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AGREEMENT  
BETWEEN OWNER AND TESTING FIRM  
FOR  
PROFESSIONAL SERVICES

TASK ORDER EDITION

[Month 2014]

Owner: \_\_\_\_\_

Testing Firm: \_\_\_\_\_

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**AGREEMENT  
BETWEEN OWNER AND TESTING FIRM  
FOR  
PROFESSIONAL SERVICES**

**TASK ORDER EDITION**

THIS IS AN AGREEMENT effective as of \_\_\_\_\_ (“Effective Date”) between  
\_\_\_\_\_ [Cass County Joint Water Resource District] [Diversion Authority] \_\_\_\_\_ (“Owner”) and  
\_\_\_\_\_ (“Testing Firm”).

From time to time Owner, or the Owner’s Representative/Construction Manager, may request that Testing Firm provide professional services for Specific Projects. Each engagement will be documented by a Task Order. This Agreement sets forth the general terms and conditions which shall apply to all Task Orders duly executed under this Agreement.

Owner and Testing Firm further agree as follows:

**ARTICLE 1 – SERVICES OF TESTING FIRM**

1.01 *Scope*

- A. Testing Firm’s services will be detailed in a duly executed Task Order for each Specific Project. The general format of a Task Order is shown in Attachment 1 to this Agreement. Each Task Order will indicate the specific services to be performed and deliverables to be provided.
- B. This Agreement is not a commitment by Owner to Testing Firm to issue any Task Orders.
- C. Testing Firm shall not be obligated to perform any prospective Task Order unless and until Owner and Testing Firm agree as to the particulars of the Specific Project, including the scope of Testing Firm’s services, time for performance, Testing Firm’s compensation, and all other appropriate matters.
- D. Testing Firm may be entitled to appropriate adjustment in compensation arising from:
  - 1. Changes in the instructions or approvals given by Owner or Owner’s Representative/Construction Manager, untimely decisions by Owner or Owner’s Representative/Construction Manager, or enactment or revision of codes, Laws or Regulations, or official interpretations that cause an unreasonable number of revisions in previously approved Documents.
  - 2. Significant changes in the Project including, but not limited to, size, quality, complexity, schedule or budget, or procurement method.
- E. Material testing will be performed by qualified individuals, licensed as appropriate for the Work.

## 1.02 *Task Order Procedure*

- A. Owner and Testing Firm shall agree on the scope, time for performance, and basis of compensation for each Task Order. Each duly executed Task Order shall be subject to the terms and conditions of this Agreement. In the event of a conflict between terms of the duly executed Task Order and this Agreement, the provisions of the duly executed Task Order shall take precedence with regard to the Specific Project referenced in the Task Order.
- B. Testing Firm will commence performance as set forth in the Task Order upon receipt of executed Task Order.

## **ARTICLE 2 – OWNER’S RESPONSIBILITIES**

### 2.01 *General*

- A. Owner shall have the responsibilities set forth herein, unless expressly stated otherwise in each executed Task Order.
- B. Owner shall compensate Testing Firm as set forth in each Task Order, pursuant to the applicable terms of Exhibit C.
- C. Owner or Owner’s Representative/Construction Manager shall be responsible for, and Testing Firm may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by Owner or by Owner’s Representative/Construction Manager, to Testing Firm pursuant to this Agreement. Testing Firm may use such requirements, programs, instructions, reports, data, and information in performing or furnishing services under this agreement.
- D. Owner shall provide access to properties and facilities reasonably required for the prosecution of the Work.

## **ARTICLE 3 – TERM; TIMES FOR RENDERING SERVICES**

### 3.01 *Term*

- A. This Agreement shall be effective and applicable to Task Orders issued hereunder for 5 years from the Effective Date of the Agreement.
- B. The parties may extend or renew this Agreement, with or without changes, by written instrument establishing a new term.

### 3.02 *Times for Rendering Services*

- A. The times for performing services or providing deliverables will be stated in each Task Order. If no times are so stated, Testing Firm will perform services and provide deliverables within a reasonable time.
- B. If, through no fault of Testing Firm, such periods of time or dates are changed, or the orderly and continuous progress of Testing Firm’s services is impaired, or Testing Firm’s services are delayed or suspended, then the time for completion of Testing Firm’s services, and the rates and amounts of Testing Firm’s compensation, shall be adjusted equitably.

- C. If Owner authorizes changes in the scope, extent, or character of the Specific Project referenced in an executed Task Order, then the time for completion of Testing Firm's services, and the rates and amounts of Engineer's compensation, shall be adjusted equitably.
- D. Owner shall make decisions and carry out its other responsibilities in a timely manner so as not to delay the Testing Firm's performance of its services.
- E. If Testing Firm fails, through its own fault, to complete the performance required in a Task Order within the time set forth, as duly adjusted, then Owner shall be entitled, as its sole remedy, to the recovery of direct damages, if any, resulting from such failure.
- F. If completion of any portion of the Services or Work for the Project or any Specific Project is delayed for causes beyond the control of or without the fault of Testing Firm, including Force Majeure, the time of performance of the Testing Firm's Services or Work will be extended for a period equal to the delay and fee equitably adjusted. Neither party shall be liable to the other for failure to perform as a result of an event of Force Majeure. Force Majeure includes, without limitation, acts of God; acts of a public enemy; acts of war, terrorism, acts of federal, state, local, or foreign governments; fires; floods; epidemics; strikes; riots; freight embargoes; lawsuit or court order and unusually severe weather.
- G. With respect to each Task Order, the number of Construction Contracts for Work designed or specified by Testing Firm upon which the Testing Firm's compensation has been established shall be identified in the Task Order. If the Work designed or specified by Testing Firm under a Task Order is to be performed or furnished under more than one prime contract, or if Testing Firm services are to be separately sequenced with the work of one or more prime Contractors (such as in the case of fast-tracking), then Owner and Testing Firm shall, prior to commencement of final design services, develop a schedule for performance of Testing Firm remaining services in order to sequence and coordinate properly such services as are applicable to the work under such separate Construction Contracts. This schedule is to be prepared and included in or become an amendment to the authorizing Task Order whether or not the work under such contracts is to proceed concurrently.

## ARTICLE 4 – INVOICES AND PAYMENTS

### 4.01 *Invoices*

- A. *Preparation and Submittal of Invoices:* Testing Firm shall prepare invoices in accordance with its standard invoicing practices, the terms of Exhibit C, and the specific Task Order. Testing Firm shall submit its invoices to Owner on a monthly basis. Invoices are due and payable within 30 days of receipt.

