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**MASTER AGREEMENT FOR PROFESSIONAL SERVICES**

**Related to:**

**THE  
FARGO-MOORHEAD AREA DIVERSION PROJECT**

**BY AND BETWEEN**

**METRO FLOOD DIVERSION AUTHORITY  
as Diversion Authority**

**and**

**ADVANCED ENGINEERING AND ENVIRONMENTAL SERVICES, INC.  
as AE2S**

**Dated as of February 28, 2020**

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This instrument was drafted by:  
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## MASTER AGREEMENT FOR PROFESSIONAL SERVICES

THIS MASTER AGREEMENT FOR PROFESSIONAL SERVICES (the “Agreement”) is made as of February 28, 2020 (the “Effective Date”), by and between the Metro Flood Diversion Authority (“Diversion Authority”) and Advanced Engineering and Environmental Services, Inc. (“Consultant”) (collectively, the “Parties”).

WHEREAS, the Diversion Authority and the United States Army Corps of Engineers (“USACE”) have completed significant work in readying the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the “Project”) for implementation; and

WHEREAS, using a Split Delivery Method, the multiple Project features will be split into those implemented by the Diversion Authority and those implemented by the USACE, with the Diversion Authority delivering the majority of the Diversion Authority’s features through a Public-Private Partnership (“P3”) delivery method; and

WHEREAS, the portions of the Project that the Diversion Authority will implement through a P3 are collectively referred to as the Diversion Channel and Associated Infrastructure Work Package (“DCAI WP”); and

WHEREAS, the Diversion Authority has selected Consultant to provide the Diversion Authority with professional services, subject to the oversight of the Executive Director and the Diversion Authority Board; and

WHEREAS, the Diversion Authority desires to enter into a master agreement for professional services with Consultant and retain Consultant to provide professional services for the Project, commencing on February 28, 2020.

NOW THEREFORE, it is agreed by and between the Parties as follows:

1. EMPLOYMENT. The Diversion Authority hires Consultant, which accepts the hiring with the Diversion Authority pursuant to this Agreement. Consultant is an independent contractor under this Agreement. Nothing in this Agreement shall be construed to create an employer-employee relationship between the Parties.
2. DEFINITIONS. All capitalized terms used and not otherwise defined herein shall have the meanings given to them in this Agreement as defined in this Section, unless a different meaning clearly applies from the context.

“Agreement” means this Master Agreement for Professional Services by and between the Metro Flood Diversion Authority and Advanced Engineering and Environmental Services, Inc. (AE2S).

“Best Efforts” means that the parties to this Agreement will act in Good Faith, act in accordance with generally accepted commercial practices, and use reasonable due diligence to undertake all action contemplated by this Agreement, in accordance with applicable federal and state laws, regulations, and rules; however, the obligation to use Best Efforts does not mean a duty to take action that would be in violation of applicable federal or state law.

“Cass County Joint Water Resource District” means the Cass County Joint Water Resource District, a political subdivision of the State of North Dakota, its successors and assigns.

“City of Fargo” means the City of Fargo, a North Dakota Home Rule City and political subdivision of the State of North Dakota.

“Consultant” means the individual or entity with which the Owner has contracted for performance of the services as set forth in this Agreement.

“Diversion Authority Board” means the Governing Body of the Metro Flood Diversion Authority.

“Effective Date” means February 28, 2020.

“Executive Director” means the Chief Administrative Officer of the Metro Flood Diversion Authority.

“Fargo-Moorhead Metropolitan Area” means Fargo, North Dakota, Moorhead, Minnesota, and surrounding communities; it is further defined by the United States Census Bureau as comprising all of Cass County, North Dakota, and Clay County, Minnesota, which includes the cities of Dilworth, Minnesota, West Fargo, North Dakota, and numerous other towns and developments from which commuters travel daily for work, education, and regular activities.

“Fargo-Moorhead Metropolitan Area Flood Risk Management Project” has the same definition as “Project” in this Agreement and is the name given to the Project by the USACE.

“Good Faith” means observance of reasonable commercial standards of fair dealing in a given trade of business.

“Governing Body” means the body which performs the legislative and governmental functions of a political subdivision, including but not limited to, a board, council, or commission. For example, the Cass County Commission, the Clay County Commission, the Moorhead City Council and the Fargo City Commission are the Governing Body of each of said entities as the board for the CCJWRD is the Governing Body for that entity.

“JPA” or “Joint Powers Agreement” means the agreement dated as of June 1, 2016, by and between the Member Entities.

“LJPA” or “Limited Joint Powers Agreement” means the agreement dated July 11, 2011, and subsequently amended, which was entered into between the City of Moorhead, the City of Fargo, Clay County, Cass County, the Buffalo-Red River Watershed District and the Cass County Joint Water Resource District in order to cooperate in the planning and design phase of the Locally Preferred Plan.

“Member Entities” shall mean the City of Moorhead, the City of Fargo, Clay County, Cass County, and Cass County Joint Water Resource District.

“Metro Flood Diversion Authority” means the political subdivision created by the LJPA and continued through and vested with the powers set forth in the JPA.

“Owner” means the individual or entity with which the Consultant has contracted regarding the services set forth herein, and which has agreed to pay Consultant for the performance of the services, pursuant to the terms of this Agreement.

“Person” means any natural or legal person, county, city, municipality, political subdivision, public benefit corporation, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority, or other entity.

“Project” means the LPP Flood Risk Management Features and the Recreation Features as generally described in the Final Feasibility Report and Environmental Impact Statement, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated July 2011 and approved by the Chief of Engineers on December 19, 2011, as amended by the Supplemental Environmental Assessment, Fargo-Moorhead Metropolitan Area Flood Risk Management Project, dated September 2013 and approved by the District Engineer, St. Paul District on September 19, 2013, and as further amended by the Final Supplemental Environmental Assessment, Modifications to the Fargo Moorhead Metropolitan Area Flood Risk Management Program dated February 2019 and the Fargo-Moorhead Flood Risk Management Project, Final Supplemental Environmental Impact Statement dated November 12, 2018.

3. AUTHORIZATION TO PROCEED. Execution of this Agreement by the Diversion Authority will be authorization for Consultant to proceed with the services, unless otherwise provided for in this Agreement.
4. PRIOR AGREEMENTS. Any prior agreements between the Diversion Authority or its Member Entities and Consultant shall, upon execution of this Agreement, be terminated and have no further force and effect. Except with respect to the Cass County Joint Water Resource District, any Task Orders between the Diversion Authority or its Member Entities and Consultant entered into on or after the effective date of this Agreement shall be subject to the terms of this Agreement.
5. REQUIRED MEETINGS. On the first Tuesday of every month during the term of this Agreement, or as otherwise agreed to by the parties, Consultant will meet with the Diversion Authority Executive Director and the Program Management Consultant (PMC) to review the current status of services under this Agreement and to coordinate with other consultants under separate agreements with the Diversion Authority.
6. SCOPE OF SERVICES. Consultant’s detailed scope of services, work schedule, and cost budget will be mutually agreed upon in writing and set forth in Task Orders issued by the Diversion Authority under this Agreement as directed by the Executive Director. Each Task Order will specifically refer to and incorporate this Agreement by reference, and the provisions of this Agreement shall apply to all Task Orders entered into subsequent to the effective date of this Agreement. In general, Consultant’s services will include services in support of the Project as mutually agreed upon between the Parties.

