

# **SAMPLE**

## **PROFESSIONAL SERVICES AGREEMENT BETWEEN THE BOROUGH AND THE CONSULTANT**

For the following Project: Improvements to Stockton Street & Joseph Street

### **I. The BOROUGH and the CONSULTANT agree as set forth below:**

1. The CONSULTANT shall provide professional services for the Project as set forth in the CONSULTANT's proposal dated \_\_\_\_\_, in response to the BOROUGH's Request for Proposals (RFP# 2019-1), received by the BOROUGH on \_\_\_\_\_, for compensation not to exceed Project ceiling amount of \$\_\_\_\_\_. The Request for Proposals and the proposal are incorporated herein by reference. Fees for additional work over the \_\_\_\_\_ provided for in this Agreement will be authorized only upon the approval of the Borough of Hightstown Council prior to the additional work being performed.
2. The CONSULTANT warrants that all engineering services shall be performed or approved by an engineer licensed by the New Jersey Board of Professional Engineers and Land Surveyors to practice in the State of New Jersey.
3. If the CONSULTANT is required by the Professional Service Corporation Act (N.J.S.A. 14A: 17-1 et seq.) to be authorized by the New Jersey Board of Professional Engineers and Land Surveyors to provide engineering and/or land surveying services, the CONSULTANT hereby warrants that it is currently so authorized and that it will retain its authorization by the New Jersey Board of Professional Engineers and Land Surveyors until completion of all work under this Agreement.
4. To the extent that it is not inconsistent with the terms of this Agreement, the Request for Proposals for this Project, RFP # 2019-1, and the CONSULTANT's proposal dated \_\_\_\_\_ is made a part of this Agreement as if set forth herein. Notwithstanding the above, however, all payment and compensation provisions of the proposal are superseded by the terms of this Agreement, whether or not there is conflict or inconsistency between such provisions and such terms.

### **II. COMPENSATION This is a Cost Plus Fixed Fee Agreement.**

The BOROUGH shall compensate the CONSULTANT for allowable direct and indirect costs incurred, together with a Fixed Fee, up to a maximum not-to-exceed Project ceiling amount of \$ \_\_\_\_\_ for satisfactorily performing the work. In addition to this limitation on total compensation, the limitations set forth below on specific categories of costs shall also apply.

Properly drawn payment vouchers will be honored if the Fixed Fee amounts for the CONSULTANT is correct and the total costs are within the Project not-to exceed ceiling or as amended with BOROUGH Resolution of Additional Work modification(s). Invoices will not be rejected if cumulative costs exceed various line item budgets such as direct labor, direct expenses, overhead and ceilings. Billings in excess of estimated line item budget ceilings will be considered for payment with CONSULTANT explanation/justification and reallocation of the budget within the maximum not-to-exceed Project ceiling amount, or reduced to the current budget ceiling amount allowed. Monthly payment vouchers must detail actual costs versus budgeted for each of those contract line items. Progress reports must also accompany the monthly payment vouchers.

This Agreement does not create for the CONSULTANT the right to provide any services other than those specifically authorized in Part IV.A. The BOROUGH reserves the right to authorize

additional work with approval of the BOROUGH, perform any Extra Work services needed to complete the project with its own forces, or to contract with other parties for performance of said services.

1. Allowable Costs for Project Work

- A. Allowable direct costs are those costs incurred by the CONSULTANT solely for the Project work and services set forth in subparagraph C(i) and in subparagraph D(i) below and not identified as unallowable. Allowable indirect costs are those costs (i.e., payroll burden, general overhead and administrative costs) of the CONSULTANT set forth in subparagraph C(ii) below which are not identified solely with one agreement, but are rather, companywide or attributable to more than one agreement of the CONSULTANT, and are not identified as unallowable. Costs incurred in preparing proposals for this Agreement and modifications, if any, shall be treated as allowable indirect costs.
- B. Unallowable costs are those costs identified in the Agreement as unallowable or nonreimbursable; costs identified as unallowable or nonreimbursable by New Jersey Department of Transportation policies and practices pertinent to agreement compensation; and costs identified as unallowable or nonreimbursable in FAR (Federal Acquisition Regulations Subpart 31.2 - Contracts with Commercial Organizations (48 C.F.R. 31.201 et. seq.)).

If costs are identified as unallowable or nonreimbursable in any one of the categories specified in the previous sentence, they shall be considered unallowable costs.

- C. The BOROUGH shall reimburse the CONSULTANT upon receipt of properly drawn monthly invoices for those portions of its allowable direct labor and indirect costs incurred for Project work, up to a maximum total reimbursement of allowable costs of \$ \_\_\_\_\_.

The BOROUGH shall reimburse the CONSULTANT for the following allowable direct labor and indirect costs:

- i. As allowable direct costs, wages earned by partners and principals while performing technical work on the Project and the actual wages paid to employees for work on the Project. A Certified Payroll Schedule shall be submitted with the first invoice and shall list all employees of the CONSULTANT separately, who will perform technical functions on the project, stating their names, titles, ASCE grades, and direct hourly wage rates as of the awarded date posted on the BOROUGH website. The CONSULTANT shall provide an additional certified payroll when a cost proposal is required for Additional or Extra Work and when employee(s) direct hourly wage rates change. The BOROUGH may request special documentation of any wage rate or individual job function at any time it deems necessary during the Agreement duration. No individual shall be shown on any invoice unless his or her function and title have been approved by the BOROUGH and wage rates have been documented in the project's then current Certified Payroll Schedule. Direct hourly wage rate shall not exceed the "Maximum Direct Hourly Wage Rate" per title and/or ASCE grade as proposed in the CONSULTANT's cost proposal through the Agreement duration or from the date of Additional or Extra Work modification as appropriate.

Upon notice to the Consultant, the Consultant will be required to provide monthly employment and wage data to the New Jersey Department of Transportation (NJDOT) via a web based application and on line electronic Form CC-257R, "Monthly Employment Utilization Report". All consultants must file employment and wage data reports no later than 10 calendar days

following the end of the reporting month. All employment and wage data must be verified as correct and accurate in corroboration with the certified payroll records. Failure to provide the requested employment and wage data may impact your current Pre-Qualification contract rating with the New Jersey Department of Transportation.

- ii. As allowable indirect costs, NJDOT approved overhead rate of \_\_\_\_ % shall be used for the duration of this contract.
- D. The BOROUGH shall reimburse the CONSULTANT as allowable direct non-salary costs, costs incurred for the following itemize expenses which are directly chargeable to the Project, and not normally provided as part of overhead, up to an amount not to exceed \$\_\_\_\_\_.
- i. Use of non-consultant owned vehicles at a mileage rate approved by the BOROUGH which will be at the actual company reimbursement rate allowed or at the mileage rate limitation noted in the current Federal Travel Regulation, whichever is lesser, exclusive of commutation. The current Federal Travel Regulation mileage limitations are at <http://www.gsa.gov/mileage>.
  - ii. Expendable materials and equipment rental as approved by the BOROUGH.
  - iii. Vendor invoiced prints, reproductions, renderings, and acquisition of documents.
  - iv. Provision of all regular and special equipment, tools, labor, and all else necessary to perform any task or inspection, including, but not limited to, sampling, testing and traffic control.
- E. If, during the duration of this Agreement, the CONSULTANT determines the costs to be incurred in any of the cost categories set forth in Part II.1.C.i. and ii or Part II.1.D.i. will be less than the category limitations contained therein, the CONSULTANT may ask the BOROUGH to transfer the excess monies to one of the other categories to cover the cost of additional work or anticipated overages within the scope of the Agreement or a previously executed extra work Consultant Agreement Modification. The CONSULTANT must provide the BOROUGH with a complete written justification for the transfer and gain approval from the BOROUGH before performing the proposed additional work or before incurring costs in excess of a category limitation.