### 4.02 *Payments*

- A. *Application to Interest and Principal:* Payment will be credited first to any interest owed to Testing Firm and then to principal.
- B. *Failure to Pay:* If Owner fails to make any payment due Testing Firm for services and expenses within 30 days after receipt of Engineer's invoice, then:
  - 1. the compounded amount due Testing Firm will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day; and

2. Testing Firm may, after giving seven days written notice to Owner, suspend services under any Task Order issued until Owner has paid in full all amounts due for services, expenses, and other related charges. Owner waives any and all claims against Testing Firm for any such suspension.
- C. *Disputed Invoices:* If Owner contests an invoice, Owner shall advise Testing Firm in writing within 20 days from receipt of invoice of the amount in dispute and the factual basis for the Owner's belief that the invoice need not be paid. Owner may withhold only that portion so contested, and must pay the undisputed portion.
  - D. *Legislative Actions:* If after the Effective Date of a Task Order any governmental entity takes a legislative action that imposes sales or use taxes, fees, or charges on Testing Firm's services or compensation under the Task Order, then the Testing Firm may invoice such new taxes, fees, or charges as a Reimbursable Expense without markup. Owner shall reimburse Testing Firm for the cost of such invoiced new taxes, fees, and charges; such reimbursement shall be in addition to the compensation to which Testing Firm is entitled under the terms of Exhibit C and the specific Task Order.

## **ARTICLE 5 – OPINIONS OF COST (NOT USED)**

## **ARTICLE 6 – GENERAL CONSIDERATIONS**

### 6.01 *Standards of Performance*

- A. *Standard of Care:* The standard of care for all professional services performed or furnished by Testing Firm under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Testing Firm makes no warranties, express or implied, under this Agreement or otherwise, in connection with Testing Firm's services.
- B. *Technical Accuracy:* Owner shall not be responsible for discovering deficiencies in the technical accuracy of Testing Firm's services. Testing Firm shall correct deficiencies in technical accuracy without additional compensation unless such corrective action is directly attributable to deficiencies in Owner-furnished information. Testing Firm shall not be responsible for discovering deficiencies in the technical accuracy of information provided by Owner or Owner's Representative/Construction Manager. Testing Firm will notify Owner of errors, discrepancies and inconsistencies it may discover. If requested, Testing Firm shall correct deficiencies in technical accuracy of information or materials supplied by Owner or Owner's Representative/Construction Manager as an additional service and Testing Firm's fee shall be equitably adjusted.
- C. *Consultants:* Testing Firm shall serve as Owner's prime professional under each Task Order. Testing Firm may employ such Consultants as Testing Firm deems necessary to assist in the performance or furnishing of the services, subject to reasonable, timely, and substantive objections by Owner.
- D. *Reliance on Others:* Subject to the standard of care set forth in Paragraph 6.01.A, Testing Firm and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.
- E. *Compliance with Laws and Regulations, and Policies and Procedures:* When performing Work under an executed Task Order, Testing Firm and Owner shall each exercise due care to comply with applicable Laws and Regulations in effect as of the execution of any Task Order.

1. Prior to the execution and Effective Date of each Task Order, Owner shall provide to Testing Firm in writing any and all policies and procedures of Owner applicable to Testing Firm's performance of services under such Task Order. Testing Firm shall comply with such policies and procedures pursuant to the standard of care set forth in Paragraph 6.01.A, and to the extent compliance is not inconsistent with professional practice requirements.
2. Each Task Order is based on Laws and Regulations and Owner-provided written policies and procedures as of the Effective Date of such Task Order. Changes after the Effective Date to these Laws and Regulations, or to Owner-provided written policies and procedures, may be the basis for modifications to Owner's responsibilities or to Testing Firm's scope of services, times of performance, or compensation.

F. Testing Firm shall not be required to sign any documents, no matter by whom requested, that would result in Testing Firm having to certify, guarantee, or warrant the existence of conditions whose existence Testing Firm cannot ascertain within its services for that Specific Project. Owner agrees not to make resolution of any dispute with Testing Firm or payment of any amount due to the Testing Firm in any way contingent upon Testing Firm signing any such certification.

## 6.02 *Use of Documents*

The specific work product of Testing Firm for which it is compensated by Owner, including all data, documents, and results that Testing Firm delivers to Owner during the course of its performance under this Agreement, shall be the property of Owner, but Testing Firm may reuse such information in the normal course of its business and retains its rights in any standard details or drawings. Owner may rely on any Document, signed or sealed by the Testing Firm or one of its Consultants whether printed or transmitted electronically.

Either party to this Agreement may rely on data or information set forth on paper (also known as hard copies) that the party receives from the other party by mail, hand delivery, or facsimile. In addition, either party to this Agreement may rely on items sent in electronic media format of text, data, graphics, or other types that are furnished by one party to the other unless otherwise designated by the delivering Party. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any transmittal errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files.

- A. When transferring documents in electronic media format, the transferring party makes no representations as to long term compatibility, usability, or readability of such documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the documents' creator.
- B. If Testing Firm at Owner's request verifies or adapts the Documents for extensions of the Specific Project or for any other purpose, then Owner shall compensate Engineer at rates or in an amount to be agreed upon by Owner and Engineer.
- C. Owner acknowledges that the Documents are not intended or represented to be suitable for use on projects other than this Specific Project unless completed by Testing Firm, or for use or reuse by Owner or others on extensions of the Specific Project, on any other project, or for any other use or purpose, without written verification or adaptation by Testing Firm. Any such use or reuse by Owner, or any modification of the Documents, without written verification, completion or adaptation by

Testing Firm, as appropriate for the specific purpose intended, will be at Owner's sole risk and without liability or legal exposure to Testing Firm or its Consultants.