7. CHANGES TO SCOPE OF SERVICES. The Diversion Authority may make or approve changes within the general scope of services in this Agreement. If such changes affect Consultant's cost of or time required for performance of the services as set out in any applicable Task Order, then an equitable adjustment will be made through an amendment to the applicable Task Order or this Agreement.
8. RESPONSIBILITY FOR ERRORS OR DELAYS FROM INACCURATE DATA. Consultant and the Diversion Authority acknowledge that the reliability of Consultant's services depends upon the accuracy and completeness of the data supplied to Consultant. The Diversion Authority accepts sole responsibility for errors or delays in services resulting from inaccurate or incomplete data supplied to Consultant, and the Diversion Authority acknowledges and agrees that any additional services thereby necessitated will result in additional fees payable by the Diversion Authority to Consultant. Consultant must receive promptly the information to deliver the services as well as the Diversion Authority's prompt updates to any information where there has been a material change which may affect the scope or delivery of the services, such as a change in the nature of the Diversion Authority's products or equipment, systems, and/or processes that are the focus of Consultant's services.
9. TASK ORDERS. Consultant shall receive assignments for services under this Agreement through Task Orders authorized and provided by the Diversion Authority as directed by the Executive Director. The Diversion Authority shall compensate Consultant only for work contained within the Task Orders. Consultant shall not be obligated to perform any work or services unless such services are set forth in an executed Task Order. If Consultant engages in work beyond the scope of a Task Order, the Diversion Authority shall not compensate Consultant for that work, unless agreed to in writing by the Diversion Authority prior to the work being completed. All amendments to Task Orders must be authorized and provided by the in writing.
10. PERSONNEL. All persons assigned by Consultant to perform services as set forth in Task Orders issued under this Agreement shall be fully qualified to perform the work assigned to them. Consultant shall devote such personnel and resources, time, attention, and energies to the Diversion Authority's business as are necessary to fulfill the duties and responsibilities required by the Diversion Authority and agreed to by Consultant in any given Task Order. Consultant must endeavor to minimize turnover of personnel performing services under this Agreement. If the Diversion Authority is dissatisfied with any of Consultant's personnel, the Diversion Authority reserves the right to require removal of those personnel from the Task Order. The Diversion Authority shall provide Consultant with a written statement, including reasonable detail, outlining its reasons for desiring removal. Replacement personnel for the removed person shall be fully qualified for the position.
11. SUBCONTRACTORS. Consultant may enter into agreements with subcontractors in furtherance of their services under this Agreement, as approved by the Executive Director.
12. TERM. Unless terminated under Section 42, this Agreement shall remain in full force and effect for a period of approximately seven (7) years from the Effective Date through December 31, 2026. This Agreement shall take full force and effect on February 28, 2020, upon approval and execution by the Diversion Authority Board. Pursuant to Section 13 of this Agreement



and upon expiration of the initial term of this Agreement, this contract may be renewed by mutual agreement of the Parties.

13. EXTENSION OF TERM. This Agreement may be extended by written amendment. If this Agreement expires before the completion of a Task Order, the Agreement shall be deemed to have been extended until the completion of services under the applicable Task Order.
14. COMPENSATION. For all services rendered by Consultant, the Diversion Authority will pay Consultant an amount based on the time spent by those Consultant employees working on the Project and the Standard Hourly Rates applicable to those Consultant employees, plus certain reimbursable expenses (as set forth in this paragraph) and Consultant's subconsultant charges, plus a service charge of five percent (5%) on Consultant's approved subconsultants and reimbursable expenses, plus applicable sales, use, value added, business transfer, gross receipts, or other similar taxes. Consultant's Standard Hourly Rates for services rendered from the Effective Date through December 31, 2020, are listed in Exhibit A. Beginning January 1, 2021, and annually thereafter on January 1, Consultant's Standard Hourly Rates may be increased by amounts agreed upon by the Executive Director and the Consultant. The Executive Director shall be allowed to review the Standard Hourly Rates of Consultant on a quarterly basis to review the gross profit margins of the Consultant on the Project. Reimbursable expenses shall include non-unit based costs incurred by the Consultant, such as airfare, lodging, and meals and are listed in Exhibit B. Reimbursable expenses shall not include unit-based expenses, such as mileage and printing costs.
  - A. Budgetary amounts, excluding taxes, will be established for each Task Order executed under the Agreement. Consultant will make reasonable efforts to complete the services within the budget amount stated therein and will keep the Diversion Authority informed of progress toward that end so that the budget or work effort can be adjusted if found necessary. Consultant is not obligated to incur costs beyond the indicated budgets, as may be adjusted, nor is the Diversion Authority obligated to pay Consultant beyond these limits. When any budget has been increased, Consultant's costs expended prior to such increase will be allowable to the same extent as if such costs had been incurred after the approved increase.
  - B. If a Task Order issued under this Agreement contains a not-to-exceed compensation amount, the Diversion Authority will only pay compensation to Consultant for fees and/or expenses that are less than or equal to the not-to-exceed amount stated on the Task Order, unless the Task Order has been amended pursuant to Section 7 of this Agreement.
  - C. The compensation is payable following the end of each month upon submission by Consultant of a monthly invoice setting forth the services performed in that month on behalf of the Owner. Invoices shall be sent as required in Section 15 of this Agreement. Invoices are due and payable within thirty (30) days of receipt.
15. INVOICING AND PAYMENT.
  - A. Consultant must submit invoices to the Diversion Authority before the fifteenth (15<sup>th</sup>) day of each month for all services provided and allowed expenses incurred during the preceding month. Consultant's Project Principle or Project Manager must personally



- H. Payment does not imply acceptance of services, that expenses are allowable, or that the invoice is accurate. In the event an error is identified within three (3) months of receipt of payment, Consultant must credit any payment in error from any payment that is due or that may become due to Consultant under this Agreement.
  - I. The Diversion Authority will be charged interest at the rate of one-half percent (1/2%) per month, or that permitted by law if lesser, on all past-due amounts starting thirty (30) days after receipt of invoice. Payments will be first credited to interest and then to principal.
  - J. If the Diversion Authority fails to make payment in full within thirty (30) days of the date due for any undisputed billing, Consultant may, after giving seven (7) days' written notice to the Diversion Authority, suspend services under this Agreement until paid in full, including interest. In the event of suspension of services, Consultant will have no liability to the Diversion Authority for delays or damages caused by the Diversion Authority because of such suspension.
  - K. Without waiving any rights to recover payment for reimbursable taxes, fees or other costs per the provisions of Paragraph 15 herein, Consultant must pay in the first instance all fees, fines, taxes, or other costs of doing business related to the services.
16. RELATIONSHIP BETWEEN PARTIES. Consultant is retained by the Diversion Authority only for the purposes and to the extent set forth in this Agreement, and its relationship to the Diversion Authority shall, during the period or periods of services under this Agreement, be that of an independent contractor. Consultant shall be free to use such portion of Consultant's entire time, energy and skill during the course of this Agreement to meet its contractual obligation to the Diversion Authority. Neither Consultant, nor its personnel, shall be considered to be employed by the Diversion Authority or entitled to participate in any plans, arrangements or distributions by the Diversion Authority pertaining to or in connection with any benefits accorded the Diversion Authority's regular employees. The Diversion Authority shall not be financially responsible to Consultant, except for the payment of compensation specifically set forth in this Agreement, and shall not be responsible for the payment of any cost of living allowances, merit increases, medical insurance, employee's retirement, life or disability coverage, sick leave or holiday pay or vacation pay or any benefit of any kind not specifically set forth in this Agreement. Likewise, the Diversion Authority shall not be responsible for wage or salary withholding to the federal or any state government.
17. REPRESENTATIONS AND WARRANTIES. Consultant represents that the following statements are true:
- A. Consultant has not directly or indirectly offered or given any gratuities (in the form of entertainment, gifts, or otherwise) to any member of the Diversion Authority with a view toward securing this Agreement or securing favorable treatment with respect to any determinations concerning the performance of this Agreement.
  - B. The Consultant team members performing the services hereunder have no interest that would constitute a conflict of interest with the Diversion Authority during the term of the Project. This does not preclude or prohibit other Consultant employees or representatives

from working with other parties who may participate on the Project and have potential or actual adverse interest to the Diversion Authority.

- C. This Agreement does not constitute a conflict of interest or default under any of Consultant's other agreements.
  - D. No suit, action, arbitration, or legal, administrative, or other proceeding or governmental investigation is pending or threatened that may adversely affect Consultant's ability to perform under this Agreement.
  - E. Consultant is in compliance with all laws, rules, and regulations applicable to its business, including rules of professional conduct (the "Laws and Regulations").
  - F. During the term of this Agreement, Consultant must not take any action, or omit to perform any act, that may result in a representation becoming untrue. Consultant must immediately notify the Executive Director if any representation and warranty becomes untrue.
  - G. THIS WARRANTY SHALL BE IN LIEU OF AND EXCLUDES ALL OTHER IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE.
19. WORKING RELATIONSHIP. Consultant's Principal-in-Charge, Project Manager, and Deputy Project Manager shall be the individual(s) that will engage with the Diversion Authority's Executive Director. Consultant shall work in close cooperation and coordinate with the Diversion Authority's Program Management Consultant, advisors, and their staff as appropriate: Kimberly Daily and Paul Barthel, PMC; Martin Nicholson, Program Advisor Services, LLC; John T. Shockley, local counsel, under such terms and conditions as may be set from time to time by the Diversion Authority.
- Consultant recognizes that the Diversion Authority has assigned to the CCJWRD the tasks of acquiring property rights in North Dakota and to the Moorhead Clay County Joint Powers Authority (MCCJPA) the task of acquiring property rights in Minnesota. Under this Agreement, Consultant shall answer to and comply with all CCJWRD and MCCJPA work directives in furtherance of those responsibilities of the CCJWRD and MCCJPA which are in accordance with Consultant's scope of work.
20. INDEPENDENT PROFESSIONAL JUDGMENT. Nothing in this Agreement shall be construed to interfere with or otherwise affect the rendering of services by Consultant in accordance with the independent professional judgment of each of its employees. Consultant shall perform the services rendered in accordance with accepted principals of its profession. Consultant personnel are subject to the rules and regulations of any and all licensing and professional organizations or associations to which those personnel may from time to time belong, and the laws and regulations of the State of North Dakota.
21. STANDARD OF CARE. The standard of care applicable to Consultant's services will be the degree of skill and diligence normally employed by professional consultants or consultants performing the same or similar services at the time and at the same locality said services are

performed. Consultant will re-perform any services not meeting this standard without additional compensation.