2. Fixed Fee

The BOROUGH shall pay the CONSULTANT a Fixed Fee of \$\_\_\_\_\_ for performance of Project work in a satisfactory manner. The BOROUGH shall pay as invoices are approved, a percentage of the Fixed Fee, which percentage shall be equal to the percentage of the Project completed during the period covered by the invoice as shown on the CONSULTANT's monthly progress report.

2. Payment for Additional Work Costs and Related Fixed Fee

If the BOROUGH orders a change in the work which constitutes Additional Work, the BOROUGH shall pay the CONSULTANT for Additional Work costs in accordance with allowable costs incurred, as defined, and in a manner set forth, in paragraph 1 above. Additional Work is defined as work performed by the CONSULTANT outside of the scope or limits of Project work (as expanded by a Freeholder Resolution) but connected with the Project, and/or work necessitated by the revision of approved completed work, and/or work designated as Additional or Extra Work in this Agreement. In addition to payment of additional costs, the BOROUGH shall pay a negotiated Fixed Fee for

Additional Work. The Fixed Fee shall be treated in the manner set forth in paragraph 2 above. Allowable costs and Fixed Fee for Additional Work shall be established by BOROUGH and shall be in addition to the limitations established in paragraphs 1 and 2, above, for the Agreement. They shall be invoiced as new tasks from the Agreement work and other Additional or Extra Work.

The CONSULTANT shall perform no Additional or Extra Work without having received prior written notice from the BOROUGH authorizing such work.

4. Payment of Subconsultant(s)

Pursuant to *N.J.S.A. 2A:30-2b*, as amended (*P.L. 2006, c. 96*), the CONSULTANT shall pay its subconsultants and subcontractors within 10 days of receipt of payment from the BOROUGH and those subconsultants and subcontractors shall pay their sub-subconsultants and sub-subcontractors within 10 days of receipt of payment from the CONSULTANT, unless otherwise agreed between the parties.

5. Payment of Overpayment

In the event of overpayment to the CONSULTANT, the BOROUGH may, at its option either require the CONSULTANT to repay the overpayment or deduct the amount of overpayment from monies due the CONSULTANT under this Agreement.

6. Retention of Records

- A. The CONSULTANT shall maintain all documentation related to products, transactions or services under this contract for a period of five years from the date of final payment. Such records shall be made available to the New Jersey Office of the State Comptroller upon request. (*N.J.A.C. 17:44-2.2*)
- B. FAR Subpart 4.7 - Contractor Records Retention (Apr. 1984) (48 C.F.R. 4.700 et seq.) and FAR 52.215-1 (Apr. 1984) (48 C.F.R. 52-215-1) are hereby made a part of this Agreement by reference as if set forth fully herein.
- C. The CONSULTANT shall make available at its office at all times requested retained records and records involved with disputes, litigation or settlement of claims for examination, audit, and/or reproduction by the BOROUGH without conditions of any type.

7. Final Payment

When in the opinion of the CONSULTANT all work required by the Agreement has been completed, it shall notify the BOROUGH in writing of this. The BOROUGH will notify the CONSULTANT that it shall submit a final invoice which shall include the following release clause: "In consideration of the requested final payment, the CONSULTANT hereby releases and gives up any and all claims the CONSULTANT may have, now or in the future, against the BOROUGH of Hightstown, its officers and employees, arising out of any and all obligations assumed and work performed under the Professional Services Agreement for RFP 2019-1, including claims for Extra or Additional Work." If this invoice is accepted by the BOROUGH, the BOROUGH will then make final payment to the CONSULTANT. It is expressly understood and agreed that this final payment shall not waive any rights of the BOROUGH to adjust and collect subsequently disclosed overpayments.

Should the Agreement be terminated prior to completion of all work, the procedures set forth in the above paragraph shall be followed to close out the Agreement.

III. TIME The BOROUGH and CONSULTANT agree that:

1. Work under this Agreement shall begin within ten (10) calendar days of the CONSULTANT's receipt of written notice from the BOROUGH to proceed.
2. Additional Work or Extra Work shall begin within ten (10) calendar days of receipt by the CONSULTANT of a copy of the BOROUGH Resolution authorizing such Additional Work or Extra Work and shall be completed by the date established for the completion of the work under paragraph 1 above, unless a new completion date for all work under this Agreement or for the specific Additional Work or Extra Work in question is established.

IV. STATEMENT OF CONSULTANT'S WORK AND SERVICES

1. The CONSULTANT shall:
  - A. Perform the work tasks described in the Request for Proposals, RFP #2019-1, proposal dated TBD and incorporated herein pursuant to paragraph I.5. above.
  - B. At no cost to the BOROUGH, give general advice and make visits to the construction site, as required, to correct all errors and omissions in the plans or specifications and to discuss the conformity between the project construction and construction contract documents.
2. The CONSULTANT agrees to ensure that Emerging Small Business Enterprises (ESBEs), as defined in NJDOT Disadvantaged Business Enterprise Program, and the Disadvantaged Business Program (DBE) as defined in 49 CFR, Part 26, Subpart B and FTA Circular 4716.1A, or the State Small Business Program (SBE's I, II, III, IV, V) criteria, set forth in N.J.A.C. 12A:10 (N.J.A.C. 17:13) and N.J.A.C. 12A:10A (N.J.A.C. 14:14) have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal and/or State funds. For this Agreement, the DBE/ESBE participation goal, as established by the N.J. Department of Transportation, shall be a minimum of 12.44% of the Project cost. The Consultant hereby commits to make a good faith effort to achieve a DBE/ESBE goal of 12.44% under this Agreement. Failure to achieve or make a good faith effort to meet the established goal may result in sanctions and/or project termination.

- V. The CONSULTANT's representative and coordinator for this Project, to whom the BOROUGH will address all correspondence is:

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

The CONSULTANT's project representative, address and telephone number may be changed by the CONSULTANT upon written notification and approval by the BOROUGH.

- VI. The BOROUGH's coordinator for this Project, to whom the CONSULTANT shall address all correspondence, is:

**Debra Sopronyi, Borough Administrator/Clerk**  
**Borough of Hightstown**  
**156 Bank Street**  
**Hightstown, New Jersey 08520**  
**609-490-5100**

The BOROUGH'S Coordinator, address and telephone number may be changed by the BOROUGH upon written notification to the CONSULTANT.

VII. STANDARD TERMS AND CONDITIONS

1. Applicable Law

This Agreement shall be governed by the terms of the Local Public Contracts Law, NJSA 40A:11-1 et seq. and all other applicable provisions of New Jersey Law.

The CONSULTANT shall stay fully informed of all Federal, State, and local laws, ordinances, and regulations, and all orders and decrees of bodies or tribunals having any jurisdiction or authority, which in any manner affect those engaged or employed on the Project, or which in any way affect the conduct of the work. It shall at all times observe and comply with, and shall cause its agents, subcontractors and employees to observe and comply with, all such laws, ordinances, regulations, orders, and decrees, and shall protect and indemnify the BOROUGH and its representatives against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order, or decree, whether by itself or its agents, subcontractors or employees. If any discrepancy or inconsistency is discovered between the Agreement and any such law, ordinance, regulation, order or decree, the CONSULTANT shall immediately report the same to the BOROUGH in writing.