### 6.03 *Insurance*

- A. At all times when any Task Order is under performance, Testing Firm shall procure and maintain insurance as set forth in Exhibit G, "Insurance." Testing Firm shall cause Owner to be listed as an additional insured on any applicable general liability insurance policy carried by Testing Firm which is applicable to a Specific Project.
- B. At all times when any Task Order is under performance, Owner shall procure and maintain insurance as set forth herein, or such additional insurance as may be agreed upon by the Parties and set forth in Exhibit G.
- C. Owner shall require Contractors to purchase and maintain policies of insurance covering workers' compensation, general liability, property damage (other than to the Work itself), motor vehicle damage and injuries, and other insurance necessary to protect Owner's and Testing Firm's interests in the Project.
- D. Owner and Testing Firm shall each deliver to the other certificates of insurance evidencing the coverages indicated in Exhibit G. Such certificates shall be furnished prior to commencement of Testing Firm's services under any Task Order and at renewals thereafter during the life of this Agreement.
- E. All policies of property insurance relating to a Specific Project shall contain provisions to the effect that Testing Firm's and Consultants' interests are covered and that in the event of payment of any loss or damage the insurers will have no rights of recovery against Testing Firm or its Consultants, or any insureds, additional insureds, or loss payees thereunder.
- F. All policies of insurance shall contain a provision or endorsement that the coverage afforded will not be canceled or reduced in limits by endorsement, and that renewal will not be refused, until at least 10 days prior written notice has been given to Owner and Engineer and to each other additional insured (if any) to which a certificate of insurance has been issued.
- G. Under the terms of any Task Order, or after commencement of performance of a Task Order, Owner may request that Testing Firm or its Consultants, at Owner's sole expense, provide additional insurance coverage, increased limits, or revised deductibles that are more protective than those specified in Exhibit G. If so requested by Owner and consented to by Testing Firm (which such consent shall not be unreasonably withheld), and if commercially available, Testing Firm shall obtain and shall require its Consultants to obtain such additional insurance coverage, different limits, or revised deductibles for such periods of time as requested by Owner. The additional costs associated with any such additional insurance coverage, increased insurance limits and/or revised deductibles shall be invoiced to, and paid by, Owner in accordance with Article 4.
- H. Testing Firm's insurance (except for Professional Liability), through a policy or endorsement, shall include: (1) "Waiver of Subrogation" waiving any right to recovery the insurance company may have against an Owner; (2) A provision that the policy or endorsements may not be canceled, non-renewed or reduced without 30 days' prior written notice to Owner; and (3) A provision that the Testing Firm's Commercial General Liability and Auto Liability insurance coverage shall be primary, and that the Owner's insurance shall be in excess of Testing Firm's insurance.



6.04 *Suspension and Termination*

A. *Suspension:*

1. *By Owner:* Owner may suspend a Task Order upon seven days written notice to Testing Firm.
2. *By Testing Firm:* If Testing Firm's services are substantially delayed through no fault of Testing Firm, then Testing Firm may, after giving seven days written notice to Owner, suspend services under a Task Order.
3. If Owner suspends services required in any Task Order for more than 90 days, then Testing Firm's fees shall be adjusted equitably.

B. *Termination:* The obligation to provide further services under this Agreement, or under a Task Order, may be terminated:

1. For cause:

- a. By either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the terms of this Agreement or any Task Order through no fault of the terminating party.
- b. By Testing Firm:
  - 1) Upon seven days written notice if Owner demands that Testing Firm furnish or perform services contrary to Testing Firm's responsibilities as a licensed professional; or
  - 2) Upon seven days written notice if the Testing Firm's services under a Task Order are delayed or suspended for more than 90 days for reasons beyond Testing Firm's control.
  - 3) Testing Firm shall have no liability to Owner on account of such termination.
- c. Notwithstanding the foregoing, neither this Agreement nor the Task Order will terminate under Paragraph 6.04.B.1.a if the party receiving such notice begins, within seven days of receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt thereof; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, 60 days after the date of receipt of the notice.

2. For convenience:

- a. By Owner effective upon Testing Firm's receipt of notice from Owner.

C. *Effective Date of Termination:* The terminating party under Paragraph 6.04.B may set the effective date of termination at a time up to 30 days later than otherwise provided to allow Testing Firm to demobilize personnel and equipment from the Site, to complete tasks whose value would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Task Order materials in orderly files.

D. *Payments Upon Termination:*

1. In the event of any termination under Paragraph 6.04, Testing Firm will be entitled to invoice Owner and to receive full payment for all services performed or furnished in accordance with this Agreement and all Reimbursable Expenses incurred through the effective date of termination.
2. In the event of termination by Owner for convenience or by Testing Firm for cause, Testing Firm shall be entitled, in addition to invoicing for those items identified in Paragraph 6.04.D.1, to invoice Owner and to payment of a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Testing Firm's Consultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.

6.05 *Controlling Law*

- A. This Agreement is to be governed by the laws of the state of North Dakota.

6.06 *Successors, Assigns, and Beneficiaries*

- A. Owner and Testing Firm each is hereby bound and the successors, executors, administrators, and legal representatives of Owner and Engineer are hereby bound to the other party to this Agreement and to the successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements and obligations of this Agreement.
- B. Neither Owner nor Testing Firm may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in this Agreement without the written consent of the other, except to the extent that any assignment, subletting, or transfer is mandated or restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement. Any assignment in violation of this provision shall be null and void and unenforceable.
- C. Unless expressly provided otherwise in this Agreement:
  1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Owner or Testing Firm to any Contractor, Subcontractor, Supplier, other individual or entity, or to any surety for or employee of any of them.
  2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner, City of Oxbow, Diversion Authority member entities, U.S. Army Corps of Engineers, and Testing Firm and not for the benefit of any other party.
  3. The Owner agrees that the substance of the provisions of this Paragraph 6.06.C shall appear in any Contract Documents prepared for any Specific Project under this Agreement.

6.07 *Dispute Resolution*

Owner and Testing Firm agree to use their best efforts to resolve amicably any dispute, including use of alternative dispute resolution options. Nothing prevents either party from seeking redress in a court of law.

6.08 *Environmental Condition of Site*

A. With respect to each Task Order, Specific Project, and Site:

1. Owner shall disclose to Testing Firm in writing the existence of all known and suspected Asbestos, PCBs, Petroleum, Hazardous Waste, Radioactive Material, hazardous substances, and other Constituents of Concern located at or near the Site, including type, quantity, and location.
2. Owner represents to Testing Firm that to the best of its knowledge no Constituents of Concern, other than those disclosed in writing to Testing Firm, exist at the Site.
3. If Testing Firm encounters or learns of an undisclosed Constituent of Concern at the Site, then Testing Firm shall notify (a) Owner and (b) appropriate governmental officials if Testing Firm reasonably concludes that doing so is required by applicable Laws or Regulations.
4. It is acknowledged by both parties that Testing Firm's scope of services does not include any services related to Constituents of Concern. If Testing Firm or any other party encounters an undisclosed Constituent of Concern, or if investigative or remedial action, or other professional services, are necessary with respect to disclosed or undisclosed Constituents of Concern, then Testing Firm may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Specific Project affected thereby until Owner: (1) retains appropriate specialist consultant(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the Constituents of Concern; and (2) warrants that the Site is in full compliance with applicable Laws and Regulations.
5. If the presence at the Site of undisclosed Constituents of Concern adversely affects the performance of Testing Firm's services under this Agreement or any executed Task Order, then the Engineer shall have the option of (a) accepting an equitable adjustment in its compensation or in the time of completion, or both; or (b) terminating the executed Task Order or (c) terminating this Agreement for cause on 30 days' notice.
6. Owner acknowledges that Testing Firm is performing services for Owner and that Testing Firm is not and shall not be required to become an "owner," "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, which are or may be encountered at or near the Site in connection with Engineer's activities under this Agreement.