22. SUBSURFACE INVESTIGATIONS. In soils, foundation, groundwater, and other subsurface investigations, the actual characteristics may vary significantly between successive test points and sample intervals and at locations other than where observations, exploration, and investigations have been made. Because of the inherent uncertainties in subsurface evaluations, changed or unanticipated underground conditions may occur that could affect total Project cost and/or execution. These conditions and cost/execution effects are not the responsibility of Consultant.

23. CONSULTANT'S PERSONNEL AT CONSTRUCTION SITE.

- A. The presence or duties of Consultant's, or its subcontractor's or subconsultant's, personnel at a construction site, whether as onsite representatives or otherwise, do not make Consultant or Consultant's personnel, or Consultant's subcontractors or subconsultants, in any way responsible for those duties that belong to the Diversion Authority and/or the construction contractors or other entities, except as specifically outlined in a Task Order, and do not relieve the construction contractors or any other entity of their obligations, duties, and responsibilities, including, but not limited to, all construction methods, means, techniques, sequences, and procedures necessary for coordinating and completing all portions of the construction work in accordance with the construction contract documents and any health or safety precautions required by such construction work; for the safety precautions and programs incident thereto; for security or safety at any Project Site; or for any failure of a contractor to comply with laws and regulations applicable to such contractor's furnishing and performing of its work.
- B. Consultant and Consultant's personnel have no authority to exercise any control over any construction contractor or other entity or their employees in connection with their work or any health or safety precautions and have no duty for inspecting, noting, observing, correcting, or reporting on health or safety deficiencies of the construction contractor(s) or other entity or any other persons at the site except Consultant's own personnel.
- C. For this Agreement only, construction sites include places of manufacture for materials incorporated into the construction work, and construction contractors include manufacturers of materials incorporated into the construction work.
- D. Consultant neither guarantees the performance of any contractor nor assumes responsibility for any contractor's failure to furnish and perform work at the Project in accordance with any plans, specifications, drawings, details, or other construction or design documents prepared for the Project.
- E. For each service performed or furnished, Consultant shall be responsible only for those construction phase services that have been itemized and expressly required of Consultant in the authorizing Task Order. With the exception of such expressly required services, Consultant shall have no design, shop drawing review, or other obligations during construction and Diversion Authority assumes all responsibility for the application and interpretation of the Contract Documents, contract administration, construction

observation and review, and all other necessary construction phase engineering and professional services. Consultant shall not be liable to the Diversion Authority for any construction phase professional services except for those services that are expressly required of Consultant in the authorizing Task Order.

24. OPINIONS OF COST, FINANCIAL CONSIDERATIONS, AND SCHEDULES.

- A. Consultant has no control over cost or price of labor and materials; unknown or latent conditions of existing equipment or structures that may affect operation or maintenance costs; competitive bidding procedures and market conditions; time or quality of performance by operating personnel or third parties; and other economic and operational factors that may materially affect the ultimate Project cost or schedule. Therefore, Consultant makes no warranty that the Diversion Authority's actual Project costs, financial aspects, economic feasibility, or schedules will not vary from any opinions of Project costs, financial analyses, economic feasibility projections, or schedules for the Project included in Consultant's services deliverables for the Project.
- B. If the Diversion Authority wishes greater assurance as to any element of Project cost, feasibility, or schedule, the Diversion Authority will employ an independent cost estimator, contractor, or other appropriate advisor.

25. CONSTRUCTION PROGRESS PAYMENTS. Recommendations by Consultant to the Diversion Authority for periodic construction progress payments to the construction contractor(s) will be based on Consultant's knowledge, information, and belief from selective sampling that the work has progressed to the point indicated. Such recommendations do not represent that continuous or detailed examinations have been made by Consultant to ascertain that the construction contractor(s) have completed the work in exact accordance with the construction documents; that the final work will be acceptable in all respects; that Consultant has made an examination to ascertain how or for what purpose the construction contractor(s) have used the moneys paid; that title to any of the work, materials, or equipment has passed to the Diversion Authority free and clear of liens, claims, security interests, or encumbrances; or that there are no other matters at issue between the Diversion Authority and the construction contractors that affect the amount that should be paid.

26. RECORD DRAWINGS. Record drawings, if required, will be prepared, in part, on the basis of information compiled and furnished by others, and may not always represent the exact location, type of various components, or exact manner in which the Project was finally constructed. Consultant is not responsible for any errors or omissions in the information from others that are incorporated into the record drawings.

27. CONSULTANT'S INSURANCE. Consultant shall maintain throughout this Agreement the following insurance:

- A. Consultant shall purchase and maintain throughout this Agreement such insurance as is required by this Agreement in the categories and amounts set forth below:
  - (1) Claims under workers' compensation, disability benefits, and other similar employee benefit acts;

- (2) Claims for damages because of bodily injury, occupational sickness or disease, or death of Consultant's employees;
- (3) Claims for damages because of bodily injury, sickness or disease, or death of any person other than Consultant's employees;
- (4) Claims for damages insured by reasonably available personal injury liability coverage which are sustained:
  - (a) by any person as a result of an offense directly or indirectly related to the employment of such person by Consultant, or
  - (b) by any other person for any other reason;
- (5) Claims for damages, other than to the services itself, because of injury to or destruction of tangible property wherever located, including loss of use resulting therefrom; and
- (6) Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance, or use of any motor vehicle.

B. The policies of insurance required by this Section will:

- (1) With respect to insurance required by Sections 27(A)(3) through 27(A)(6) inclusive, be written on an occurrence basis, included as additional insureds (subject to any customary exclusion regarding Professional liability and Workers Compensation) the Diversion Authority, the State of North Dakota, and any other individuals or entities identified, all of whom will be listed as additional insureds, and include coverage for the respective officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of all such additional insured, and the insurance afforded to these additional insureds will provide primary coverage for all claims covered in the General Liability and Automobile Liability Policies;
  - (a) All insurance policies required under this Agreement, including the Excess or Umbrella Liability policies, must be from insurers rated "A-" or better by the A.M. Best Company, Inc.
- (2) Include at least the specific coverages and be written for not less than the limits of liability specified or required by Laws or Regulations, whichever is greater;
- (3) Contain a provision or endorsement that the coverage afforded will not be canceled or renewal refused until at least thirty (30) days prior written notice has been given to the Diversion Authority and to each other additional insured identified to whom a certificate of insurance has been issued (and the certificates of insurance furnished by Consultant pursuant to this section will so provide);

- (4) Remain in effect at least until final payment and at all times thereafter when Consultant may be correcting, removing, or replacing defective services;
- (5) Include completed operations coverage:
  - (a) Such insurance will remain in effect for two (2) years after final payment.
  - (b) Consultant will furnish the Diversion Authority and each other additional insured identified, to whom a certificate of insurance has been issued, evidence satisfactory to the Diversion Authority and any such additional insured of continuation of such insurance at final payment and one (1) year thereafter.
- (6) Not limit in any way Consultant's duties to defend, indemnify, and hold harmless the Diversion Authority and the State of North Dakota, and those parties' officers, employees, agents, consultants, subcontractors, and representatives in accordance with Section 39;
- (7) Either in the policies or in endorsements, contain a "waiver of subrogation" (except for in the Professional Liability Policy and Workers Compensation policy) that waives any right to recovery any of Consultant's insurance companies might have against the Diversion Authority or the State of North Dakota;
- (8) Either in the policies or in endorsements, contain a provision that Consultant's insolvency or bankruptcy will not release the insurers from payment under the policies, even when Consultant's insolvency or bankruptcy prevents Consultant from meeting the retention limits under the policies;
- (9) Either in the policies or in endorsements, contain cross liability/severability of interests, to ensure that all additional parties are covered as if they were all separately covered (with the exception of Workers' Compensation and Professional Liability policies);
- (10) Either in the policies or in endorsements, contain a provision that the legal defense provided to the Diversion Authority and the State of North Dakota must be free of any conflict of interest, even if retention of separate legal counsel is necessary;
- (11) Either in the policies or in endorsements, contain a provision that any attorney who represents the State of North Dakota must first qualify as and be appointed by the North Dakota Attorney General as a special assistant attorney general as required under N.D.C.C § 54-12-08;
- (12) Either in the policies or in endorsements, contain a provision that Consultant's policies will be primary and noncontributory regarding any other insurance maintained by or available to the Diversion Authority or the State of North Dakota, and that any insurance maintained by those parties will be in excess of Consultant's insurance and will not contribute with it (except for Workers' Compensation and Professional Liability Policies).