2. Permits and Licenses

The CONSULTANT shall procure all permits, grants and licenses and give all notices necessary and incidental to the due and lawful performance of the work, except that where the BOROUGH has procured permits, grants or licenses relating to the performance of the work, the CONSULTANT will be relieved of the above obligation to the extent provided by the terms of such permit, grant or license. However, the CONSULTANT shall advise the issuing agency or party of its proposed operations and obtain their cooperation and such supplemental permission as may be necessary. The CONSULTANT shall obtain from the BOROUGH all available information on the permits, grants and license it has obtained. Charges for permits, grants and licenses in connection with the work shall be paid by the BOROUGH and shall not be included in the Allowable Costs of this Agreement.

3. Patented Devices, Materials and Processes

If the CONSULTANT employs any design, device, material, or process covered by letters of patent or copyright, it shall provide for such use by suitable legal agreement with the patentee or owner. The CONSULTANT shall assume all costs arising from the use of patented materials, equipment, devices, or processes used on or incorporated in the work. The CONSULTANT shall defend, indemnify and save harmless the BOROUGH, any affected third party, or political subdivision from any and all claims for infringement by reason of the use of any such patented design, device, material or process, or any trademark or copyright, and shall indemnify the BOROUGH for any costs, expenses and damages which it may be obliged to pay by reason of an infringement, at any time during the prosecution of or after the acceptance of the work.

4. Independent Contractor

The relationship of the CONSULTANT to the BOROUGH is that of an independent contractor, and said CONSULTANT, in accordance with its status as an independent contractor, covenants and agrees that it will conduct itself consistent with such status, that it will neither hold itself out as, nor claim to be, an officer or employee of the BOROUGH by reason hereof. The CONSULTANT will not, by reason hereof, make any claim, demand or application to or for any right or privilege applicable to an officer or employee of the BOROUGH, including but not limited to, workers' compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit.

5. Third Party Beneficiary Clause

It is specifically agreed between the parties executing this Agreement that it is not intended by any of the provisions of any part of the Agreement to make the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party to the Agreement to maintain a suit for personal injuries or property damage pursuant to the

terms or provisions of the Agreement.

It is the further intent of the BOROUGH and the CONSULTANT in executing this Agreement that no individual, firm, corporation, or any combination thereof, which supplies materials, labor, services or equipment to the CONSULTANT for the performance of the work becomes thereby a third party beneficiary of this Agreement. The BOROUGH and the CONSULTANT understand that such individual, firm, corporation, or combination thereof, has no right to bring an action in the courts of this State against the BOROUGH.

6. Assignment of Funds and Claims

The CONSULTANT shall not transfer or assign to any person any funds, due or to become due, under this Agreement, or claims of any nature it has against the BOROUGH, without the written approval of the BOROUGH having first been obtained. The BOROUGH in its sole discretion, considering primarily the interests of the BOROUGH, may grant or deny such approval.

7. Personal Liability of Public Officials

In carrying out any of the provisions of the Agreement, or in exercising any power or authority granted to them by or within the scope of the Agreement, there shall be no liability upon the BOROUGH OF HIGHTSTOWN COUNCIL, or other BOROUGH officers or employees of the BOROUGH, either personally or as officials of the BOROUGH, it being understood that in all such matters they act solely as agents and representatives of the BOROUGH.

8. Recovery of Monies by the Borough

Whenever it is provided that the BOROUGH withhold or deduct money from the monies due or to become due the CONSULTANT, or that the CONSULTANT is to pay or return monies to the BOROUGH for any reason, or that the BOROUGH can charge against the CONSULTANT certain costs, assessments or fines, or that the BOROUGH can recover any sum for any reason from the CONSULTANT, it is understood that the BOROUGH has available to it all monies due or to become due the CONSULTANT under this Agreement as well as under other agreements between the CONSULTANT and the BOROUGH. Such other agreements shall include joint ventures in which the CONSULTANT is a participant, but only to the extent of its participation. The right to recover against the CONSULTANT as herein provided is in addition to and does not affect the right of the BOROUGH to seek recovery against the CONSULTANT as otherwise allowed by law.

9. No Waiver of Legal Rights

Notwithstanding any other provision of this Agreement, for a period of 3 years after final acceptance all estimates and payments made pursuant to the Agreement, including the Final Payment, shall be subject to correction and adjustment for clerical or other errors in the calculations involved in the determination of quantities and payments. The CONSULTANT and the BOROUGH agree to pay to the other any sum due under this provision, provided, however, if the total sum to be paid is less than \$100, no such payment shall be made.

A waiver on the part of the BOROUGH of any breach of any part of the Agreement shall not be held to be a waiver of any other or subsequent breach.

Except as limited by law, the CONSULTANT shall be liable to the BOROUGH at any time both before and after completion of the work and final payment for latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the BOROUGH's rights under any warranty or guaranty.

10. Limitations of Liability

In no event, whether under the provisions of this Agreement, as a result of breach hereof, tort (including negligence) or otherwise, shall the BOROUGH be liable to the

CONSULTANT for any special, consequential, incidental or punitive damages including, but not limited to, loss of profit or revenues, cost of capital, or interest of any nature.

11. Indemnification

The CONSULTANT shall defend, indemnify, protect, and save harmless the BOROUGH, its agents, servants, and employees from and against any and all suits, claims, losses, demands or damages of whatever kind or nature arising out of or claimed to arise out of any willful misconduct or negligent act, error, or omission of the CONSULTANT, its agents, servants, employees and subcontractors in the performance of this Agreement. The CONSULTANT shall, at its own expense, appear, defend and pay all charges for attorneys and all costs and other expenses arising from such suit or claim or incurred in connection therewith. If any judgment shall be rendered against the BOROUGH for which indemnification is provided under this paragraph, the CONSULTANT shall at its own expense satisfy and discharge the same.

The BOROUGH shall, as soon as practicable after a claim has been made against it, arising out of or claimed to arise out of the willful or negligent act, error or omission of the CONSULTANT, its agents, servants or employees, give written notice thereof to the CONSULTANT along with full and complete particulars of the claim. If suit is brought against the BOROUGH or any of its agents, servants, and employees, the BOROUGH shall expeditiously forward or have forwarded to the CONSULTANT every demand, complaint, notice, summons, pleading, or other process received by the BOROUGH or its representatives.

It is expressly agreed and understood that any approval by the BOROUGH of the services performed and/or reports, plans or specifications provided by the CONSULTANT shall not operate to limit the obligations of the CONSULTANT assumed in this provision or in the other provisions of this Agreement. It is further understood and agreed that the BOROUGH assumes no obligation to indemnify or save harmless the CONSULTANT, its agents, servants, employees and subcontractors from and against any claim which may arise out of their performance of this Agreement. Furthermore, the CONSULTANT expressly understands and agrees that the provisions of this indemnification clause shall in no way limit the CONSULTANT's obligations assumed in this Agreement, nor shall they be construed to relieve the CONSULTANT from any liability, nor preclude the BOROUGH from taking any other actions available to it under any other provisions of this Agreement or otherwise in law.