6.09 *Indemnification and Mutual Waiver*

- A. *Indemnification by Testing Firm:* To the fullest extent permitted by law, Testing Firm shall indemnify Owner, the Diversion Authority, and the State of North Dakota its officers, directors, partners, employees, and representatives, from and against losses, damages, and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are found to be caused by a negligent act, error, or omission of Testing Firm or Testing Firm's officers, directors, members, partners, agents, employees, or Consultants in the performance of services under this Agreement. This indemnification provision is subject to and limited by the provisions, if any, agreed to by Owner and Testing Firm in Subdivision D, below, entitled "Limitations of Liability."
- B. *Percentage Share of Negligence:* As controlled by state law.

- C. *Mutual Waiver*: To the fullest extent permitted by law, Owner and Testing Firm waive against each other, and the other's employees, officers, directors, members, agents, insurers, partners, and Consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project or any Specific Project.
- D. *Limitations of Liability*: Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, the total liability, in the aggregate, of Testing Firm and Testing Firm's officers, directors, members, partners, agents, guarantors, Consultants, and employees, to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project, a Specific Project or Task Order, from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty, express or implied, of Testing Firm or Testing Firm's officers, directors, members, partners, agents, employees, guarantors or Consultants, shall not exceed the total amount, individually or collectively, of \$3,000,000.

#### 6.10 *Miscellaneous Provisions*

- A. *Notices*: Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address on the signature page and given personally, by facsimile, by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.
- B. *Survival*: All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason.
- C. *Severability*: Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Testing Firm, which agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.
- D. *Waiver*: A party's non-enforcement of any provision shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.
- E. *Accrual of Claims*: To the fullest extent permitted by law, all causes of action arising under this Agreement shall be deemed to have accrued, and all statutory periods of limitation shall commence, no later than the date of Substantial Completion of Work called for in each particular Specific Project.
- F. *Applicability to Task Orders*: The terms and conditions set forth in this Agreement apply to each Task Order as if set forth in the Task Order, unless specifically modified. In the event of conflicts between this Agreement and a Task Order, the conflicting provisions of the Task Order shall take precedence for that Task Order. The provisions of this Agreement shall be modified only by a written instrument. Such amendments shall be applicable to all Task Orders issued after the effective date of the amendment if not otherwise set forth in the amendment.
- G. *Non-Exclusive Agreement*: Nothing herein shall establish an exclusive relationship between Owner and Testing Firm. Owner may enter into similar agreements with other professionals for the same or different types of services contemplated hereunder, and Testing Firm may enter into similar or different agreements with other project owners for the same or different services contemplated hereunder.

## ARTICLE 7 – DEFINITIONS

### 7.01 *Defined Terms*

- A. Wherever used in this Agreement (including the Exhibits hereto and any Task Order) terms (including the singular and plural forms) printed with initial capital letters have the meanings indicated in the text above, in the exhibits or Task Order, or in the following provisions:
1. *Addenda*: Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Documents.
  2. *Additional Services*: Services to be performed for or furnished to Owner by Testing Firm in accordance with a Task Order which are not included in Basic Services for that Task Order.
  3. *Agreement*: This "Agreement between Owner and Testing Firm for Professional Services – Task Order Edition" including those Exhibits listed in Article 8 and any duly executed Task Order.
  4. *Application for Payment*: The form acceptable to Owner which is to be used by a Testing Firm in requesting progress or final payments for the completion of its Work and which is to be accompanied by such supporting documentation as is required by the Agreement.
  5. *Asbestos*: Any material that contains more than one percent asbestos and is friable or is releasing asbestos fibers into the air above current action levels established by the United States Occupational Safety and Health Administration.
  6. *Authority Work Directive*: A written directive to the Testing Firm signed by Owner upon recommendation of the Owner's Representative/Construction Manager, ordering an addition, deletion, or revision in a Task Order Scope of Work. An Authority Work Directive will not change the Task Order Price or Schedule, but is evidence that the parties expect that the change directed or documented by an Authority Work Directive will be incorporated into a subsequent issued Amendment following negotiations by the Parties as to its effect, if any, on the Task Order Price or Schedule.
  7. *Basic Services*: Specified services to be performed for or furnished to Owner by Testing Firm in accordance with a Task Order.
  8. *Bid*: The offer or proposal of a bidder submitted on the prescribed form setting forth the prices for the Work to be performed.
  9. *Bidding Documents*: The advertisement or invitation to Bid, instructions to bidders, the Bid form and attachments, the Bid bond, if any, the proposed Contract Documents, and all Addenda, if any.
  10. *Change Order*: A document recommended by Engineer, which is signed by a Contractor and Owner to authorize an addition, deletion or revision in the Work, or an adjustment in the Contract Price or the Contract Times.
  11. *Constituent of Concern*: Any substance, product, waste, or other material of any nature whatsoever (including, but not limited to, Asbestos, Petroleum, Radioactive Material, and PCBs) which is or becomes listed, regulated, or addressed pursuant to (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq.

(“CERCLA”); (b) the Hazardous Materials Transportation Act, 49 U.S.C. §§1801 et seq.; (c) the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (“RCRA”); (d) the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; (e) the Clean Water Act, 33 U.S.C. §§1251 et seq.; (f) the Clean Air Act, 42 U.S.C. §§7401 et seq.; and (g) any other federal, state, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.