C. The limits of liability for the insurance required by this Section will provide coverage for not less than the following amounts or greater where required by Laws and Regulations:

(1) Workers' Compensation, and related coverages under Sections 27(A)(1) and 27(A)(2):

- (a) State: Statutory;
- (b) Applicable Federal (e.g. Longshoreman's): Statutory;
- (c) Employer's Liability: \$1,000,000.

(2) Consultant's General Liability under Sections 27(A)(3) through 27(A)(6) which will include premises or operations coverage, completed operations and product liability coverages, and will eliminate the exclusion with respect to property under the care, custody, and control of Consultant:

- (a) General Aggregate: \$2,000,000
- (b) Products- Completed Operations Aggregate: \$2,000,000
- (c) Personal and Advertising Injury: \$1,000,000
- (d) Each Occurrence (Bodily Injury and Property Damage): \$2,000,000
- (e) Property damage liability insurance will provide Explosion, Collapse, and Under-ground coverages where applicable.
- (f) Excess or Umbrella liability:
  - i. General Aggregate: \$3,000,000
  - ii. Each Occurrence: \$4,000,000

(3) Automobile Liability under Section 27(A)(6) (which will include coverage for any auto, including owned, non-owned, and hired):

- (a) Bodily injury:
  - i. Each person: \$2,000,000
  - ii. Each accident: \$2,000,000
- (b) Property Damage:
  - i. Each accident: \$2,000,000
- OR
- (c) Combined Single
  - i. Limit of: \$2,000,000

(4) Professional Liability coverage will provide coverage for not less than the following amounts:

- (a) Each claim made: \$3,000,000
- (b) Annual Aggregate: \$3,000,000

(5) The following will be included as additional insured on all of Consultant's general liability and automobile insurance policies required under this Agreement:

- (a) Cass County Joint Water Resource District;

- (b) Diversion Authority; and
- (c) State of North Dakota.

- (6) If Consultant is domiciled outside of the State of North Dakota, Consultant will purchase and maintain employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on Consultant's Workers' Compensation and General Liability Policies.
- D. Consultant will ensure that any of its subcontractors or subconsultants secure and maintain insurance policies and endorsements required of Consultant and the Diversion Authority in limits no less than those specified and required to be passed down to subcontractors in paragraph 8 of the Diversion Authority's contract with the North Dakota State Water Commission.
  - E. If any required policy is written on a "claims made" form, Consultant must maintain the coverage continuously throughout the term of this Agreement, and, without lapse, for three (3) years beyond the termination or expiration of this Agreement and the Diversion Authority's acceptance of all services provided under this Agreement. The retroactive date or "prior acts inclusion date" of any "claims made" policy must be no later than the date that services commence under this Agreement.
  - F. Before Consultant begins performing services, Consultant must send the Executive Director certificates of insurance and any applicable endorsements attesting to the existence of coverage. Consultant will not allow its policies to be cancelled, lapse, and/or terminate or be amended to reduce coverage below the minimums called for in this Agreement without thirty (30) days' notice to the Executive Director. The certificates of insurance issued to confirm Consultant's compliance must reference this Agreement.
  - G. If required insurance lapses during the term of this Agreement, the Diversion Authority is not required to process invoices after such lapse until Consultant provides evidence of reinstatement that is effective as of the lapse date.
  - H. The Diversion Authority shall have no specific responsibility to provide any general liability coverage or workers' compensation coverage for the benefit of Consultant's employees during the terms of this Agreement.
28. THIRD PARTIES. The Diversion Authority and Consultant acknowledge and agree that some of the design services for the Project will be separately engaged by the Diversion Authority through retention of separate professionals. Notwithstanding any provision to the contrary, Consultant shall have no responsibility for the accuracy or sufficiency of the services provided by such individuals. Consultant will notify the Diversion Authority of errors, discrepancies and inconsistencies it may discover in such services. If such errors, discrepancies or inconsistencies cause an increase in cost or the time for performance, Consultant shall be entitled to an equitable adjustment.
29. OPEN RECORDS. Consultant will cooperate with the Diversion Authority in responding to any request for documents by any third party to the extent such documents may be required

to be disclosed under Chapter 44-04 of North Dakota Century Code regarding open records laws.

30. DATA FURNISHED BY THE DIVERSION AUTHORITY. The Diversion Authority will provide to Consultant all data in the Diversion Authority's possession relating to Consultant's services on the Project. Consultant may reasonably rely upon the accuracy, timeliness, and completeness of the information provided by the Diversion Authority.
31. ADVERTISEMENTS, PERMITS, AND ACCESS. Unless otherwise agreed to in the Scope of Services of a Task Order, the Diversion Authority will obtain, arrange, and pay for all advertisements for bids; permits and licenses required by local, state, or federal authorities; and land, easements, rights-of-way, and access necessary for Consultant's services or Project construction.
32. ACCESS TO FACILITIES AND PROPERTY. The Diversion Authority will make its facilities accessible to Consultant as required for Consultant's performance of its services and will provide labor and safety equipment as required by Consultant for such access. The Diversion Authority will perform, at no cost to Consultant, such tests of equipment, machinery, pipelines, and other components of the Diversion Authority's facilities as may be required in connection with Consultant's services.
33. TIMELY REVIEW. The Executive Director will examine Consultant's studies, reports, proposals, and other documents; obtain advice of an attorney, insurance counselor, accountant, auditor, bond and financial advisors, and other consultants as the Executive Director deems appropriate; and render in writing decisions required by the Executive Director in a timely manner.
34. PROMPT NOTICE. The Diversion Authority will give prompt written notice to Consultant whenever the Diversion Authority observes or becomes aware of any development that affects the scope or timing of Consultant's services, or of any suspected or actual defect in the work of Consultant or its subcontractors.
35. ASBESTOS OR HAZARDOUS SUBSTANCES. If asbestos or hazardous substances in any form are encountered or suspected, Consultant will stop its own work in the affected portions of the Project to permit testing and evaluation. If asbestos is suspected, Consultant will, if requested, manage the asbestos remediation activities using a qualified subcontractor at an additional fee and contract terms to be negotiated. If hazardous substances other than asbestos are suspected, Consultant will, if requested, conduct tests to determine the extent of the problem and will perform the necessary studies and recommend the necessary remedial measures at an additional fee and contract terms to be negotiated. The Diversion Authority recognizes that Consultant assumes no risk and/or liability for a waste or hazardous waste site originated by other than Consultant.
36. CONTRACTOR INDEMNIFICATION AND CLAIMS.
  - A. The Diversion Authority agrees to include in all construction contracts the provisions of Section 23, Consultant's Personnel at Construction Site, and provisions providing

contractor indemnification of the Diversion Authority and Consultant for contractor's negligence.

- B. The Diversion Authority shall require construction contractor(s) to name the Diversion Authority, the State of North Dakota, Consultant, and its subcontractors as additional insureds on the contractor's general liability insurance policy.
- C. The Diversion Authority agrees to include the following clause in all contracts with construction contractors, and equipment or materials suppliers: "Contractors, subcontractors, and equipment and material suppliers on the Project, or their sureties, shall maintain no direct action against Consultant, Consultant's officers, employees, affiliated corporations, and subcontractors for any claim arising out of, in connection with, or resulting from the consulting services performed. The Diversion Authority will be the only beneficiary of any undertaking by Consultant."

37. OWNER'S INSURANCE.

- A. The Diversion Authority will maintain property insurance on all pre-existing physical facilities associated in any way with the Project.
- B. The Diversion Authority will provide for a waiver of subrogation as to all Owner-carried property damage insurance, during construction and thereafter, in favor of Consultant, Consultant's officers, employees, affiliates, and subcontractors.
- C. The Diversion Authority will provide (or have the construction contractor(s) provide) a Builders Risk All Risk insurance policy for the full replacement value of all Project work including the value of all onsite Owner-furnished equipment and/or materials associated with Consultant's services. Such policy will include coverage for loss due to defects in materials and workmanship and errors in design, and will provide a waiver of subrogation as to Consultant and the construction contractor(s) (or the Diversion Authority), and their respective officers, employees, agents, affiliates, and subcontractors. The Diversion Authority will provide Consultant a copy of such policy.
- D. The Diversion Authority is not responsible for the payment of deductibles owed under Consultant's insurance policies.
- E. The Diversion Authority reserves the right to enter into a program-wide insurance plan at its expense. Consultant agrees to participate in such a program if named as an insured party and if commercially reasonable terms are available.