12. Insurance

The CONSULTANT has provided proof of all insurance required in this section of the Agreement, and shall maintain this insurance for the duration of this Agreement except as otherwise noted herein. Minimum insurance required under this section shall consist of the following:

A. COMMERCIAL GENERAL LIABILITY INSURANCE

The minimum limits of liability for this insurance shall be as follows:

<u>BODILY INJURY LIABILITY</u>	
<u>Each Occurrence</u>	<u>Aggregate</u>
\$1,000,000	\$2,000,000

  

<u>PROPERTY DAMAGE LIABILITY</u>	
<u>Each Occurrence</u>	<u>Aggregate</u>
\$1,000,000	\$2,000,000

The above required commercial general liability insurance shall name the BOROUGH, its officers, employees and Borough Engineer as additional insureds. The coverage to be provided under this policy shall be at least as broad as the standard, basic unamended and unendorsed commercial general liability policy of the CONSULTANT, and shall include contractual liability coverage. In the event that the above coverage is or may be impaired by claims against the CONSULTANT, the BOROUGH in its sole discretion, may increase the aggregate limits in order to provide the minimum protection to the BOROUGH as required above. Commercial general liability insurance shall be procured and maintained until at least one year after the completion of all services performed under this Agreement. For design services, this shall be the date that plans and specifications are approved by the BOROUGH.

B. BUSINESS AUTOMOBILE LIABILITY INSURANCE

The business automobile liability policy shall cover owned, non-owned, and hired vehicles with minimum limits as follows:

<u>BODILY INJURY LIABILITY</u>	
<u>Each Occurrence</u>	<u>Aggregate</u>
\$1,000,000	\$1,000,000

  

<u>PROPERTY DAMAGE LIABILITY</u>	
<u>Each Occurrence</u>	<u>Aggregate</u>
\$1,000,000	\$1,000,000

C. WORKER'S COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE

Workers compensation insurance or its equivalent with statutory benefits as required by any state or Federal law, including standard "other states" coverage; employers liability insurance or its equivalent with minimum limits of:

\$500,000	each accident for bodily injury by accident;
\$500,000	each employee for bodily injury by disease; and
\$500,000	policy limit for bodily injury by disease.

D. PROFESSIONAL LIABILITY INSURANCE

The CONSULTANT shall carry errors and omissions, professional liability insurance and/or professional malpractice insurance sufficient to protect the CONSULTANT from liabilities arising out of professional obligations performed pursuant to the requirements of this Agreement. This insurance shall be in the amount of \$1,000,000, and shall be in such policy form as shall be approved by the

BOROUGH. Should the CONSULTANT change carriers during the term of this Agreement, it shall obtain from its new errors and omissions, professional liability insurance and/or professional malpractice insurance carrier an endorsement for retroactive coverage.

13. Notice

“Written notice” shall be sufficiently given when delivered or sent by United States mail to the CONSULTANT’s project representative or to the Borough Engineer, respectively, at the address shown in this Agreement.

14. Consultant

The term “CONSULTANT” means the person, firm, or corporation which will perform the work. The term is used collectively to include the CONSULTANT and all other persons, firms, or corporations employed or contracted with by the CONSULTANT in connection with this Agreement.

The CONSULTANT shall assign to the work a competent project representative who shall coordinate all phases of the work, including additions and revisions thereto, until final acceptance of the work. The project representative’s educational background and job experience shall be submitted to the BOROUGH for review. The representative shall be approved by the BOROUGH in writing. The representative shall be available to the Borough at all reasonable times and all correspondence from the BOROUGH to the CONSULTANT relative to the Project shall be directed to him or her.

The CONSULTANT shall not remove any project representative, consulting engineer, inspector or other person whose name is submitted to the BOROUGH as part of the CONSULTANT’s Professional Qualifications or Proposal, without the BOROUGH’s prior approval. The CONSULTANT acknowledges that the BOROUGH relied on Project participation by all persons named in the Professional Qualifications and Proposal in entering into this Agreement with the CONSULTANT. The BOROUGH reserves the right to have such person replaced if, in the judgment of the BOROUGH, any such person proves unsatisfactory.

The CONSULTANT shall allow representatives of the BOROUGH to visit the office(s) of the CONSULTANT periodically, without notice, in order to monitor work being performed under this Agreement.

15. Subcontracting

The CONSULTANT shall not subcontract any of the work.

16. Quality Management Plan

The CONSULTANT shall submit a Quality Management Plan to the BOROUGH prior to the start of the Project.

The CONSULTANT shall establish and maintain a Quality Management Plan approved by the BOROUGH, which sets forth both the CONSULTANT's policy for quality control and procedures for implementing that policy during the performance of work on the Project. All work performed by the CONSULTANT shall be in conformity with the Quality Management Plan approved by the BOROUGH. Approval of the Quality Management Plan by the BOROUGH does not relieve the CONSULTANT of any liability for any deficiency in the work. The BOROUGH, by approving the Quality Management Plan, does not accept any liability therefore or for any deficiency or error in the work performed by the CONSULTANT. If after approval by the BOROUGH of the Quality Management Plan, the BOROUGH determines that the CONSULTANT has not conformed with the approved Quality Management Plan, the BOROUGH will so notify the CONSULTANT in writing and require the submission of a corrective action plan within 30 days of the date of the non-conformity notice. Failure of the CONSULTANT to provide a timely corrective action plan deemed satisfactory by the BOROUGH may be considered a material breach of this Agreement.

17. Borough's Right to Withhold Payments

The BOROUGH shall have the right to withhold form payments due the CONSULTANT such sums as are necessary to protect the BOROUGH against any loss or damage which may result from negligence or unsatisfactory work by the CONSULTANT, failure by the CONSULTANT to perform its obligations, or claims filed against the CONSULTANT or the BOROUGH relating to the CONSULTANT's work or resulting therefrom.

18. Ownership of Documents

Documents of every nature prepared under or as a result of this Agreement, including, but not limited to, all basic notes, sketches, drawings, specifications, computations, test data, survey results, models, photographs and renderings are the property of the BOROUGH. They shall be delivered to the BOROUGH in good condition and properly indexed prior to final payment. The CONSULTANT assumes the positive obligation of maintaining all such documents until delivery to the BOROUGH. The BOROUGH may use these documents without reservation.

The CONSULTANT may retain and use copies of all such documents. The CONSULTANT will not be responsible for another party's application of the information contained in such documents other than that for which the information was intended. All technical data in regard to this Agreement, whether existing in the office of the CONSULTANT or existing in the offices of the BOROUGH, shall be made available to either party to this Agreement without expense to the other party.

19. Monthly Reporting

The CONSULTANT shall submit the following on a monthly basis to the BOROUGH for its approval:

- A. Unless otherwise stated in the RFP, monthly Progress Reports are required regardless of billing activity. They shall include the following:
  - i. A narrative description of the work performed during the reporting period and, if necessary, a discussion of any difficulties or delays encountered;
  - ii. A comparison, by task, of work performed to the baseline schedule including a narrative which clearly depicts the percentage completed by task;
  - iii. A comparison, by task, of costs incurred with amounts budgeted (not applicable to Fixed Price Agreements);
  - iv. The percentage of work completed to date;
  - v. A list indicating those submissions for which the CONSULTANT is awaiting a response.
  