12. *Construction Agreement*: The written instrument which is evidence of the agreement, contained in the Contract Documents, between Owner and a Contractor covering the Work.
13. *Construction Contract*: The entire and integrated written agreement between Owner and Contractor concerning the Work.
14. *Construction Cost*: The cost to Owner of those portions of an entire Specific Project designed or specified by Engineer. Construction Cost does not include costs of services of Engineer or other design professionals and consultants; cost of land or rights-of-way, or compensation for damages to properties; Owner's costs for legal, accounting, insurance counseling or auditing services; interest or financing charges incurred in connection with a Specific Project; or the cost of other services to be provided by others to Owner Construction Cost is one of the items comprising Total Project Costs.
15. *Construction Manager*: Professional firm retained by Owner to assist Owner with management of construction contracts.
16. *Consultants*: Individuals or entities having a contract with Testing Firm to furnish services with respect to a Specific Project as Testing Firm's independent professional associates, consultants, subcontractors, or vendors. The term Testing Firm includes Testing Firm's Consultants.
17. *Contract Documents*: Those items so designated in the Construction Contract, including the Drawings, Specifications, construction agreement, and general and supplementary conditions. Only printed or hard copies of the items listed in the Construction Contract are Contract Documents. Approved Shop Drawings, other Contractor submittals, and the reports and drawings of subsurface and physical conditions are not Contract Documents.
18. *Contract Price*: The moneys payable by Owner to a Contractor for completion of the Work in accordance with the Contract Documents and as stated in the Construction Agreement.
19. *Contract Times*: The numbers of days or the dates stated in a Construction Agreement to: (i) achieve Substantial Completion, and (ii) complete the Work so that it is ready for final payment as evidenced by Engineer's written recommendation of final payment.
20. *Contractor*: The entity or individual with which Owner has entered into the Construction Contract.
21. *Correction Period*: The time after Substantial Completion during which a Contractor must correct, at no cost to Owner, any Defective Work, normally one year after the date of Substantial Completion or such longer period of time as may be prescribed by Laws or Regulations or by the terms of any applicable special guarantee or specific provision of the Contract Documents.

22. *Defective*: An adjective which, when modifying the word Work, refers to Work that is unsatisfactory, faulty, or deficient, in that it does not conform to the Contract Documents, or does not meet the requirements of any inspection, reference standard, test, or approval referred to in the Contract Documents, or has been damaged prior to Engineer's recommendation of final payment.
23. *Documents*: Data, reports, Drawings, Specifications, Record Drawings, and other deliverables, whether in printed or electronic media format, provided or furnished in appropriate phases by Engineer to Owner pursuant to this Agreement.
24. *Drawings*: That part of the Contract Documents prepared or approved by Engineer which graphically shows the scope, extent, and character of the Work to be performed by a Contractor. Shop Drawings are not Drawings as so defined.
25. *Effective Date of the Construction Agreement*: The date indicated in a Construction Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Construction Agreement is signed and delivered by the last of the two parties to sign and deliver.
26. *Effective Date of the Agreement*: The date indicated in this Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Agreement is signed and delivered by the last of the two parties to sign and deliver.
27. *Effective Date of the Task Order*: The date indicated in the Task Order on which it becomes effective, but if no such date is indicated, it means the date on which the Task Order is signed and delivered by the last of the two parties to sign and deliver.
28. *Engineer*: The individual or entity named as such in the Contract Documents.
29. *Field Order*: A written order issued by Engineer which directs minor changes in the Work but which does not involve a change in the Contract Price or the Contract Times.
30. *General Conditions*: That part of the Contract Documents which sets forth terms, conditions, and procedures that govern the Work to be performed or furnished by a Contractor with respect to a Specific Project.
31. *Hazardous Waste*: The term Hazardous Waste shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (42 USC Section 6903) as amended from time to time.
32. *Laws and Regulations; Laws or Regulations*: Any and all applicable laws, rules, regulations, ordinances, codes, standards, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.
33. *Owner*: The individual or entity with which Testing Firm has entered into this Agreement and for which the Testing Firm's services are to be performed. Unless indicated otherwise, this is the same individual or entity that will enter into any construction contracts concerning the Project.
34. *Owner's Representative*: Professional firm retained by Owner to assist Owner with Owner's activities, also referred to as Program Management Consultant or Construction Manager.
35. *PCBs*: Polychlorinated biphenyls.

36. *Petroleum*: Petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute), such as fuel oil, oil sludge, oil refuse, gasoline, kerosene, and oil mixed with other non-Hazardous Waste and crude oils.
37. *Program*: The total Fargo-Moorhead Area Diversion.
38. *Program Management Consultant*: Professional firm retained by Owner to assist Owner with the management of the Program, also referred to as Owner's Representative or Construction Manager.
39. *Project*: A discrete engineering or construction project carried out under the Program. Also referred to as a Specific Project.
40. *Radioactive Materials*: Source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (42 USC Section 2011 et seq.) as amended from time to time.
41. *Record Drawings*: The Drawings as issued for construction on which Engineer, upon completion of the Work, has shown changes due to Addenda or Change Orders and other information which Engineer considers significant based on record documents furnished by Contractor to Engineer and which were annotated by Contractor to show changes made during construction.
42. *Reimbursable Expenses*: The expenses incurred directly by Testing Firm in connection with the performing or furnishing of Basic and Additional Services for a Specific Project for which Owner shall pay Testing Firm as indicated in Exhibit C.
43. *Resident Project Representative*: The authorized representative, if any, of Construction Manager assigned to assist Construction Manager at the Site of a Specific Project during the Construction Phase. As used herein, the term Resident Project Representative or "RPR" includes any assistants or field staff of the RPR agreed to by Owner. The duties and responsibilities of the RPR will be as set forth in each Task Order.
44. *Samples*: Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.
45. *Shop Drawings*: All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for a Contractor and submitted by a Contractor to Engineer to illustrate some portion of the Work.
46. *Site*: Lands or areas indicated in the Contract Documents for a Specific Project as being furnished by Owner upon which the Work is to be performed, rights-of-way and easements for access thereto, and such other lands furnished by Owner which are designated for use of a Contractor.
47. *Specifications*: That part of the Contract Documents prepared by Engineer consisting of written technical descriptions of materials, equipment, systems, standards, and workmanship as applied to the Work to be performed by a Contractor and certain administrative details applicable thereto.
48. *Specific Project*: An undertaking of Owner as set forth in a Task Order.



49. *Subcontractor*: An individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work at a Site.
50. *Substantial Completion*: The time at which the Work has progressed to the point where, in the opinion of Engineer, the Work is sufficiently complete, in accordance with the Contract Documents, so that the Work can be utilized for the purposes for which it is intended.
51. *Supplementary Conditions*: That part of the Contract Documents which amends or supplements the General Conditions.
52. *Supplier*: A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by Contractor or Subcontractor.
53. *Task Order*: A document executed by Owner and Testing Firm, including amendments if any, stating the scope of services, Testing Firm's compensation, times for performance of services and other relevant information for a Specific Project.
54. *Total Project Costs*: The sum of the Construction Cost, allowances for contingencies, the total costs of services of Engineer or other design professionals and consultants, cost of land, rights-of-way, or compensation for damages to properties, or Owner's costs for legal, accounting, insurance counseling, or auditing services, or interest and financing charges incurred in connection with a Specific Project, or the cost of other services to be provided by others to Owner.
55. *Work*: The entire completed construction or the various separately identifiable parts thereof required to be provided under the Contract Documents for a Specific Project. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by those Contract Documents.
56. *Work Change Directive*: A written directive to a Contractor signed by Owner upon recommendation of the Engineer, ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed or to emergencies. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the change directed or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Times.