38. LITIGATION ASSISTANCE. Services required or requested of Consultant by the Diversion Authority to support, prepare, document, bring, defend, or assist in litigation undertaken or defended by the Diversion Authority, except for suits or claims between the parties to this Agreement, will be defined in an authorized Task Order and reimbursed as mutually agreed.

39. INDEMNIFICATION. Consultant will defend, indemnify, and hold harmless the Diversion Authority and the State of North Dakota, and those parties' officers, employees, agents, consultants, subcontractors, and representatives, from and against any and all claims, losses,

liabilities, damages, expenses, demands, suits, fines, judgments, costs, expenses, and fees (including all fees and charges of attorneys, engineers, architects, and other professionals and all court, arbitration, mediation, or other resolution costs) arising out of or relating to claims by third parties for property damage or bodily injury, including death, to the proportionate extent caused by any negligent act or omission of Consultant, any subcontractor, any supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the services or anyone for whose acts any of them may be liable, and including all costs, expenses, and fees incurred by the Diversion Authority or the State of North Dakota in establishing and litigating the existence, scope, or any other matters relating to Consultant's obligations to defend, indemnify, and hold harmless. Consultant's obligations to defend will be free of any conflicts of interest, even if retention of separate legal counsel is necessary. Subject to Consultant's liability limit in Section 40, Consultant's duties to defend, indemnify, and hold harmless include anything in excess of any minimum insurance requirements described in the Contract Documents, and anything in excess of any of Consultant's insurance policy limits. Consultant's obligations to defend, indemnify, and hold harmless will continue for a period of not less than six (6) years following completion of the Project or any termination or expiration of the Contract Documents.

The indemnified party shall provide notice to Consultant after obtaining knowledge of any claim that it may have pursuant to this Section 39. In the event the indemnified party pursues a claim pursuant to this Section, the indemnified party will also provide relevant information and assistance to Consultant.

40. LIMITATION OF LIABILITY. To the maximum extent permitted by law, Consultant's liability for the Diversion Authority's damages will not, in the aggregate, exceed five million dollars (\$5,000,000). This article takes precedence over any conflicting article of this Agreement or any document incorporated into it or referenced by it. This limitation of liability will apply whether Consultant's liability arises under breach of contract or warranty; tort, including negligence, strict liability, statutory liability, or any other cause of action, and shall include Consultant's officers, affiliated corporations, employees, and subcontractors.

41. BREACH AND REMEDIES.

A. A breach exists under this Agreement if either Party:

- (1) Makes a material misrepresentation in writing; or
- (2) Fails or is unable to meet or perform any material promise in this Agreement, and
  - (a) Is incapable of curing the failure, or
  - (b) Does not cure the failure within twenty (20) calendar days following notice (or within a longer period if specified in the notice).

B. Consultant must give the Executive Director notice immediately if Consultant breaches, or if a third party claim or dispute is brought or threatened that alleges facts that would constitute a breach under this Agreement.

- C. The Parties will use their Best Efforts to resolve amicably any dispute, including use of alternative dispute resolution options.
- D. All remedies provided for in this Agreement may be exercised individually or in combination with any other available remedy.

42. TERMINATION.

- A. Either Party may terminate this Agreement, in whole or in part, for cause if either Party fails substantially to perform through no fault of the other and does not commence correction of such nonperformance within twenty (20) calendar days of written notice and diligently complete the correction thereafter.
- B. The Diversion Authority may terminate this Agreement, in whole or in part, or modify or limit Consultant's services, and proportionately, Consultant's compensation, if:
  - (1) The Diversion Authority determines that having Consultant provide services has become infeasible due to changes in applicable laws or regulations, or
  - (2) Expected or actual funding to compensate Consultant is withdrawn, reduced, or limited.
- C. Either Party may terminate this Agreement, in whole or in part, for any or no reason upon thirty (30) calendar days' written notice.
- D. On termination, Consultant will be paid for all authorized services performed up to the termination date plus termination expenses, such as, but not limited to, reassignment of personnel, subcontract termination costs, and related closeout costs.
- E. In the event a federal or state tax or employment agency concludes that an independent contractor relationship does not exist, either Consultant or the Diversion Authority may terminate this Agreement immediately upon written notice.
- F. Upon receipt of any termination notice from the Diversion Authority related to any specific Task Order, Consultant must promptly discontinue all affected services under the Task Order unless the Parties mutually agree otherwise.
- G. Upon the end date of the Agreement, which is the date when this Agreement as a whole, along with any pending Task Orders, expires or are terminated pursuant to their terms:
  - (1) The Diversion Authority will be released from compensating Consultant for services other than those Consultant satisfactorily performed prior to the end date.
  - (2) Consultant must submit Consultant's final invoice for payment within sixty (60) calendar days of the end date. The Diversion Authority will not pay any Consultant invoice received after this period.

- (3) Consultant will be released from performing services, except for services in any non-terminated portion of the Agreement.

H. All rights and duties with respect to services performed prior to the expiration or termination of this Agreement, and continuing obligations specified in this Agreement to be performed following expiration or termination of this Agreement, will survive the expiration or termination of this Agreement.

I. In the event of termination, expiration, or removal/withdrawal, Consultant must terminate its services as soon as it is reasonably possible to do so without (1) prejudice to the Diversion Authority’s interests (or the interest of any person represented on the Diversion Authority’s behalf) or (2) violation of Consultant’s statutory or ethical duties. Consultant must notify the Diversion Authority of any further services, prior to withdrawal or substitution, which Consultant believes are necessary to avoid prejudice to the Diversion Authority’s interests (or the interest of any person represented on the Diversion Authority’s behalf), and obtain the Diversion Authority’s consent prior to performing such services.

43. ADDITIONAL PAYMENT. Nothing contained in this Agreement shall obligate the Diversion Authority to make any payment for services rendered in any period after the termination of Consultant’s retention by the Diversion Authority.

44. SUSPENSION, DELAY, OR INTERRUPTION OF WORK. The Diversion Authority may suspend, delay, or interrupt the services of Consultant for the convenience of the Diversion Authority. In such event, Consultant’s contract price and schedule shall be equitably adjusted.

45. NOTICE. Any notice or election required or permitted to be given or served by any Party to this Agreement upon any other will be deemed given or served in accordance with the provisions of this Agreement if said notice or election is (1) delivered personally, or (2) mailed by United States certified mail, return receipt requested, postage prepaid and in any case properly addressed as follows:

If to Consultant: AE2S  
Eric Dodds  
4170 28<sup>th</sup> Ave. S  
Fargo, ND 58104

If to Diversion Authority: Executive Director  
Metro Flood Diversion Authority  
207 4<sup>th</sup> St. N, Suite A  
Fargo, ND 58102

Each such mailed notice or communication will be deemed to have been given on the date that is three (3) calendar days after the same is deposited in the United States mail. Each such delivered notice or communication will be deemed to have been given upon the delivery. Any Party may change its address for service of notice in the manner specified in this Agreement.