- B. Invoices:
  - i. The CONSULTANT shall prepare and submit two original company invoices for payment for work performed under this Agreement on Payment Voucher forms supplied by the BOROUGH.
  - ii. The CONSULTANT shall submit a separate company invoice for each billing under this Agreement which includes a grand summary and supporting summaries for each Consultant Agreement Modification for Extra Work.
  - iii. Each invoice shall contain, but is not limited to, the following:
    - a. Project Name
    - b. The Consultant Agreement date, RFP #, PO #, Account #
    - c. The billing period covered by the invoice
    - d. The amount of the current billing and the amount for the items listed as follows:
      - 1. For Cost Plus Fixed Fee Agreements:
        - i. Salary/Wage Expense
        - ii. Payroll Burden & Overhead
        - iii. Non-Salary Direct Expense (detailed line item w/ back up)
        - iv. Sub-consultant Expense
        - v. Proportional Amount of Fixed Fee

- e. Other items as determined by the BOROUGH and communicated to the CONSULTANT in writing.
- iv. Receipts are required to be submitted with an invoice for direct expenses.
- v. The CONSULTANT shall prepare the Final Invoice in accordance with the Agreement.
- vi. The BOROUGH will not process any invoice for payment without accompanying monthly progress reports for the corresponding reporting periods.
- vii. The BOROUGH will not process for payment any monthly invoice that shows the total amount payable to be less than \$2,000.00 for agreements with maximum project amounts in excess of \$100,000.00 or less than 2% of the maximum project amount for all other agreements, unless the CONSULTANT's written justification for such a payment is approved by the BOROUGH. In no event however, will the CONSULTANT be precluded from submitting an invoice in a lesser amount if there has been no project work performed in at least three months and the BOROUGH has been so notified.
- viii. Upon notice to CONSULTANT, the Consultant will be required to provide monthly employment and wage data to the NJDOT via web based application and on line electronic Form CC-257R, "Monthly Employment Utilization Report". All consultants must file employment and wage data reports no later than 10 calendar days following the end of the reporting month. All employment and wage data must be verified as correct and accurate in corroboration with the certified payroll records.

**C. Prompt Payment Provisions – Borough Billing & Payment Cycles**

Contracts for the improvement of real property and related design professional contracts are subject to the prompt payment provisions of *N.J.S.A. 2A:30A-1, et seq.*, as amended (*P.L. 2006, c. 96*), modified, however, in accordance with the BOROUGH's billing and payment cycles, as follows.

The CONSULTANT will bill for periodic payments under the contract no more frequently than monthly.

Absent extraordinary circumstances, approval by the Hightstown Borough Council is required for each periodic payment, final payment or payment of retainage monies. The Hightstown Borough Council regularly, but not always, meets on the first and third Mondays of each month. (A specific schedule of meeting dates will be supplied to the Consultant upon request.) The BOROUGH reserves the right to amend its regular meeting schedule upon notice to the CONSULTANT.

The CONSULTANT should submit a bill (including a properly prepared, dated and signed BOROUGH voucher) to the BOROUGH at least 14 days prior to a Council meeting date. The "billing date" is the date when the BOROUGH receives the bill. The BOROUGH mails payment of approved bills by no later than the fifth business day following the Council meeting at which payment is approved.

If the BOROUGH challenges all or part of a bill submitted by the CONSULTANT, the BOROUGH will notify the CONSULTANT in writing of the amount(s) withheld and the reason(s) therefor within 3 business days following the Council meeting that occurs on or after the 20<sup>th</sup> day following the billing date.

Pursuant to *N.J.S.A. 2A:30-2b*, as amended (*P.L. 2006, c. 96*), the CONSULTANT shall pay its subconsultants and subcontractors within 10 days of receipt of payment from the BOROUGH and those subconsultants and subcontractors shall pay their sub-subconsultants and sub-subcontractors within 10 days of receipt of payment from the CONSULTANT, unless otherwise agreed between the parties.

20. Changes – Consultant Agreement Additional or Extra Work

The BOROUGH reserves the right to make such alterations, deviations, additions to or omissions from the work to be performed under this Agreement or from the provisions of the Agreement affecting performance of the work including the right to increase or decrease all or any portion of the work or to omit all or any portion of the work, as may be deemed by the BOROUGH to be necessary or advisable. The BOROUGH may also require such Additional or Extra Work as the BOROUGH may determine to be necessary for proper completion of the Project. Such increases or decreases, alterations and omissions shall not invalidate the Agreement, and the CONSULTANT agrees to accept the work as changed, the same as if it had been a part of the original Agreement.

All changes, extensions of time and adjustments to compensation deemed appropriate by the BOROUGH will be formalized. The BOROUGH may direct the CONSULTANT to proceed with a desired change by written notice issued prior to formalization of the change, and the CONSULTANT shall comply. In such cases, the BOROUGH will, as soon as practicable, formalize the requested Additional or Extra Work.

The CONSULTANT shall not proceed with work which it believes or claims involve a change without prior written notice from the BOROUGH authorizing the work. In such event the CONSULTANT shall give written notice to the BOROUGH advising the BOROUGH of its claim. If it is determined pursuant to provision 27 that the work does, in fact, constitute a change, an appropriate Additional or Extra Work authorization will be issued. However, if the determination made pursuant to provision 27 is that the work does not constitute a change, then the BOROUGH will give written notice to the CONSULTANT to proceed with the work in accordance with the Agreement.

The CONSULTANT shall not be reimbursed for work of any nature made necessary because of errors or omissions attributable to the CONSULTANT.

21. Disputes

If, during the course of the Agreement, a dispute between the BOROUGH and the CONSULTANT arises to which *N.J.S.A. 40A:11-50* is applicable, the parties will participate, in good faith, in non-binding mediation.

Mediation is intended to be an informal process for resolving disputes between the CONSULTANT and BOROUGH. Both parties shall act in good faith and exercise their best efforts to achieve a reasonable settlement of disputes.

Either party may demand such mediation by written notice to the other party. The written notice shall contain at least: (a) A brief statement of the nature of the dispute, and (b) the name, address and phone number of that party's designated representative for the purposes of mediation.

The other party shall designate its representative for mediation in writing no later than five business days after receipt of the demand for mediation. The respective designees shall thereupon, and promptly, with due regard for the need for timely action, choose a mediator.

If the parties cannot agree on a mediator, or if they prefer, they shall choose a reputable mediation firm. Any mediation firm so chosen shall present to the parties a list of at least five proposed mediators, along with a summary of each person's qualifications to serve as the mediator. Each party shall rank the proposed mediators in order of preference. The fifth or lower ranked person on each party's list shall be excluded from further consideration. Each party shall assign a score of "4" to their first choice, "3" to their second choice, "2" to their third choice and "1" to their remaining fourth choice. The parties' score for each person shall then be added together. The person with the highest combined score shall be the chosen mediator. In the event of a tie, the mediator shall be chosen by lot.

The parties will not be bound by the Rules of Evidence in presenting their positions

before the mediator. The mediation shall be conducted in such reasonable and efficient manner as may be agreed between the parties and the mediator or, lacking such agreement, as may be determined by the mediator. Each party will bear its own costs of participation in mediation, and they will each pay one-half the costs of the mediator.

If, after a good faith effort to resolve the dispute through mediation, the dispute is not resolved, either party may terminate the mediation by written notice to the mediator and the other party. In that event, either party may submit the dispute to the Superior Court of New Jersey, Mercer County, for adjudication, which Court shall have exclusive original jurisdiction of the dispute.

22. Assignment

At the option of the BOROUGH, this Agreement shall bind the heirs, representatives, successors, or assigns of the CONSULTANT. Any purported transfer or assignment of this obligation without written approval or consent by the BOROUGH shall be void.