## **ARTICLE 8 – EXHIBITS AND SPECIAL PROVISIONS**

### **8.01 Exhibits**

Attachment 1, Task Order (Suggested Form)

Exhibit A, Testing Firm's Services – Not Included

Exhibit B, Owner's Responsibilities –

Exhibit C, Payments to Testing Firm for Services and Reimbursable Expenses

Exhibit D, Duties, Responsibilities and Limitations of Authority of Resident Project Representative – Not Included

Exhibit E, Notice of Acceptability of Work – Not Included

Exhibit F, Construction Cost Limit – Not Included

Exhibit G, Insurance

Exhibit H, Dispute Resolution – Not Included

Exhibit I, Limitations on Liability-Not included

Exhibit J, Special Provisions-Not Included

Exhibit K, Amendment to Task Order (Suggested Form)

## 8.02 *Total Agreement*

- A. This Agreement (together with the Exhibits identified as included above) constitutes the entire agreement between Owner and Testing Firm and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a duly executed written instrument based on the format provided in Exhibit K to this Agreement, "Amendment to Task Order."

## 8.03 *Designated Representatives*

- A. With the execution of this Agreement, Testing Firm and Owner shall designate specific individuals to act as Testing Firm's and Owner's representatives with respect to the services to be performed or furnished by Testing Firm and responsibilities of Owner under this Agreement. Such individuals shall have authority to transmit instructions, receive information, and render decisions relative to the Agreement on behalf of each respective party. Each Task Order shall likewise designate representatives of the two parties.

## 8.04 *Testing Firm's Certifications*

- A. Testing Firm certifies that it has not engaged in corrupt, fraudulent, or coercive practices in competing for or in executing the Agreement. For the purposes of this Paragraph 8.04:
  - 1. "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value likely to influence the action of a public official in the selection process or in the Agreement execution;
  - 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the selection process or the execution of the Agreement to the detriment of Owner, or (b) to deprive Owner of the benefits of free and open competition;
  - 3. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the selection process or affect the execution of the Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the Effective Date of which is indicated on Page 1.

OWNER:

TESTING  
FIRM

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

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

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

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

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Testing Firm License or  
Firm's Certificate No. \_\_\_\_\_

State of : \_\_\_\_\_

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

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

Address for giving notices:

Address for giving notices:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DESIGNATED REPRESENTATIVE  
(Paragraph 8.03.A):

DESIGNATED REPRESENTATIVE  
(Paragraph 8.03.A):

\_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Title: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

E-Mail  
Address: \_\_\_\_\_

E-Mail  
Address: \_\_\_\_\_

SUGGESTED FORM OF  
TASK ORDER

This is Task Order No. \_\_\_\_\_,  
consisting of \_\_\_\_\_ pages.

**Task Order**

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*[NOTE TO USER: Modify as to scope, compensation, schedule, and other key items.]*

In accordance with Paragraph 1.01 of the Agreement Between Owner and Testing Firm for Professional Services – Task Order Edition, dated \_\_\_\_\_ ("Agreement"), Owner and Engineer agree as follows:

1. Specific Project Data

A. Title: \_\_\_\_\_

B. Description: \_\_\_\_\_

2. Services of Testing Firm

3. Owner's Responsibilities

Owner shall have those responsibilities set forth in Article 2 and in this executed Task Order subject to the following: *[Here state any additions or modifications to Exhibit B, for this Specific Project.]*

4. Times for Rendering Services

<u>Phase</u>	<u>Completion Date</u>
_____	_____
_____	_____
_____	_____

5. Payments to Testing Firm

A. Owner shall pay Testing Firm for services rendered as follows:

<i>Category of Services</i>	<i>Compensation Method</i>	<i>Lump Sum, or Estimate of Compensation for Services</i>
<hr/>		
Choose <u>One</u> :		
A. Standard Hourly Rates		
B. <i>[Insert any other compensation method]</i>		

B. The terms of payment are set forth in Article 4 of the Agreement and in Exhibit C.

6. Consultants:

7. Other Modifications to Agreement:

*[Supplement or modify Agreement and Exhibits, if appropriate.]*

8. Attachments:

9. Documents Incorporated By Reference:

10. Terms and Conditions: Execution of this Task Order by Owner and Testing Firm shall make it subject to the terms and conditions of the Agreement (as modified above), which Agreement is incorporated by this reference. Testing Firm is authorized to begin performance upon its receipt of a copy of this Task Order signed by Owner.

The Effective Date of this Task Order is \_\_\_\_\_, \_\_\_\_\_.

OWNER:

TESTING FIRM:

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

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

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

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

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Testing Firm License or  
Firm's Certificate No. \_\_\_\_\_  
State of: \_\_\_\_\_

DESIGNATED REPRESENTATIVE FOR  
TASK ORDER:

DESIGNATED REPRESENTATIVE FOR TASK  
ORDER:

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

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

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Address: \_\_\_\_\_

E-Mail  
Address: \_\_\_\_\_

E-Mail  
Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Fax: \_\_\_\_\_

## **Owner's Responsibilities**

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Article 2 of the Agreement is amended and supplemented to include the following responsibilities unless expressly stated otherwise in a Task Order.