46. PROHIBITION AGAINST ASSIGNMENT. This is a bilateral personal services Agreement. Neither Party shall have the power to, nor will, assign any of the duties or rights or any claim arising out of or related to this Agreement, whether arising in tort, contract, or otherwise, without the written consent of the other Party. Any unauthorized assignment is void and unenforceable.
47. NO THIRD PARTY BENEFICIARIES. This Agreement gives no rights or benefits to anyone other than the Diversion Authority and Consultant and has no third-party beneficiaries.
48. CONSEQUENTIAL DAMAGES. To the maximum extent permitted by law, Consultant and Consultant's affiliated corporations, officers, employees, and subcontractors shall not be liable for the Diversion Authority's special, indirect, or consequential damages, whether such damages arise out of breach of contract or warranty, tort including negligence, strict or statutory liability, or any other cause of action.
49. MATERIALS AND SAMPLES. Any items, substances, materials, or samples removed from the Project site for testing, analysis, or other evaluation will be returned to the Project site within sixty (60) calendar days of Project close-out unless agreed to otherwise. The Diversion Authority recognizes and agrees that Consultant is acting as a bailee and at no time assumes title to said items, substances, materials, or samples.
50. CONSULTANT'S DELIVERABLES. A Party may rely on data or information that the Party receives from the other Party by hard copy or electronic media. When transferring documents in electronic media format, the transferring party makes no representations as to long-term compatibility, usability, or readability of such documents. Consultant's deliverables are for the Diversion Authority or others' convenience. Any conclusions or information derived or obtained from these files will be at user's sole risk.
51. ACCESS TO CONSULTANT'S ACCOUNTING RECORDS AND AUDIT RIGHTS.
- A. Consultant must allow the Diversion Authority and its designees to review and audit Consultant's financial documents and records relating to this Agreement. Subject to Chapter 44-04 of North Dakota Century Code and any other applicable law, the Diversion Authority shall use best efforts to protect Consultant's confidential information and trade secrets disclosed to the Diversion Authority pursuant to Section 15 or this Section 51. Consultant will maintain accounting records, in accordance with generally accepted accounting principles. These records will be available to the Diversion Authority for a period of two (2) years after Consultant's final invoice for examination to the extent required to verify the direct costs (excluding established or standard allowances and rates) incurred hereunder. The Diversion Authority may only audit accounting records applicable to a cost-reimbursable type compensation. Upon finalization of the audit, the Diversion Authority will submit to Consultant a notice of audit results and a copy of the audit report, which may supplement or modify any tentative findings verbally communicated to Consultant at the completion of an audit.
- B. Within 180 calendar days after the date of the notice of audit results, Consultant will respond, in writing, to the Diversion Authority indicating (a) whether it concurs with the audit report, (b) clearly explaining the nature and basis for any disagreement as to a



disallowed item of expense, and (c) providing a written explanation as to any questioned or no opinion expressed item of expense (“Response”). The Response will be clearly stated and will provide any supporting documentation necessary to resolve any disagreement or questioned or no opinion expressed item of expense. Where the documentation is voluminous, Consultant may supply appropriate excerpts and make alternate arrangements to conveniently and reasonably make that documentation available for review by the Diversion Authority. The Response will refer to and apply the language of this Agreement. Consultant agrees that failure to submit a Response within the 180-day period constitutes agreement with any disallowance of an item or expense and authorizes the Diversion Authority to finally disallow any items of questioned or no opinion expressed cost.

- C. The Diversion Authority will make its decision with regard to any notice of audit results and Response within 120 calendar days after the date of the notice of audit results. If it is determined by a court of competent jurisdiction or by mutual agreement that an overpayment has been made to Consultant, Consultant will repay the amount to the Diversion Authority or reach an agreement with the Diversion Authority on a repayment schedule within thirty (30) calendar days after the date of an invoice from the Diversion Authority. If Consultant fails to repay the overpayment or reach an agreement with the Diversion Authority on a repayment schedule within the thirty (30) calendar day period, Consultant agrees that the Diversion Authority will deduct all or a portion of the overpayment from any funds then or thereafter payable by the Diversion Authority to Consultant for this project. Interest will be assessed on any partial payments or repayment schedules based on the unpaid balance at the end of each month until the balance is paid in full. The assessment of interest will begin thirty (30) calendar days from the date of the invoice. The rate of interest will be the interest rate on judgments in North Dakota as calculated by the state court administrator pursuant to N.D.C.C. § 28-20-34. The rate of interest will be reviewed annually by the Diversion Authority and adjusted as necessary. Consultant expressly consents to this withholding or offsetting of funds under those circumstances, reserving the right to file a lawsuit to contest the Diversion Authority’s decision.

52. OWNERSHIP. Ownership of work product and inventions created by Consultant shall be as follows:

- A. Pre-Existing Consultant Materials. The Diversion Authority acknowledges and agrees that in the performance of the services, Consultant will utilize its proprietary data, concepts, methods, techniques, processes, protocols, ideas, inventions, know-how, trade secrets, algorithm, software, works of authorship, software and hardware architecture, databases, tools, other background technologies and standards of judgment that developed or licensed from third parties prior to the Effective Date of this Agreement (the “Pre-Existing Consultant Materials”) and that Consultant shall retain all right, title and interest, including intellectual property rights in the Pre-existing Consultant Materials. Subject to the terms and conditions of this Agreement, Consultant hereby grants to the Diversion Authority a non-exclusive, non-transferable, royalty-free license, fully assignable to the Diversion Authority’s member entities, to utilize the Pre-Existing Consultant Materials for the purpose of the Diversion Authority’s Project.

- B. Derivative Consultant Materials. The Diversion Authority acknowledges and agrees that in the performance of the services, Consultant will utilize and develop customization, enhancements, improvements, modifications and adaptations of and to the Pre-Existing Consultant Materials (the “Derivative Consultant Materials”). Consultant shall retain all right, title and interest, including intellectual property rights in the Derivative Consultant Materials. Subject to the terms and conditions of this Agreement, Consultant hereby grants to the Diversion Authority a non-exclusive, non-transferable, royalty-free license, fully assignable to the Diversion Authority’s Member Entities, to utilize the Derivative Consultant Materials.
- C. New Consultant Materials. The Diversion Authority acknowledges and agrees that in the performance of Consultant’s services, Consultant may utilize and develop new software, hardware and other technology or processes that do not utilize or incorporate, or are not based upon, the Pre-Existing Consultant Materials (“New Consultant Materials”). Between the Parties, subject to the license grant-back set forth below, the Diversion Authority will retain all right, title and interest, including without limitation intellectual property rights, in and to the New Consultant Materials. The Diversion Authority shall have the full ownership of such New Consultant Materials without any limitation or restriction.
- D. License Grant Back. Subject to the terms and conditions of the Agreement, the Diversion Authority hereby grants to Consultant a non-exclusive, transferable, royalty-free license to utilize the concepts, methods, techniques, processes, protocols, ideas, inventions, know-how, trade secrets, algorithm, software and hardware architecture, and other background technologies that are newly developed by Consultant under the Agreement and assigned to the Diversion Authority under this Agreement, to make, have made, use, reproduce, license, display, perform, distribute, sell, offer for sale, service, support, import, and otherwise disposed of any products, technologies, and services and for any purposes without restriction.
- E. License Restrictions. Except as otherwise permitted above, the Diversion Authority and its Member Entities shall not, and shall not allow any third party to: (i) modify or otherwise create derivative works of the Pre-Existing Consultant Materials; (ii) use the Pre-Existing Consultant Materials for any other purpose, other than the Diversion Authority’s Project; (iii) make, have made, use, reproduce, license, display, perform, distribute, sell, offer for sale, service, support, or import any product that incorporates, embodies and/or is based upon the Pre-Existing Consultant Materials; (iv) sublicense, distribute or otherwise transfer to a third party any of the Pre-Existing Consultant Materials by itself or as incorporated in the services; or (v) reverse engineer, disassemble, decompile or attempt to derive the source code or underlying ideas or algorithms of the Pre-Existing Consultant Materials. Any additional use of the Pre-Existing Consultant Materials shall require a separate written license agreement.
- F. Miscellaneous. Nothing contained in this Agreement shall be construed as conferring to the Diversion Authority or any third party any license or right by implication, estoppel or otherwise to any intellectual property rights of Consultant, other than the rights expressly granted under this Agreement. The Diversion Authority and its Member Entities may use said work products for the specific purpose for which the work product was intended. Any

other use or reuse, without written verification or adaptation by Consultant will be at the user's sole risk.

G. Diversion Authority Material. As between the Parties, the Diversion Authority is the exclusive owner of all material Consultant collects from the Diversion Authority in connection with the services under this Agreement, including copyrights. Within thirty (30) calendar days of the end date of the Agreement, or upon the Diversion Authority's notice at any time, Consultant must give all materials collected to the Diversion Authority (or to another party at the Diversion Authority's direction). Unless the Diversion Authority specifies otherwise, all files must be saved in Microsoft Word and Excel formats, as applicable. Consultant must maintain Consultant's records relating to services under this Agreement and Consultant's invoices, and all other materials, in an accessible location and condition for a period of not less than one (1) year after the later of:

- (1) The date when Consultant receives final payment under this Agreement; or
- (2) The date when the Diversion Authority resolves with Consultant the findings of any final audit.

Consultant may retain copies of any original documents Consultant provides to the Diversion Authority and a copy of any material collected from the Diversion Authority in Consultant's confidential files for the purpose of complying with applicable laws or established company procedure regarding the preservation of business records.

53. REUSE OF PROJECT DOCUMENTS. Services and deliverables are for the exclusive use of the Diversion Authority and are not to be relied upon by third parties. All reports, drawings, specifications, documents, and other deliverables of Consultant, whether in hard copy or in electronic form, are instruments of service for this Project, whether the Project is completed or not. Upon full payment for services due under this Agreement, Consultant agrees to grant to the Diversion Authority an irrevocable license to the instruments of service.

