

PROFESSIONAL SERVICES AGREEMENT CHECKLIST FOR TOWN STAFF

Before sending contract documents to the Town Attorney:

- Enter the following information into the form contract below:
 - Project/services name (on page 1 and in footer; same as RFP or RFQ)
 - Date on which contract is executed by Town (page 1, introductory paragraph)
 - Consultant name and address (page 1, introductory paragraph)
 - Consultant name in footer
 - Name of Town Representative (paragraph 1.2)
 - Not-to-exceed amount in written form (e.g. One Hundred Thousand Dollars) and numerical form (e.g. \$100,000.00) in paragraph 2.1
 - Check the appropriate boxes under Reimbursable Expenses (paragraph 2.2). If the contract is for a lump sum, check the "None" box.
 - Enter the Effective Date (date on which contract term begins) and the date the contract will terminate (paragraph 4.1). Permit enough time for grant closeout, if applicable.
 - Check the appropriate boxes for required insurance in Section 5.0 and, if applicable, the correct amounts of insurance coverage for the Project/Services.
 - Enter the Consultant's information in the appropriate box in Section 10.0.
 - Check the boxes for the appropriate attachments/exhibits in Section 11.0.
 - Make sure the box in Section 11.2 is checked if Davis-Bacon does not apply
 - Check the appropriate boxes on the signature page:
 - Contracts \$5,000.00 or less: Board of Trustees Approval Not Required
 - Contracts over \$5,000.00: Town Administrator Approval Not Required
- Review/proofread/spell check Scope of Work (Exhibit A) and Compensation (Exhibit B)
- Discuss with Town Attorney any special provisions or terms that may be required

Before Uploading Contract for Agenda (minimum 2-3 weeks before agenda deadline):

- Send the following to the Town Attorney **in Word format, if possible, and as separate documents:**
 - Contract
 - Scope of Work (Exhibit A)
 - Compensation (Exhibit B – for consultant only; no pricing information for subcontractors)
 - Request for Proposals or Request for Qualifications (if applicable)
 - Consultant's proposal

One (1) Week Before Uploading Contract for Agenda: Send attorney-reviewed contract and attachments/exhibits to Consultant for review and signature with a request to return to Town Staff by deadline for uploading agenda items.

**Town of Lyons
PROFESSIONAL SERVICES AGREEMENT**

Project/Services Name: 2019 Paving Condition Assessment Plan

This PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into this 21st day of October 2019, by and between the TOWN OF LYONS, COLORADO, a municipal corporation of the State of Colorado, with offices at 432 5th Avenue, Lyons, Colorado 80540 (the "**Town**"), and Capitol Asset & Pavement Services with offices at 204 North 1st Street, Suite C, Silverton, OR 97381 (the "**Consultant**"). The Town and Consultant may be referred to collectively as the "Parties" or each individually as "Party".

RECITALS

WHEREAS, the Town requires certain professional services as more fully described in Exhibit A;

WHEREAS, the Town issued a Request for Proposals for the services which are the subject of this Agreement; and

WHEREAS, the time for submittal of proposals has passed, and the Town has evaluated all proposals; and

WHEREAS, the Town has identified the Consultant as the most qualified responsible bidder; and

WHEREAS, the Consultant represents that it possesses the necessary qualifications to perform these services; and

WHEREAS, the Town desires to contract with the Consultant subject to the terms of this Agreement.

NOW, THEREFORE, for the consideration herein expressed, it is agreed as follows by and between the Town and the Consultant that the Consultant shall perform the following:

1.0 SERVICES AND PURPOSE OF AGREEMENT

1.1 **Services.** The Town desires to achieve, secure, receive, or obtain certain service(s) or work product(s) as more specifically described in Exhibit A (the "Services"). Exhibit A describes the requirements and deliverables required by this Agreement and is attached hereto and incorporated herein by reference. As an independent contractor, the Consultant offers and agrees to perform and/or deliver the Services in accordance with the terms and conditions of this Agreement. The Parties recognize and acknowledge that, although the Town has requested certain general services to be performed or certain work product to be produced, the Consultant has offered to the Town the process, procedures, terms, and conditions under which the Consultant plans and proposes to achieve or produce the services and/or work product(s) and the Town, through this Agreement, has accepted such process, procedures, terms, and conditions as binding on the Parties.