- B2.01 Owner or, at Owner's designation, Owner's Representative/Construction Manager shall provide the following services:
- A. Provide Testing Firm with all criteria and full information as to Owner's requirements for the Specific Project identified in any executed Task Order, including Contract Documents consisting of Drawings and Specifications; and furnish copies of Owner's standard forms, conditions, and related documents, when applicable.
  - B. Furnish to Testing Firm any other available information pertinent to the Specific Project including reports and data relative to previous investigation at or adjacent to the Site of the Specific Project.
  - C. Following Testing Firm's assessment of initially-available Specific Project information and data and upon Testing Firm's request, furnish or otherwise make available such additional Specific Project related information and data as is reasonably required to enable Testing Firm to complete its Basic and Additional Services. Such additional information or data would generally include the following:
    - 1. Descriptions of property to be accessed or acquired.
    - 2. Known zoning, deed, and other land use restrictions.
    - 3. Explorations and tests of subsurface conditions at or contiguous to the Site, drawings of physical conditions relating to existing surface or subsurface structures at the Site, or hydrographic surveys, with appropriate professional interpretation thereof.
    - 4. Environmental assessments, audits, investigations and impact statements, and other relevant environmental or cultural studies as to a Specific Project, the Site and adjacent areas.
    - 5. Data or consultations as required for a Specific Project but not otherwise identified in the Agreement, the Exhibits thereto, or the Task Order.
  - D. Give prompt written notice to Testing Firm whenever Owner observes or otherwise becomes aware of the presence at the Site of any Constituent of Concern, or of any other development that affects the scope or time of performance of Testing Firm's services, or any defect or nonconformance in Testing Firm's services, the Work, or in the performance of any Contractor.
  - E. Authorize Testing Firm to provide Additional Services as set forth in the Task Order as required.
  - F. Arrange for safe access to and make provisions for Testing Firm to enter upon public and private property as required for Testing Firm to perform services under the Task Order.

- G. Examine all alternate solutions, studies, reports, sketches, Drawings, Specifications, proposals, and other documents presented by Testing Firm for the Specific Project (including obtaining advice of an attorney, insurance counselor, and other advisors or consultants as Owner deems appropriate with respect to such examination) and render in writing timely decisions pertaining thereto.
- H. Obtain, arrange, provide and/or pay for reviews, approvals, and permits from governmental authorities having jurisdiction to approve phases of the Specific Project as may be necessary for completion of each phase of the Project or any Specific Project.
- I. If more than one materials testing contract is to be awarded for the Work of the Specific Project, designate in the Task Order a person or entity to have authority and responsibility for coordinating the activities among the various Testing Firms.
- J. Inform Testing Firm of any specific requirements of safety or security programs that are applicable to Testing Firm, as a visitor to the Site.



This is **EXHIBIT C**, consisting of \_\_\_\_ pages, referred to in and part of the **Agreement between Owner and Testing Firm for Professional Services – Task Order Edition** dated \_\_\_\_\_, \_\_\_\_\_.

## **Payments to Testing Firm for Services and Reimbursable Expenses**

Article 2 of the Agreement is amended and supplemented to include the following agreement of the parties:

### **ARTICLE 2 – OWNER'S RESPONSIBILITIES**

#### *C2.01 Method of Payment*

- B. Owner shall pay Testing Firm for services in accordance with one or more of the following methods as identified in each Task Order:
1. Method A: Standard Hourly Rates
  2. Method B: [Identify any other method to be used to compensate Engineer for some or all of its services]

#### *C2.02 Explanation of Methods*

##### C. Method A – Standard Hourly Rates

1. For the specified category of services, the Owner shall pay Testing Firm an amount equal to the cumulative hours charged to the Specific Project by each class of Testing Firm employees times Standard Hourly Rates for each applicable billing class for all services performed on the Specific Project, plus Reimbursable Expenses and Consultant's charges, if any.
2. Standard Hourly Rates include salaries and wages paid to personnel in each billing class plus the cost of customary and statutory benefits, general and administrative overhead, non-project operating costs, and operating margin or profit.
3. Engineer's Reimbursable Expenses Schedule and Standard Hourly Rates are attached to this Exhibit as Appendices 1 and 2.
4. The total estimated compensation for the specified category of services shall be stated in the Task Order. This total estimated compensation will incorporate all labor at Standard Hourly Rates, Reimbursable Expenses, and Consultants' charges, if any.
5. The amounts billed will be based on the cumulative hours charged to the specified category of services on the Specific Project during the billing period by each class of Testing Firm's employees times Standard Hourly Rates for each applicable billing class, plus Reimbursable Expenses and Testing Firm's Consultant's charges, if any.
6. The Standard Hourly Rates and Reimbursable Expenses Schedule may be adjusted annually (as of January 1st) to reflect equitable changes in the compensation payable to Testing Firm.

- D. Method B – *[Identify and define any other method to be used to compensate Engineer for some or all of its services]*

### C2.03 *Reimbursable Expenses*

Costs incurred by Testing Firm in the performance of the Task Order in the following categories constitute Reimbursable Expenses:

- A. Transportation and subsistence incidental thereto; postage, and shipping costs; reproduction of reports. If authorized in advance by Owner, Reimbursable Expenses will also include expenses incurred for the use of highly specialized equipment. Reimbursable expenses shall be paid at rates set forth in Appendix 1 to this Exhibit C which may be adjusted annually (as of January 1st) to reflect equitable changes in the rates.
- B. The amounts payable to Testing Firm for Reimbursable Expenses will be the project-specific internal expenses actually incurred or allocated by Testing Firm, plus all invoiced external Reimbursable Expenses allocable to a Specific Project, the latter multiplied by a Factor of 1.0. In addition, all invoiced Consultants Expenses allocated to a Specific Project or Task Order multiplied by a factor of 1.05.

### C2.04 *Serving as a Witness*

- A. For services performed by Testing Firm's employees as witnesses giving testimony in any litigation, arbitration or other legal or administrative proceedings, the rate of 1.3 times the witness's standard hourly rate. Compensation for Consultants for such services will be by reimbursement of Consultants' reasonable charges to Testing Firm for such services.

### C2.05 *Other Provisions Concerning Payment*

- A. *Extended Contract Times.* Should the Contract Times to complete the Work be extended beyond the period stated in the Task Order, payment for Testing Firm's services shall be continued based on the Standard Hourly Rates Method of Payment.
- B. *Estimated Compensation Amounts*
  - 1. Testing Firm's estimate of the amounts that will become payable for services are only estimates for planning purposes, are not binding on the parties, and are not the minimum or maximum amounts payable to Engineer under the Agreement.
  - 2. When estimated compensation amounts have been stated in a Task Order and it subsequently becomes apparent to Testing Firm that a compensation amount thus estimated will be exceeded, Testing Firm shall give Owner written notice thereof. Promptly thereafter Owner and Testing Firm shall review the matter of services remaining to be performed and compensation for such services. Owner shall either agree to such compensation exceeding said estimated amount or Owner and Testing Firm shall agree to a reduction in the remaining services to be rendered by Testing Firm so that total compensation for such services will not exceed said estimated amount when such services are completed. If Testing Firm exceeds the estimated amount before Owner and Testing Firm have agreed to an increase in the

compensation due Testing Firm or a reduction in the remaining services, the Testing Firm shall give written notice thereof to Owner and shall be paid for all services rendered thereafter.