54. CONFIDENTIAL INFORMATION AND PUBLICITY.

A. Consultant agrees to hold in confidence the following confidential information:

- (1) All information that the Diversion Authority discloses to Consultant; and
- (2) All information to which Consultant gains access while providing services under this Agreement.

B. Confidential information does not include any information that Consultant can demonstrate has been made available to the public (other than through a breach of this Agreement). As between Consultant and the Diversion Authority, the Diversion Authority owns the confidential information, and the Diversion Authority authorizes Consultant to use it only for purposes of performing this Agreement. Consultant may also disclose the Diversion Authority's confidential information to the extent necessary to comply with law, provided Consultant gives the Diversion Authority prior written notice. Upon the end date of this Agreement, Consultant must destroy or return all confidential information to the

Diversions Authority, at the Diversions Authority's discretion, and certify to the Diversions Authority, in writing, that it has done so; provided, however, such destruction shall include, without limitation, the process of expunging, to the extent reasonably practicable, all such confidential information from any computer, hard drive, word processor, server, backup tape, or other electronic device containing such confidential information. Notwithstanding the foregoing, Consultant may retain one archival copy of the confidential information in its confidential files for the purpose of complying with applicable laws or established company procedure regarding the preservation of business records.

- C. Consultant must not make any public announcement, press release, or other writing relating to the services under this Agreement without the Diversions Authority's prior written approval.
  - D. Consultant understands a breach under this Section may result in irreparable damage for which no adequate remedy may be available. Accordingly, injunctive relief and other equitable relief are remedies available to the Diversions Authority.
55. MODIFICATION. This Agreement, including its Exhibits and schedules, constitutes the entire Agreement, supersedes all prior written or oral understandings, and may only be changed by a written amendment approved by the Diversions Authority and executed by Consultant, the Executive Director and the Chair of the Diversions Authority on behalf of the Diversions Authority. It may be modified as to terms and conditions from time to time upon the mutual consent of the parties; however, such modification shall be reduced to writing, signed by the parties and the document appended to and made a part of this Agreement.
56. FORCE MAJEURE. Consultant is not responsible for damages or delay in performance caused by acts of God, strikes, lockouts, accidents, or other events beyond the control of Consultant. In any such event, Consultant's contract price and schedule shall be equitably adjusted.
57. WAIVER. A Party's waiver of enforcement of any of this Agreement's terms or conditions will be effective only if it is in writing. A Party's specific waiver will not constitute a waiver by that Party of any earlier, concurrent, or later breach or default.

The Diversions Authority waives all claims against Consultant, including those for latent defects, which are not brought within six (6) years of substantial completion of the facility designed or final payment to Consultant, whichever is earlier.

58. BINDING EFFECT. This Agreement shall be binding upon and inure to the benefit of the Diversions Authority, its successors and assigns, and any such successor shall be deemed substituted for the Diversions Authority under the terms of this Agreement. This Agreement shall likewise be binding upon Consultant, its successors and assigns. As used in this Agreement, the term "successor" shall include any person, firm, corporation or other business entity which at any time whether by merger, purchase or otherwise acquires all or substantially all of the assets or business of the corporation.

59. NEGOTIATED AGREEMENT. This Agreement has been arrived at through negotiation between the Parties.
60. INTEGRATED SERVICES. Notwithstanding anything in the Agreement to the contrary, the Parties recognize and support the integrated nature of the Project team in the performance and delivery of professional services by Consultant. This Agreement, and particularly the contractual risk allocation and liability provisions, shall be interpreted and applied, and the professional accountability determined in such a manner that the integrated nature, shared control of the Service performance, and joint decision making roles of the Parties and Consultant's role as agent for the Diversion Authority shall be given due and full consideration. Further, the Parties agree to re-visit this Agreement, if necessary, to better reflect the Parties' changing roles on the Project, and any changes in Consultant's role as the Project proceeds.
61. SEVERABILITY AND SURVIVAL. If any court of competent jurisdiction declares, for any reason, any provision or part of this Agreement to be invalid, illegal, or unenforceable, all remaining terms and provisions of this Agreement will remain binding and enforceable. Limitations of liability, indemnities, and other express representations shall survive termination of this Agreement for any cause.
62. WAIVER OF JURY TRIAL. THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT THEY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS AGREEMENT AND DOES NOT APPLY TO THIRD PARTY CLAIMS OR SUITS BY OR ON BEHALF OF THE PARTIES FOR PROJECT PROPERTY ACQUISITION AND/OR CONSTRUCTION CONTRACT CLAIMS AND DEFENSES.
63. CONTROLLING LAW AND VENUE. This Agreement, its interpretation and performance, and any other claims related to it shall be controlled by the laws of the State of North Dakota, and any action brought as a result of any claim, demand or cause of action arising under the terms of this Agreement shall be brought in an appropriate venue in the State of North Dakota.
64. FEDERAL LOBBYING RESTRICTIONS. Recipients of federal financial assistance may not pay any person for influencing or attempting to influence any officer or employee of a federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress with respect to the award, continuation, renewal, amendment, or modification of a federal grant, loan, or contract. These requirements are implemented for USEPA in 40 CFR Part 34, which also describes types of activities, such as legislative liaison activities and professional and technical services, which are not subject to this prohibition. Upon award of this contract, Consultant shall complete and submit to the Executive Director the certification and disclosure forms in Appendix A and Appendix B to 40 CFR Part 34,

which are attached in Exhibits to this Agreement. Consultant shall also require all subcontractors and suppliers of any tier awarded a subcontract over \$100,000 to similarly complete and submit the certification and disclosure forms pursuant to the process set forth in 40 CFR 34.110.

65. DEBARMENT AND SUSPENSION. Consultant certifies that it will not knowingly enter into a contract with anyone who is ineligible under the 40 CFR Part 32 to participate in the Project. Suspension and debarment information can be accessed at <http://www.sam.gov>. Consultant represents and warrants that it has or will include a term or conditions requiring compliance with this provision in all of its subcontracts under this Agreement. Upon award of this contract, Consultant shall complete and submit to the Executive Director the federal certification form regarding debarment and suspension, which is attached as an Exhibit to this Agreement.
66. CIVIL RIGHTS OBLIGATIONS. Consultant shall comply with the following, federal non-discrimination requirements:
- A. Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin, including limited English proficiency (LEP).
  - B. Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against persons with disabilities.
  - C. The Age Discrimination Act of 1975, which prohibits age discrimination.
  - D. Section 13 of the Federal Water Pollution Control Act Amendments of 1972, which prohibits discrimination on the basis of sex.
  - E. 40 CFR Part 7, as it relates to the foregoing.
  - F. Executive Order No. 11246.

Upon award of this contract, Consultant shall complete and submit to the Executive Director the federal certification form regarding civil rights, which is attached as an Exhibit to this Agreement.

This Agreement is executed the day and year above noted.

*(Signatures contained on the following pages.)*

DIVERSION AUTHORITY:

Metro Flood Diversion Authority

By: \_\_\_\_\_  
Dr. Tim Mahoney, Chair  
Diversion Authority Board

By: \_\_\_\_\_  
Joel Paulsen, Executive Director  
Metro Flood Diversion Authority

*(Additional signature contained on the following page.)*

CONSULTANT:

Advanced Engineering and Environmental Services, Inc.