1.2 **Town Representative.** The Town assigns Joel Price, P.E., as the Town Representative for this Agreement. The Town Representative will monitor the

Consultant's progress and performance under this Agreement and shall be available to the Consultant to respond to questions, assist in understanding Town policies, procedures, and practices, and supervise the performance of any Town obligations under this Agreement.

- 1.3 Changes to Services. Any changes to the Services that are mutually agreed upon between the Town and the Consultant shall be made in a formal writing referencing this Agreement and, only upon execution by both Parties of such formal writing, shall become an amendment to the Services described in this Agreement. To be effective, any written change must be signed by the Consultant and by the Town or by a person expressly authorized in writing to sign on behalf of the Town. Changes to the Services or to this Agreement shall not be made through oral agreement or electronic mail messages.
- 1.4 Meeting Attendance. The Consultant shall attend such meetings of the Town relative to the Scope of Work set forth in **Exhibit A** as may be requested by the Town. Any requirement made by the named representatives of the Town shall be given with reasonable notice to the Consultant so that a representative may attend.
- 1.5 Agreement to Comply with Requisite Provisions Based On Funding Source. If checked in Section 11.0 below, the Town will pay in whole or in part for the Services rendered hereunder with federal or State based grant funding. Consultant agrees to comply with all provisions set forth in any Attachment as noted and if checked.
- 1.6 Lawful Performance. It is further agreed that no party to this Agreement will perform contrary to any state, federal, or county law, or any of the ordinances of the Town of Lyons, Colorado.

2.0 COMPENSATION

- 2.1 Commencement of and Compensation for Services. Following execution of this Agreement by the Town, the Consultant shall be authorized to and shall commence performance of the Services as described in **Exhibit A**, subject to the requirements and limitations on compensation as provided by this Section 2.0 and its subsections. Compensation to be paid hereunder shall not exceed **fifteen thousand, three hundred and thirty Dollars (\$15,330.00)** unless a larger amount is agreed to by and between the Parties in accordance with the amendment requirements of this Agreement.
 - A. Method of Compensation. The Consultant shall perform the Services and shall invoice the Town for work performed based on the rates and/or compensation methodology and amounts described in **Exhibit B** subject to the not to exceed amount set forth in this Section. **These invoices for payment should be emailed to ap@townoflyons.com or mailed to Town of Lyons, P.O. Box 49, Lyons, CO 80540.** Monthly, partial, progress payments shall be made by the Town to the Consultant for the percentage of the Scope of Work completed. Progress payments shall not constitute a waiver of the right of the Town to require the fulfillment of all material terms of this Agreement and the delivery of all improvements embraced in this Agreement.
 - B. Final Payment. Final payment may be requested by the Consultant upon

completion and acceptance, by the Town, of all work or Services as set forth in Exhibit A. The total amount of final payment shall consist of the compensation set forth in paragraph 2.1, as adjusted in accordance with amendments approved per Section 2.3 of this Agreement, if applicable, less all previous payments to the Consultant.

- C. Extra Work. Should work beyond that described in Exhibit A be required, it will be paid for as extra work at a cost to be agreed upon in separate written agreement by the Town and the Consultant prior to commencement of the additional work. Such additional agreements shall be executed and approved by all persons required by Town purchasing ordinances or policies.
- D. Receipts. The Town, before making any payment, may require the Consultant to furnish at no additional charge releases or receipts from any or all persons performing work under this Agreement and/or supplying material or services to the Consultant, or any subcontractor if this is deemed necessary to protect the Town's interest. The Town, however, may in its discretion make payment in part or full to the Consultant without requiring the furnishing of such releases or receipts.

