, color, creed, national origin, marital status or the presence of any disability, including sensory, mental, or physical handicaps, based upon a bona fide occupational qualification in relationship to hiring and employment. The Consultant shall comply with the Washington Law Against Discrimination (Chapter 49.60 RCW) and with any other applicable federal or state law or local ordinance regarding nondiscrimination. Any material violation of this provision shall be grounds for immediate termination of this Contract by the Owner and, in the case of the Consultant's breach, may result in ineligibility for further Owner Contracts.

**10. Intellectual Property.** Consultant represents and warrants that the Consultant is either the author of all deliverables to be provided under this Contract or has obtained and holds all rights necessary to carry out this Contract. Consultant further represents and warrants that the Services to be provided under this Contract do not and will not infringe any copyright, patent, trademark, trade secret or other intellectual property right of any third party.

Unless otherwise provided, data which originates from this Contract shall be a "work for hire" as defined by the U.S. Copyright Act of 1976 and shall be owned by the Owner upon full payment. Data shall include, but not be limited to reports, documents, pamphlets, advertisements, books, magazines, surveys, studies, films, tapes, and sound reproductions. Ownership includes the right to copyright, patent, register, and the ability to transfer these rights

The Consultant assumes no liability for any unintended use of any stamped engineered plans prepared by a licensed engineer under this Contract beyond the use anticipated under this Contract. The City shall release, defend, indemnify, and hold harmless the Consultant from all claims, costs, expenses, damage, or liability arising out of or resulting from the use or modification of any such engineered plans prepared by the Consultant except use by the City's contractors and the City on those portions of the project(s) for which such plans were prepared.

**11. Books and Records.** The Consultant agrees to maintain books, records, and documents that sufficiently and properly reflect all direct and indirect costs related to the performance of the Services and maintain such accounting procedures and practices as may be deemed necessary by the Owner to assure proper accounting of all funds paid pursuant to this Contract. These records relating to work under the Contract shall be subject, at all reasonable times until the expiration of six (6) years after final payment of Compensation under the Contract or such other time required by the Secretary of State's records retention schedule to inspection, review, or audit by the Owner, its authorized representative, the State Auditor, or other governmental officials authorized by law to monitor this Contract.

The making of (or failure or delay in making) such inspection or approval shall not relieve Consultant of responsibility for performance of the work in accordance with this Contract, notwithstanding the Owner's knowledge of defective or non-complying performance, its substantiality or the ease of its discovery. Consultant shall provide the Owner sufficient, safe, and proper facilities for inspection, and/or shall send copies of the requested documents to the Owner. Consultant's records relating to the work will be provided to the Owner upon the Owner's request.

The records relating to the work are Owner records under the Washington State Public Records Act, Chapter 42.56.RCW, and they must be produced to third parties, if required by law.

The terms of this section shall survive any expiration or termination of this Contract.

**12. Confidentiality.** The Consultant agrees that all materials containing confidential information received pursuant to this Contract shall not be disclosed without the Owner's express written consent. Consultant agrees to provide the Owner with immediate written notification of any person seeking disclosure of any confidential information obtained for the Owner.

**13. Subcontracts/Assignment.** Consultant shall not subcontract or assign, in whole or in part, its obligations under the Contract without the prior written consent of the Owner. The Consultant shall be responsible to ensure that all requirements of the Contract shall flow down to any and all subconsultants.

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**14. Warranty.** For Purchased Services Contracts, the Consultant shall at its own cost and expense, correct all work performed that the Owner deems, in its sole discretion, to have defects in workmanship or materials, which is discovered within one year of the termination of the Contract.

**15. Termination.** The Owner may terminate or suspend the Contract at any time, with or without cause, upon ten (10) days prior written notice to the Consultant. In the event of such termination or suspension, the Consultant shall be entitled to payment for all work and services performed and reimbursable expenses incurred to the date of the termination. The Owner may terminate the Contract immediately if the Consultant's insurance coverage is cancelled for any reason or if the Consultant is unable to perform the work.

**16. Performance.** Time is of the essence in this Contract and each and all of the provisions in which performance is a factor.

**17. Modification.** No provisions of the Contract may be amended or modified except by written agreement of the Parties.

**18. Interpretation and Full Force and Effect.** Any ambiguity or conflicts in the Contract documents shall not be strictly construed against the drafter of the language but shall be resolved by applying the most reasonable interpretation under the circumstances giving full consideration to the parties' intentions. Each party agrees that it has consulted or had opportunity to consult with counsel of its own choosing. Any provision of this Contract which is declared invalid or illegal shall in no way affect or invalidate any other provision hereof and such other provisions shall remain in full force and effect.

**19. Successors.** The rights and obligations of the Parties shall inure to the benefit of and be binding upon their respective successors in interest, heirs, and assigns.

**20. Attorney's Fees.** In the event either party brings a lawsuit to enforce the terms of the Contract, or arising from a breach of the Contract, the prevailing party shall be entitled to its costs and attorneys' fees for bringing or defending against the action.

**21. No Waiver.** Failure or delay of the Owner to declare any breach or default immediately upon occurrence shall not waive such breach or default. Failure of the Owner to declare one breach or default does not act as a waiver of the Owner's right to declare another breach or default.

**22. Notices.** Any notices required to be given shall be delivered as follows:

To the Owner

Engineering Department  
203 S Pacific Ave  
(PO Box 819)  
Kelso WA; 98626

To the Consultant

At the address set forth in the statement of qualifications or proposal.

Any notices may be delivered personally or may be deposited in the US mail, postage prepaid, to the addresses above. Any notice so posted in the US mail shall be deemed received three (3) days after the date of mailing.

**23. Governing Law and Venue.** The Contract shall be governed by and interpreted in accordance with the laws of the State of Washington. Venue for any disputes arising out of the Contract, the Contract Documents, or these terms and conditions shall be Cowlitz County, Washington.