23. Special Procurements

If the CONSULTANT desires to procure any goods, services, or documents for which reimbursement will be sought, and which were not specifically itemized in this agreement or in the CONSULTANT's proposal as revised and approved by the BOROUGH, it shall obtain the BOROUGH's written approval prior to the procurement. In addition, the CONSULTANT shall recommend, for the BOROUGH's consideration, the specific requirements or specifications. Upon securing approval for both the reimbursement and the specific requirements or specifications, the CONSULTANT shall proceed with the procurement. No claim for delay shall be made for the time involved in securing the BOROUGH's approval.

24. Solicitation

The CONSULTANT warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the CONSULTANT, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person other than a bona fide employee working solely for the CONSULTANT, any fee, commission, percentage, brokerage fee, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the BOROUGH shall have the right either to annul this Agreement without liability, or to deduct from the Agreement price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or consideration.

25. Buy America

Only manufactured and farm products of the United States, wherever available, will be used in the work. *N.J.S.A. 40A:11-18.*

26. Work by Others

The BOROUGH reserves the right to employ other architects, engineers, and consultants in connection with the work.

27. Information Concerning Project

The CONSULTANT will not divulge information concerning this Project to anyone (including, for example, information in applications for permits, variances, etc.) without prior approval or direction of the BOROUGH. It will obtain similar agreements from persons and firms employed by it. The BOROUGH reserves the right to release all information as well as to time of its release, form and content. This requirement shall survive the expiration of the Agreement.

28. Scheduling

All time limits as stated in the Agreement are of the essence.

Before beginning the work, the CONSULTANT shall submit for the BOROUGH's approval a schedule setting forth its plan for completing the work in accordance with the

Agreement. Following approval by the BOROUGH, the CONSULTANT shall complete all work in accordance with the approved schedule. It shall coordinate and advance all work items in this Agreement and any Consultant Agreement Modification efficiently and economically consonant with the scheduled completion date. If any phase of the work cannot be completed as scheduled, the CONSULTANT shall submit a written request for a reasonable extension of time. All such requests shall include a statement as to the cause of the delay and be provided to the BOROUGH at the time that the need becomes apparent, but at least 15 days prior to the scheduled completion date of that particular phase of the work. A revised schedule shall also be submitted. The CONSULTANT shall make regular submissions to the BOROUGH in accordance with the BOROUGH's scheduling and review procedures and at any other time requested by the BOROUGH.

29. Review

The CONSULTANT shall perform its obligation under this Agreement with the understanding that the BOROUGH, the State and the Federal Government have the right to review, and must find acceptable, the Project and all documents produced by the CONSULTANT pertaining to the Project.

30. Unacceptable Work

If the BOROUGH determines that any document prepared by the CONSULTANT under this Agreement is unacceptable due to errors, omissions or failure to comply with requirements of this Agreement, the CONSULTANT shall promptly correct and revise the unacceptable document in accordance with directions received from the BOROUGH at no cost to the BOROUGH. The corrected and revised document shall be resubmitted for BOROUGH approval.

The BOROUGH shall give written notice to the CONSULTANT as soon as practicable after it becomes aware of a negligent error or omission by the CONSULTANT. CONSULTANT shall be liable to the BOROUGH for all damages to the BOROUGH caused by CONSULTANT's negligent errors and omissions. The CONSULTANT shall reimburse the BOROUGH for the full costs it has incurred as a result of such negligent errors and omissions, including interest and other expenses.

31. Stop Work

The CONSULTANT shall stop all work promptly, if so directed in writing by the BOROUGH.

32. Termination

The BOROUGH may terminate the CONSULTANT's services under this Agreement upon seven (7) days written notice. In such event, and where the CONSULTANT's performance is satisfactory, the CONSULTANT shall be paid in accordance with the method of compensation under Part II of the Agreement as follows:

Cost Plus Fixed Fee Agreements: 1) allowable direct and indirect costs incurred in the performance of its work up to and including the date that the CONSULTANT receives notice of termination, together with allowable direct costs incurred in closing out the Project in accordance with the notice to terminate; 2) a percentage of the Fixed Fee based on the percentage of the Project completed up to and including the date that the CONSULTANT receives notice of termination.

If the BOROUGH has terminated the Agreement due to failure of the CONSULTANT to perform in a satisfactory manner as determined by the BOROUGH, the BOROUGH may, at the option of the BOROUGH, in accordance with the method of compensation under Part II of the Agreement, make the following adjustments:

The BOROUGH shall make no further payment to the CONSULTANT under this Agreement and may require the CONSULTANT to repay all or a portion of the monies already paid. In addition, the BOROUGH shall make no payment of any

close-out costs which the CONSULTANT may incur at the direction of the BOROUGH.

Nothing herein shall limit the right of the BOROUGH to recover any and all costs and damages resulting from the CONSULTANT's failure to perform the work in a satisfactory manner.

Except as stated above, the CONSULTANT shall have no right to, nor shall it make any claim for, damages or additional compensation of any type whatever by reason of termination regardless of fault.

All documents begun or completed as the result of this Agreement shall be immediately turned over to the BOROUGH upon termination consistent with provision 23.

33. Suspension

The BOROUGH may, in its sole discretion, suspend the work. Compensation for a suspension or delay shall be allowed as follows:

If the BOROUGH determines that the work of this Agreement has been suspended or delayed for a period of cumulatively totaling 365 calendar days, and if the BOROUGH determines that the suspension or delay has resulted from no fault of the CONSULTANT, then a Consultant Agreement Modification covering the remaining work to be done shall be executed. The compensation terms of the Consultant Agreement Modification for that remainder shall be as follows for Cost Plus Fixed Fee agreements:

1. Upon resumption of work by the CONSULTANT, an updated schedule of wage rates, subject to review and approval by the BOROUGH, shall be submitted by the CONSULTANT. These wage rates shall be applied to the unused portion of the work hours developed by the CONSULTANT in the proposal, and approved by the BOROUGH. A revised total amount for allowable direct or indirect costs shall then be established by Consultant Agreement Modification.
2. The new Fixed Fee shall be in the same ratio as the original Fixed Fee to the original estimate of allowable direct and indirect costs, multiplied by the revised amount for allowable direct and indirect costs as determined in a. above.

None of the above provisions shall negate any other terms of this Agreement.

For agreements where such suspension or delay is determined by the BOROUGH to be substantially the fault of the CONSULTANT, the BOROUGH may, at its option, suspend all payments to the CONSULTANT after the established completion date. Payment shall be reinstated by the BOROUGH upon completion of the work in accordance with other provisions stated herein. In the case of such delay by the CONSULTANT, there shall be no upward adjustment in direct or indirect costs or Fixed Fee. Alternately, the BOROUGH may terminate the Agreement consistent with provision 32.

34. Standards and Procedures

The Standards and Procedures contained or referred to in the Borough's Request for Proposals will apply to the Agreement.

35. Nondiscrimination

During the performance of this Agreement, the CONSULTANT, for itself, its assignees and successors in interest (hereinafter referred to as the "CONSULTANT"), agrees as follows:

1. Compliance with Regulations: The CONSULTANT will comply with Regulations of the NJ Department of Transportation relative to nondiscrimination in federally assisted programs of Mercer County (Title 49. Code of Federal Regulations, Part 21 through Appendix H, and Title 23 CFR Part 710.405(b), hereinafter referred to as the Regulations), which are incorporated herein by reference and made a part of this Agreement.