2.2 Reimbursable Expenses. If this Agreement is for lump sum compensation, there shall be no reimbursable expenses. If the Agreement is for compensation based on a time and materials methodology, the following shall be considered "reimbursable expenses" for purposes of this Agreement and may be billed to the Town without administrative mark-up but which must be accounted for by the Consultant and proof of payment shall be provided by the Consultant with the Consultant's monthly invoices:

- None
- Vehicle Mileage (billed at not more than the prevailing per mile charge permitted by the IRS as a tax deductible business expense)
- Printing and Photocopying Related to the Services (billed at actual cost)
- Long Distance Telephone Charges Related to the Services
- Postage and Delivery Services
- Lodging and Meals (but only with prior written approval of the Town as to dates and maximum amount)

Any fee, cost, charge, or expense incurred by the Consultant not otherwise specifically authorized by this Agreement shall be deemed a non-reimbursable cost that shall be borne by the Consultant and shall not be billed or invoiced to the Town and shall not be paid by the Town.

- 2.3 Increases in Compensation or Reimbursable Expenses. Any increases or modification to the compensation or reimbursable expenses shall be subject to the approval of the Town and shall be made only by written amendment of this Agreement executed by both Parties.
- 2.4 Payment Processing. The Consultant shall submit invoices and requests for payment in a form acceptable to the Town. Invoices shall not be submitted more often than once each month unless otherwise approved by this Agreement or in writing by the Town in accordance with the amendment requirements of this

Agreement. Unless otherwise directed or accepted by the Town, all invoices shall contain sufficient information to account for all appropriate measure(s) of Consultant work effort (e.g., task completion, work product delivery, or time) and all authorized reimbursable expenses for the Services during the stated period of the invoice. Following receipt of a Consultant's invoice, the Town shall promptly review the Consultant's invoice. All Town payments for Services rendered pursuant to this Agreement shall be issued in the business name of Consultant only, and in no event shall any such payments be issued to an individual. In no event shall any Town payments to Consultant be in the form of or based upon a salary or an hourly wage rate.

2.5 Town Dispute of Invoice or Invoiced Item(s). The Town may dispute any Consultant compensation and/or reimbursable expense requested by the Consultant described in any invoice and may request additional information from the Consultant substantiating any and all compensation sought by the Consultant before accepting the invoice. When additional information is requested by the Town, the Town shall advise the Consultant in writing, identifying the specific item(s) that are in dispute and giving specific reasons for any request for information. The Town shall pay the Consultant within forty-five (45) days of the receipt of an invoice for any undisputed charges or, if the Town disputes an item or invoice and additional information is requested, within thirty (30) days of acceptance of the item or invoice by the Town following receipt of the information requested and resolution of the dispute. To the extent possible, undisputed charges within the same invoice as disputed charges shall be timely paid in accordance with this Agreement. Payment by the Town shall be deemed made and completed upon hand delivery to the Consultant or designee of the Consultant or upon deposit of such payment or notice in the U.S. Mail, postage pre-paid, addressed to the Consultant.

3.0 CONSULTANT'S REPRESENTATIONS AND OFFERED PERFORMANCE

The Consultant offers to perform the Services in accordance with the following Consultant-elected practices and procedures. By this Agreement, the Town accepts such offer and the following are hereby made part of the terms and conditions of this Agreement:

3.1 General. The Consultant shall become fully acquainted with the available information related to the Services. The Consultant shall affirmatively request from the Town Representative and the Town such information that the Consultant, based on the Consultant's professional experience, should reasonably expect is available and which would be relevant to the performance of the Services. The Consultant shall promptly inform the Town concerning ambiguities and uncertainties related to the Consultant's performance that are not addressed by the Agreement. The Consultant shall provide all of the Services in a timely and professional manner. The Consultant shall comply with all applicable federal, state and local laws, ordinances, regulations, and resolutions.

3.2 Independent Contractor. The Consultant shall perform the Services as an independent contractor and shall not be deemed by virtue of this Agreement to have entered into any partnership, joint venture, employer/employee or other relationship with the Town. This Agreement does not require the Consultant to work exclusively for the Town. This Agreement shall not be interpreted as the Town dictating or directing the Consultant's performance or the time of performance beyond a completion schedule and a range of mutually agreeable work hours, but shall be

interpreted as the Consultant's offer and Town acceptance of terms and conditions for performance. The Consultant's business operations shall not be combined with the Town by virtue of this Agreement, and the Town will not provide any training to Consultant, its agents, or employees beyond that minimal level required for performance of the Services. The Parties acknowledge that the Consultant may require some assistance or direction from the Town in order for the Services to meet the Town's contractual expectations. Any provisions in this Agreement that may appear to grant the Town the right to direct or control Consultant or the Services shall be construed as Town plans or specifications regarding the Services.