By: \_\_\_\_\_  
Grant Meyer, Chief Executive Officer



**Exhibit A – Hourly Fee Schedule**  
**ADVANCED ENGINEERING AND ENVIRONMENTAL SERVICES, INC.**  
**2020 HOURLY FEE SCHEDULE**

Labor Rates\*

Administrative I	\$60.00		
Administrative II	\$73.00		
Administrative III	\$88.00		
Communications Specialist I	\$92.00	I&C Assistant	\$86.00
Communications Specialist II	\$107.00	I&C Technician I	\$105.00
Communications Specialist III	\$123.00	I&C Technician II	\$118.00
Communications Specialist IV	\$148.00	I&C Technician III	\$133.00
Communications Specialist V	\$163.00	I&C Technician IV	\$144.00
		I&C Technician V	\$157.00
Construction Services I	\$141.00	I&C Specialist	\$171.00
Construction Services II	\$153.00	I&C Senior Specialist	\$181.00
Construction Services III	\$173.00	I&C Manager	\$190.00
Construction Services IV	\$190.00		
Construction Services V	\$209.00	IT I	\$110.00
		IT II	\$150.00
		IT III	\$180.00
Engineering Assistant 1	\$72.00	Land Surveyor Assistant	\$85.00
Engineering Assistant 2	\$92.00	Land Surveyor I	\$102.00
Engineer I	\$115.00	Land Surveyor II	\$122.00
Engineer II	\$139.00	Land Surveyor III	\$137.00
Engineer III	\$165.00	Land Surveyor IV	\$151.00
Engineer IV	\$187.00		
Engineer V	\$199.00	Operations Specialist I	\$86.00
Engineer VI	\$221.00	Operations Specialist II	\$104.00
Engineer VII	\$236.00	Operations Specialist III	\$131.00
Engineer VIII	\$246.00	Operations Specialist IV	\$148.00
		Operations Specialist V	\$172.00
Engineering Technician I	\$71.00		
Engineering Technician II	\$90.00	Program Coordinator I	\$185.00
Engineering Technician III	\$107.00	Program Coordinator II	\$199.00
Engineering Technician IV	\$125.00	Program Coordinator III	\$210.00
Engineering Technician V	\$141.00		
Engineering Technician VI	\$156.00	Project Coordinator I	\$103.00
Engineering Technician VII	\$173.00	Project Coordinator II	\$114.00
		Project Coordinator III	\$125.00
Financial Analyst I	\$95.00	Project Coordinator IV	\$140.00
Financial Analyst II	\$110.00	Project Coordinator V	\$158.00
Financial Analyst III	\$129.00		
Financial Analyst IV	\$145.00	Project Manager I	\$175.00
Financial Analyst V	\$163.00	Project Manager II	\$192.00
Financial Analyst VI	\$183.00	Project Manager III	\$212.00
Financial Analyst VII	\$199.00	Project Manager IV	\$226.00
Financial Analyst VIII	\$218.00		
		Technical Expert I	\$260.00
GIS Specialist I	\$92.00	Technical Expert II	\$283.00
GIS Specialist II	\$111.00	Technical Expert III	Negotiable
GIS Specialist III	\$131.00		
GIS Specialist IV	\$147.00		
GIS Specialist V	\$161.00		
GIS Specialist VI	\$182.00		

**EXHIBIT B**  
**ADVANCED ENGINEERING AND ENVIRONMENTAL SERVICES, INC.**  
**2020 EXPENSE SCHEDULE**

**Reimbursable Expense Rates**

Out of Town Transportation	IRS Rate
Survey Vehicle	\$0.85/mile
UAS - Photo/Video Grade	\$100.00/day
Video Production Equipment	\$100.00/each
Total Station – Robotic	\$35.00/hour
Mapping GPS	\$25.00/hour
Fast Static/RTK GPS	\$50.00/hour
All-Terrain Vehicle/Boat	\$100.00/day
Air Transportation – Cirrus	\$700.00/hour
Outside Services**	cost *1.05
Out of Pocket Expenses	cost * 1.00
Project Specific Equipment	Negotiable

\* Position titles are for labor rate grade purposes only.

\*\* Includes laboratory testing, architectural and engineering consultants, surveying, etc.

\*\*\* Includes toll telephone, shipping, postage, subsistence, technical literature, equipment rental, etc.

*These rates are subject to adjustment each year on January 1.*

**EXHIBIT C**

**FEDERAL CERTIFICATION FORMS REGARDING  
LOBBYING, DEBARMENT AND SUSPENSION, AND CIVIL RIGHTS**

## CERTIFICATION REGARDING FEDERAL LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
  
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
  
- (3) The undersigned shall require that the language of this certification be included in any award documents for any of its subcontractors at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subcontractors shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into a contract with the Authority. By executing this certificate the undersigned agrees and acknowledges that he/she has been duly authorized to execute this certificate.

Company/  
Entity Name: \_\_\_\_\_

Signed: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

PLEASE RETURN TO:  
Metro Flood Diversion Authority  
207 4<sup>th</sup> St. N, Suite A  
Fargo, ND 58102

**CERTIFICATION REGARDING DEBARMENT, SUSPENSION,  
AND OTHER RESPONSIBILITY MATTERS**

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 13 CFR Part 145. The regulations were published as Part VII of the May 26, 1988 *Federal Register* (pages 19160-19211).

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON PAGE 2)

- (1) The official representative of the party contracting with the Metro Flood Diversion Authority certifies to the best of its knowledge and belief that it and its principals:
  - (a) Are not presently debarred, suspended, proposed for disbarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
  - (b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
  - (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
  - (d) Have not within a three-year period preceding this application had one or more public transactions, including contracts (Federal, State, or local) terminated for cause or default.
  - (e) Are not presently debarred, suspended, declared ineligible or voluntarily excluded from performing work for the State of North Dakota, the State of Minnesota, the Metro Flood Diversion Authority or any of its Member Entities.
- (2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective primary participant shall attach an explanation to this proposal.
- (3) The Official signing this certificate has been and is duly authorized to sign this certificate on behalf of the entity or entities which intend to enter into a contract with the Metro Flood Diversion Authority.

Official Business Name \_\_\_\_\_

Date: \_\_\_\_\_

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

Name and Title of Authorized Representative

\_\_\_\_\_  
Signature of Authorized Representative

PLEASE RETURN TO:  
Metro Flood Diversion Authority  
207 4<sup>th</sup> St. N, Suite A  
Fargo, ND 58102

## PAGE 2 - INSTRUCTIONS FOR CERTIFICATION

1. By signing and submitting this certification, the prospective contracting party is providing the certification set out below.
2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective contracting party shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the Metro Flood Diversion Authority's (the "Authority") determination whether to enter into this transaction. However, failure of the prospective contracting party to furnish a certification or an explanation shall disqualify such person from entering into contracts with the Authority.
3. The certification in this clause is a material representation of fact upon which reliance was placed when the Authority determined to enter into a contract with the prospective contracting party. In order to qualify for participation in the U.S. EPA WIFIA program the Authority is required to obtain this certification. If it is later determined that the prospective contracting party knowingly rendered an erroneous certification, in addition to other remedies available to both the Authority and the Federal Government, the Authority may terminate this transaction for cause or default.
4. The prospective contracting party shall provide immediate written notice to the Authority to which this Certificate is submitted if at any time the prospective contracting party learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the Authority for assistance in obtaining a copy of those regulations (13 CFR Part 145).
6. The prospective contracting party agrees by submitting this certification that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the Authority.
7. The prospective contracting party further agrees by submitting this certification that it will require a "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transactions," from all sub-contractors without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
8. A contracting party in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A contracting party may decide the method and frequency by which it determines the ineligibility of its principals.
9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a contracting party is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
10. Except for transactions authorized under paragraph 6 of these instructions, if a contracting party in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the Authority may terminate this transaction for cause or default.

## ASSURANCE OF COMPLIANCE – CIVIL RIGHTS CERTIFICATE

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTION 504 OF THE REHABILITATION ACT OF 1973, THE AGE DISCRIMINATION ACT OF 1975, SECTION 13 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 40 CFR PART 7, AND EXECUTIVE ORDER NO. 11246

The undersigned provides this assurance for the purpose of entering into a contract with the Metro Flood Diversion Authority (Authority) related to the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (Project), which is receiving federal financial assistance. Specifically, the US EPA WIFIA Program requires this assurance of all contractors and subcontractors providing services for the Project.

The undersigned assures that it will comply with:

1. Title VI of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the basis of race, color, or national origin including limited English proficiency (LEP).
2. Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against persons with disabilities.
3. The Age Discrimination Act of 1975, as amended, which prohibits age discrimination.
4. Section 13 of the Federal Water Pollution Control Act Amendments of 1972, which prohibits discrimination on the basis of sex.
5. 40 CFR Part 7, as it relates to the foregoing.
6. Executive Order No. 11246.

The undersigned understands that this Assurance is binding on the undersigned, its successors, transferees, and assignees at any time during which federal financial assistance is provided to the Project. The undersigned will ensure that all contractors, subcontractors, or others with whom it arranges to provide services or benefits are not discriminating in violation of items 1-6. Otherwise, the contracts for services can be terminated for cause and the undersigned can be declared ineligible to contract for the Project.

By signing this form, the undersigned is agreeing to the above provisions and that he/she is duly authorized to execute this form.

\_\_\_\_\_  
Signature of Authorized Official

\_\_\_\_\_  
Title

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Name of Institution or Agency

\_\_\_\_\_  
Date

\_\_\_\_\_  
Street

\_\_\_\_\_  
City, State, Zip Code

PLEASE RETURN TO:  
Metro Flood Diversion Authority  
207 4<sup>th</sup> St. N, Suite A  
Fargo, ND 58102

\_\_\_\_\_  
Office Email Address