2. Nondiscrimination: The CONSULTANT, with regard to the work performed by it after award and prior to completion of the work, will not discriminate on the basis of race, color, age, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The CONSULTANT will not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the Agreement covers a program set forth in Appendix B of the Regulations.
3. Solicitation for Subcontracts, Including Procurement of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by the CONSULTANT for work to be performed under a subcontract, including procurement of materials or equipment, such potential subcontractor or supplier shall be notified by the CONSULTANT of the CONSULTANT's obligations under this Agreement and the Regulations relative to nondiscrimination on the basis of race, color, age, sex or national origin.
4. Information and Reports: The CONSULTANT will provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the BOROUGH or the State Department of Transportation or the Federal Highway Administration to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a CONSULTANT is in the exclusive possession of another who fails or refuses as appropriate, and shall set forth what efforts it has made to obtain the information.
5. Sanctions for Noncompliance: In the event of the CONSULTANT's noncompliance with the nondiscrimination provisions of this contract, the BOROUGH shall impose such sanctions as are appropriate and available under the laws of the Borough and State.
6. Incorporation of Provisions: The CONSULTANT will include the provisions of paragraph 1 through 5 and this paragraph 6 in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, orders or instructions, issued pursuant thereto.
7. This Agreement is subject to all federal, state, and local laws, rules, and regulations, including, but not limited to, those pertaining to non-discrimination in employment and affirmative action for equal employment opportunity.
8. If at any time following the execution of this Agreement, the CONSULTANT intends to purchase materials or lease equipment not contemplated during the original proposal preparation, the CONSULTANT shall:
  - a. Notify the project initiator, in writing, of the type and approximate value of the work which the CONSULTANT intends to accomplish by such subcontract, purchase order or lease.
  - b. Give DBE firms equal consideration with non-minority firms in negotiations for any purchase orders or leases.

36. State of New Jersey Affirmative Action Rules for Professional Service Contracts

**MANDATORY EQUAL EMPLOYMENT OPPORTUNITY LANGUAGE**  
*N.J.S.A. 10:5-31 et seq. (P.L. 1975, c. 127)*  
*N.J.A.C. 17:27*

**GOODS, PROFESSIONAL SERVICE AND GENERAL SERVICE CONTRACTS**

During the performance of this contract, the contractor agrees as follows:

The contractor or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex. Except with respect to affectional or sexual orientation and gender identity or expression, the contractor will ensure that equal

employment opportunity is afforded to such applicants in recruitment and employment, and that employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex. Such equal employment opportunity shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Public Agency Compliance Officer setting forth provisions of this nondiscrimination clause.

The contractor or subcontractor, where applicable will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex.

The contractor or subcontractor will send to each labor union, with which it has a collective bargaining agreement, a notice, to be provided by the agency contracting officer, advising the labor union of the contractor's commitments under this chapter and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

The contractor or subcontractor, where applicable, agrees to comply with any regulations promulgated by the Treasurer pursuant to N.J.S.A. 10:5-31 et seq., as amended and supplemented from time to time and the Americans with Disabilities Act.

The contractor or subcontractor agrees to make good faith efforts to meet targeted Borough employment goals established in accordance with N.J.A.C. 17:27-5.2.

The contractor or subcontractor agrees to inform in writing its appropriate recruitment agencies including, but not limited to, employment agencies, placement bureaus, colleges, universities, and labor unions, that it does not discriminate on the basis of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex, and that it will discontinue the use of any recruitment agency which engages in direct or indirect discriminatory practices.

The contractor or subcontractor agrees to revise any of its testing procedures, if necessary, to assure that all personnel testing conforms with the principles of job-related testing, as established by the statutes and court decisions of the State of New Jersey and as established by applicable Federal law and applicable Federal court decisions.

In conforming with the targeted employment goals, the contractor or subcontractor agrees to review all procedures relating to transfer, upgrading, downgrading and layoff to ensure that all such actions are taken without regard to age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex, consistent with the statutes and court decisions of the State of New Jersey, and applicable Federal law and applicable Federal court decisions.

The contractor shall submit to the public agency, after notification of award but prior to execution of a goods and services contract, one of the following three documents:

- Letter of Federal Affirmative Action Plan Approval
- Certificate of Employee Information Report

- Employee Information Report Form AA302 (electronically provided by the Division of Purchase & Property, CCAU, EEO Monitoring Program and distributed to the public agency through the Division of Purchase & Property, CCAU, EEO Monitoring Program's website at [www.state.nj.us/treasury/contract\\_compliance](http://www.state.nj.us/treasury/contract_compliance))

The contractor and its subcontractors shall furnish such reports or other documents to the Division of Purchase & Property, CCAU, EEO Monitoring Program as may be requested by the office from time to time in order to carry out the purposes of these regulations, and public agencies shall furnish such information as may be requested by the Division of Purchase & Property, CCAU, EEO Monitoring Program for conducting a compliance investigation pursuant to **Subchapter 10 of the Administrative Code at N.J.A.C. 17:27.**

37. Certification of Consultant

In executing this Agreement the CONSULTANT's signatory certifies on behalf of the CONSULTANT that neither the signatory, nor any other officer, agent or employee of the CONSULTANT has:

- employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for him or the CONSULTANT) to solicit or secure this Agreement,
- agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the Agreement, or
- paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for him or the CONSULTANT) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out the Agreement; except as expressly stated in a disclosure letter to the BOROUGH which shall accompany the Agreement after execution by the CONSULTANT on submission to the Hightstown Borough Council or their designee for execution.

The CONSULTANT acknowledges that this certificate furnished to the BOROUGH, the State Department of Transportation and the Federal Highway Administration, US Department of Transportation, in connection with this Agreement, is subject to applicable State and Federal laws, both criminal and civil.

38. Certification of Borough

In executing this Agreement the BOROUGH's signatory certifies that to the best of the signatory's knowledge, the CONSULTANT or his representative has not been required, directly or indirectly as an express or implied condition in connection with obtaining or carrying out this Agreement, to:

- employ or retain, or agree to employ or retain, any firm or person, or
- pay, or agree to pay, to any firm, person, or organization, any fee, contribution, donation, or consideration of any kind; except as expressly stated in a disclosure letter to the Federal Highway Administration, US Department of Transportation.

The BOROUGH acknowledges that this certificate is to be furnished to the Federal Highway Administration, US Department of Transportation, in connection with agreements involving participation of Federal-aid highway funds, and is subject to applicable State and Federal laws, both criminal and civil.

39. Certification of Restrictions on Lobbying

In executing this Agreement, the CONSULTANT's signatory certifies on behalf of the CONSULTANT that to the best of the signatory's knowledge and belief:

- (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 any 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 the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance is placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

40. Americans with Disabilities Act  
Equal Opportunity For Individuals With Disabilities.

The CONSULTANT and the BOROUGH do hereby agree that the provisions of Title II of the Americans With Disabilities Act of 1990 (the "Act") (42 U.S.C. Sec. 12101 et seq.), which prohibits discrimination on the basis of disability by public entities in all services, programs, and activities provided or made available by public entities, and the rules and regulations promulgated pursuant thereto, are made a part of this contract. In providing any aid, benefit, or service on behalf of the BOROUGH pursuant to this contract, the CONSULTANT agrees that the performance shall be in strict compliance with the Act. In the event that the CONSULTANT, its agents, servants, employees, or subconsultants violate or are alleged to have violated the Act during the performance of this contract, the CONSULTANT shall defend the BOROUGH in any action or administrative proceeding commenced pursuant to this Act. The CONSULTANT shall indemnify, protect, and save harmless the BOROUGH, its agents, servants, and employees from and against any and all suits, claims, losses, demands, or damages of whatever kind or nature arising out of or claimed to arise out of the alleged violation. The CONSULTANT shall, at its own expense, appear, defend, and pay any and all charges for legal services and any and all costs and other expenses arising from such action or administrative proceeding or incurred in connection therewith.