- 3.3 **Liability for Employment-Related Rights and Compensation.** The Consultant shall be solely responsible for all compensation, benefits, insurance and employment-related rights of any person providing Services hereunder during the course of or arising or accruing as a result of any employment, whether past or present, with the Consultant, as well as all legal costs including attorney's fees incurred in the defense of any conflict or legal action resulting from such employment or related to the corporate amenities of such employment. The Consultant will comply with all laws, regulations, municipal codes, and ordinances and other requirements and standards applicable to the Consultant's employees, including, without limitation, federal and state laws governing wages and overtime, equal employment, safety and health, employees' citizenship, withholdings, reports and record keeping. **CONTRACTOR ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS CONTRACTOR OR SOME ENTITY OTHER THAN THE TOWN PROVIDES SUCH BENEFITS. CONTRACTOR FURTHER ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO WORKERS' COMPENSATION BENEFITS. CONTRACTOR ALSO ACKNOWLEDGES THAT IT IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON ANY MONEYS EARNED OR PAID PURSUANT TO THIS AGREEMENT.** To the maximum extent permitted by law, Consultant waives all claims against the Town for any Employee Benefits; the Consultant will defend the Town from any claim and will indemnify the Town against any liability for any Employee Benefits for the Consultant imposed on the Town ; and the Consultant will reimburse the Town for any award, judgment, or fine against the Town based on the position the Consultant was ever the Town 's employee, and all attorneys' fees and costs the Town reasonably incurs defending itself against any such liability.
- 3.4 **Interaction with Public.** The Consultant recognizes that its conduct during the performance of the Services hereunder reflects upon its reputation in the community as well as upon the public perception of the Town. Therefore, the Consultant offers and warrants to the Town that the Consultant, its agents and employees will conduct all of their interactions with the citizens and the public relating to the performance of the Services hereunder in such a manner as to provide customer service that reflects positively upon its reputation and the Town's public image.
- 3.5 **Subcontractors.** The Parties recognize and agree that subcontractors may be utilized by the Consultant for the performance of certain Services if and as described more particularly in **Exhibit A**; however, the engagement or use of subcontractors will not relieve or excuse the Consultant from performance of any obligations imposed in accordance with this Agreement and Consultant shall remain solely responsible for ensuring that any subcontractors engaged to perform Services

hereunder shall perform such Services in accordance with all terms and conditions of this Agreement.

- 3.6 **Standard of Performance.** In performing the Services, the Consultant warrants that it shall use that degree of care, skill, and professionalism ordinarily exercised under similar circumstances by highly competent members of the same profession practicing in the State of Colorado. The Consultant represents to the Town that the Consultant is, and its employees or subcontractors performing such Services are, properly licensed and/or registered within the State of Colorado for the performance of the Services (if licensure and/or registration is required by applicable law) and that the Consultant and employees possess the skills, knowledge, and abilities to perform the Services competently, timely, and professionally in accordance with this Agreement. In addition, the Consultant warrants and represents that it will provide the Services in accordance with more specific standards of performance as are included within **Exhibit A.** The Consultant represents, covenants and agrees that the Services will be provided to the Town free from any material errors. The Consultant's failure to meet or exceed any of the foregoing standards and warranties may be considered a material breach of this Agreement and may be grounds for termination of the Agreement pursuant to Section 4.0 below, in addition to any other remedies as provided in Section 9.0 below.
- 3.7 **Review of Books and Records.** The Consultant shall promptly comply with any written Town request for the Town or any of its duly authorized representatives to reasonably access and review any books, documents, papers, and records of the Consultant that are pertinent to the Consultant's performance under this Agreement for the purpose of the Town performing an audit, examination, or other review of the Services.
- 3.8 **Licenses and Permits.** The Consultant shall be responsible at the Consultant's expense for obtaining, and maintaining in a valid and effective status, all licenses and permits necessary to perform the Services unless specifically stated otherwise in this Agreement.
- 3.9 **Affirmative Action.** The Consultant warrants that it will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Consultant warrants that it will take affirmative action to ensure applicants are employed, and employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action 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.
- 3.10 **Employment of or Contracts with Illegal Aliens.** The Consultant shall not knowingly employ or contract with an illegal alien to perform work under this Agreement. The Consultant shall not contract with a subcontractor that fails to certify that the subcontractor does not knowingly employ or contract with any illegal aliens. By entering into this Agreement, the Consultant certifies as of the date of this Agreement that it does not knowingly employ or contract with an illegal alien who will perform work under this contract for Services and that the Consultant will participate in the e-verify program or department program in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work