This is **Appendix 1 to EXHIBIT C**, consisting of \_\_\_\_\_ pages, referred to in and part of the **Standard Form of Agreement between Owner and Testing Firm for Professional Services – Task Order Edition**, dated \_\_\_\_\_, \_\_\_\_\_.

## **Reimbursable Expenses Schedule**

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Current agreements for engineering services stipulate that the Reimbursable Expenses are subject to review and adjustment per Exhibit C. Rates for reimbursable expenses effective on the date of this Agreement are:

### **Reimbursable Expenses**

This is **Appendix 2 to EXHIBIT C**, consisting of \_\_\_\_\_ pages, referred to in and part of the **Agreement between Owner and Testing Firm for Professional Services – Task Order Edition** dated \_\_\_\_\_, \_\_\_\_\_

## **Standard Hourly Rates Schedule**

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Current agreements for engineering services stipulate that the standard hourly rates are subject to review and adjustment per Exhibit C. Hourly rates for services effective on the date of this Agreement are:

This is **EXHIBIT G**, consisting of \_\_\_\_\_ pages, referred to in and part of the **Agreement between Owner and Testing Firm for Professional Services – Task Order Edition** dated \_\_\_\_\_, \_\_\_\_\_.

## **Insurance**

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Paragraph 6.03 of the Agreement is amended and supplemented to include the following agreement of the parties.

### *G6.03 Insurance*

A. The limits for the insurance required by Paragraphs 6.03.A and 6.03.B of the Agreement are as follows:

1. *By Testing Firm:*
  - a. Workers' Compensation: Statutory
  - b. Employer's Liability –
    - 1) Each Accident: \$1,000,000
    - 2) Disease, Policy Limit: \$1,000,000
    - 3) Disease, Each Employee: \$1,000,000
  - c. General Liability –
    - 1) Each Occurrence (Bodily Injury and Property Damage): \$2,000,000
    - 2) General Aggregate: \$2,000,000
  - d. Excess or Umbrella Liability –
    - 1) Each Occurrence: \$3,000,000
    - 2) General Aggregate: \$3,000,000
  - e. Automobile Liability –
    - 1) Combined Single Limit (Bodily Injury and Property Damage):  
Each Accident \$2,000,000
  - f. Professional Liability –
    - 1) Each Claim Made: \$3,000,000
    - 2) Annual Aggregate: \$3,000,000

g. Other (specify): \$ \_\_\_\_\_

*By Owner:*

a. Workers' Compensation: Statutory

b. Employer's Liability –

- 1) Each Accident: \$1,000,000
- 2) Disease, Policy Limit: \$1,000,000
- 3) Disease, Each Employee: \$1,000,000

c. General Liability –

- 1) Each Occurrence  
(Bodily Injury and Property Damage): \$2,000,000
- 2) General Aggregate: \$2,000,000

d. Excess or Umbrella Liability –

- 1) Each Occurrence: \$NA
- 2) General Aggregate: \$NA

e. Automobile Liability –

- 1) Combined Single Limit  
(Bodily Injury and Property Damage):  
Each Accident \$NA

f. Other (specify): \$ \_\_\_\_\_

3. The policies of insurance required by this Paragraph 6.03 will:

- a. not limit in any way Testing Firm's duties to defend, indemnify, and hold harmless Owner, the Diversion Authority, and the State of North Dakota, and those parties' officers, employees, agents, consultants, subcontractors, and representatives;
- b. either in the policies or in endorsements, contain a "waiver of subrogation" that waives any right to recovery any of Testing Firm's insurance companies might have against Owner, the Diversion Authority, or the State of North Dakota;
- c. either in the policies or in endorsements, contain a provision that Testing Firm's insolvency or bankruptcy will not release the insurers from payment under the policies, even when Testing Firm's insolvency or bankruptcy prevents Testing Firm from meeting the retention limits under the policies;
- d. either in the policies or in endorsements, contain cross liability/severability of interests, to ensure that all additional insured parties are covered as if they were all separately covered;
- e. either in the policies or in endorsements, contain a provision that the legal defense provided to Owner, the Diversion Authority, and the State of North Dakota must be free of any conflicts of interest, even if retention of separate legal counsel is necessary;

- f. 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;
  - g. either in the policies or in endorsements, contain a provision that Testing Firm's policies will be primary and noncontributory regarding any other insurance maintained by or available to Owner, the Diversion Authority, or the State of North Dakota, and that any insurance maintained by those parties will be in excess of Testing Firm's insurance and will not contribute with it.
- 4. Testing Firm will ensure that all of Testing Firm's Subcontractors purchases and maintain the same insurance policies and endorsements required of Testing Firm under the Contract Documents, with the same conditions and terms required of Testing Firm and its insurers.
  - 5. All insurance policies required under the Contract Documents, including the Excess or Umbrella Liability policies, must be from insurers rated "A-" or better by A.M. Best Company, Inc.





This is **EXHIBIT J**, consisting of \_\_\_\_\_ pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated \_\_\_\_\_, \_\_\_\_\_.

**Special Provisions**

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Paragraph(s) \_\_\_\_ of the Agreement is/are amended to include the following agreement(s) of the parties:

SUGGESTED FORM OF

This is **EXHIBIT K**, consisting of \_\_\_\_\_ pages, referred to in and part of the **Agreement between Owner and Testing Firm for Professional Services – Task Order Edition** dated \_\_\_\_\_, \_\_\_\_\_.

**Amendment To Task Order No. \_\_\_\_\_**

---

1. Background Data:
  - a. Effective Date of Task Order Agreement:
  - b. Owner:
  - c. Testing Firm:
  - d. Specific Project:
2. Description of Modifications
3. Task Order Summary (Reference only)
  - a. Original Task Order amount: \$ \_\_\_\_\_
  - b. Net change for prior amendments: \$ \_\_\_\_\_
  - c. This amendment amount: \$ \_\_\_\_\_
  - d. Adjusted Task Order amount: \$ \_\_\_\_\_

The foregoing Task Order Summary is for reference only and does not alter the terms of the Task Order, including those set forth in Exhibit C.

Owner and Testing Firm hereby agree to modify the above-referenced Task Order as set forth in this Amendment. All provisions of the Agreement and Task Order not modified by this or previous Amendments remain in effect. The Effective Date of this Amendment is \_\_\_\_\_.

OWNER:  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date  
Signed: \_\_\_\_\_

TESTING FIRM:  
By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date  
Signed: \_\_\_\_\_