In any and all complaints brought pursuant to the BOROUGH's grievance procedure, the CONSULTANT agrees to abide by any decision of the BOROUGH which is rendered pursuant to said grievance procedure. If any action or administrative proceeding results in an award of damages against the BOROUGH or if the BOROUGH incurs any expense to cure a violation of the ADA which has been brought pursuant to its grievance procedure, the CONSULTANT shall satisfy and discharge the same at its own expense.

The BOROUGH shall, as soon as practicable after a claim has been made against it, give written notice thereof to the CONSULTANT along with full and complete particulars of the claim. If any action or administrative proceeding is brought against the BOROUGH or any of its agents, servants, and employees, the BOROUGH shall expeditiously forward or have forwarded to the CONSULTANT every demand, complaint, notice, summons, pleading, or other process received by the BOROUGH or its representatives.

It is expressly agreed and understood that any approval by the BOROUGH of the services

provided by the CONSULTANT pursuant to this contract will not relieve the CONSULTANT of the obligation to comply with the Act and to defend, indemnify, protect, and save harmless the BOROUGH pursuant to this paragraph.

It is further agreed and understood that the BOROUGH assumes no obligation to indemnify or save harmless the CONSULTANT, its agents, servants, employees and subconsultants for any claim which may arise out of their performance of this Agreement. Furthermore, the CONSULTANT expressly understands and agrees that the provisions of this indemnification clause shall in no way limit the CONSULTANT's obligations assumed in this Agreement, nor shall they be construed to relieve the CONSULTANT from any liability, nor preclude the BOROUGH from taking any other actions available to it under any other provisions of this Agreement or otherwise at law.

41. Business Registration for Providers of Goods and Services to the Borough

1. The CONSULTANT (herein also referred to as the "Contractor") has previously provided the BOROUGH with a copy of the CONSULTANT's business registration certificate, verifying that the CONSULTANT is properly registered with the New Jersey Department of the Treasury.
2. The CONSULTANT acknowledges that:
  - a. *N.J.S.A. 52:32-44* imposes the following requirements on contractors and all subcontractors that knowingly provide goods or perform services for a contractor fulfilling this contract: 1) the contractor shall provide written notice to its subcontractors to submit proof of business registration to the contractor; 2) prior to receipt of final payment from a contracting agency, the contractor must submit to the contracting agency an accurate list of all subcontractors or attest that none was used; 3) during the term of this contract, the contractor and its affiliates shall collect and remit, and shall notify all subcontractors and their affiliates that they must collect and remit to the Director, New Jersey Division of Taxation, the use tax due pursuant to the Sales and Use Tax Act, (*N.J.S.A. 54:32B-1 et seq.*) on all sales of tangible personal property delivered into this State.
  - b. A contractor, subcontractor or supplier who fails to provide proof of business registration or provides false business registration information shall be liable to a penalty of \$25 for each day of violation, not to exceed \$50,000 for each business registration not properly provided or maintained under a contract with a contracting agency. Information on the law and its requirements is available by calling (609) 292-9292.

42. Public Works Contractor Registration for Work Covered by N.J. Prevailing Wage Act

To the extent that any work performed by the Consultant is governed by the New Jersey Prevailing Wage Act, N.J.S. 34:11-56.25 et seq., then pursuant to P.L. 2003, c. 91 (N.J.S. 34:11-56.48 et seq.), the Consultant shall provide to the Borough proof of the Consultant's valid, current registration with the New Jersey Department of labor as a "Public Works Contractor" prior to the start of such work, whereupon the Borough will provide the Consultant with a Wage Rate Determination and the Consultant will execute an amendment to this Agreement containing provisions regarding compliance with the Prevailing Wage Act and the Equal Employment Opportunity requirements for construction work.

VIII. CERTIFICATION OF CONSULTANT ELIGIBILITY

The CONSULTANT's signatory hereby certifies, under penalty of perjury under the laws of the United States, that except as noted below, the company or any person associated therewith in the capacity of owner, partner, director, officer, principal, project director, manager, auditor, or any position involving the administration of federal or state funds:

- is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal, state or local government agency;
- has not been suspended, debarred, voluntarily excluded or determined ineligible by any federal, state or local government agency within the past 3 years;
- does not have a proposed debarment pending; and
- has not been indicted, convicted, or had a civil judgment rendered against (it) by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past 3 years.

(Insert Exceptions - For any exception noted, indicate to whom it applies, initiating agency, and dates of action. Providing false information may result in criminal prosecution or administrative sanctions. If no exceptions, insert "None".)

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IX. CONFLICT OF INTEREST CERTIFICATION

The CONSULTANT's signatory hereby certifies to the Borough of Hightstown that he/she knows of no circumstances that would constitute a conflict of interest, financial or otherwise, between the CONSULTANT or any of its employees and the Borough of Hightstown or any of its agents, or with the interest of the Borough of Hightstown in general. The CONSULTANT's signatory further certifies that the CONSULTANT knows of no circumstances or relationships between the CONSULTANT or any of its employees and third parties that would cause the actual or appearance of a conflict of interest or compromise of judgment and independence in the performance of the designated services. The CONSULTANT acknowledges that this shall be a continuing certification, to be supplemented if and when appropriate during the term of the Agreement.

The CONSULTANT's signatory certifies that the foregoing statements made by the CONSULTANT are true. The CONSULTANT's signatory is aware that if any of the foregoing statements made by the CONSULTANT are willfully false, the CONSULTANT's signatory is subject to punishment.

X. EXECUTION

Corporate consultants shall attach a corporate resolution by the Secretary/Treasurer authorizing the President/Vice President to execute this Agreement and bind the CONSULTANT; the Secretary shall attest to the execution and affix the corporate seal. Partnership consultants shall have all partners sign the Agreement or have the Agreement signed by one partner, provided documents are attached which authorize that one partner to bind all partners; all signatures shall be witnessed. For sole proprietorships, the sole proprietor shall execute this Agreement with the execution notarized; notarization to be attached. Joint Venture consultants shall follow the execution procedure applicable to each of the joint venturers. This Agreement shall not become binding on either party until it is executed by or on behalf of the Borough of Hightstown.

This Agreement executed as of the day and year first written above, each party having caused it to be signed, attested/witnessed/sealed.

Attest/Witnessed/Sealed:

**(FIRM'S NAME - all in caps)**

(Seal)

\_\_\_\_\_  
**Name**  
**Title**

\_\_\_\_\_  
**Name**  
**Title**

Attest/Witnessed/Affix Seal:

BOROUGH OF HIGHTSTOWN

\_\_\_\_\_  
**Debra L. Sopronyi**  
Municipal Clerk

By:

\_\_\_\_\_  
**Lawrence D. Quattrone**  
Mayor

## **APPENDIX**

**(Available on Request)**

- Construction Plans
- Construction Specifications
- Borough of Hightstown Federal Aid Program Projects Policies and Procedures Handbook