under the public contract for services. The Consultant is prohibited from using either the e-verify program or the department program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed. If the Consultant obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, the Consultant shall be required to notify the subcontractor and the Town within three (3) days that the Consultant has actual knowledge that a subcontractor is employing or contracting with an illegal alien. The Consultant shall terminate the subcontract if the subcontractor does not stop employing or contracting with the illegal alien within three (3) days of receiving the notice regarding Consultant's actual knowledge. The Consultant shall not terminate the subcontract if, during such three (3) days, the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien. The Consultant is required to comply with any reasonable request made by the Department of Labor and Employment made in the course of an investigation undertaken to determine compliance with this provision and applicable state law. If the Consultant violates this provision, the Town may terminate this Agreement, and the Consultant may be liable for actual and/or consequential damages incurred by the Town, notwithstanding any limitation on such damages provided by such Agreement.

3.11 Duty to Warn. The Consultant agrees to call to the Town's attention errors in any drawings, plans, sketches, instructions, information, requirements, procedures, and/or other data supplied to the Consultant (by the Town or by any other party) that it becomes aware of and believes may be unsuitable, improper, or inaccurate in a material way. However, the Consultant shall not independently verify the validity, completeness or accuracy of such information unless included in the Services or otherwise expressly engaged to do so by the Town.

4.0 TERM AND TERMINATION

4.1 Term. This Agreement shall be effective on the **22nd day of October, 2019 at 12:01 a.m.**, (the "Effective Date") and shall terminate at the earlier of the date on which all obligations of the parties have been met (to include all Services have been completed) or **11:59 p.m. on 31st day of January, 2020**, or on a prior date of termination as may be permitted by this Agreement; provided, however, that the Parties may mutually agree in writing to extend the term of this Agreement, subject to annual appropriation. Those provisions that survive termination, to include the indemnification obligations and any warranty obligations, shall remain in effect past termination.

4.2 Continuing Services Required. The Consultant shall perform the Services in accordance with this Agreement commencing on the Effective Date until such Services are terminated or suspended in accordance with this Agreement. The Consultant shall not temporarily delay, postpone, or suspend the performance of the Services without the written consent of the Town Board of Trustees, Town Administrator, the Town Representative, or other Town employee expressly authorized in writing to direct the Consultant's services.

4.3 Town Unilateral Termination. This Agreement may be terminated by the Town for any or no reason upon written notice delivered to the Consultant at least ten (10)

days prior to termination. In the event of the Town's exercise of the right of unilateral termination as provided by this paragraph:

- A. Unless otherwise provided in any notice of termination, the Consultant shall provide no further services in connection with this Agreement after receipt of a notice of termination; and
- B. All finished or unfinished documents, data, studies and reports prepared by the Consultant pursuant to this Agreement shall be delivered by the Consultant to the Town and shall become the property of the Town; and
- C. The Consultant shall submit to the Town a final accounting and final invoice of charges for all outstanding and unpaid Services and reimbursable expenses performed prior to the Consultant's receipt of notice of termination and for any services authorized to be performed by the notice of termination as provided by Section 4.3(A) above. Such final accounting and final invoice shall be delivered to the Town within thirty (30) days of the date of termination; thereafter, no other invoice, bill, or other form of statement of charges owing to the Consultant shall be submitted to or accepted by the Town.

4.4 Termination for Non-Performance. Should a party to this Agreement fail to materially perform in accordance with the terms and conditions of this Agreement, this Agreement may be terminated by the performing party if the performing party first provides written notice to the non-performing party which notice shall specify the non-performance, provide both a demand to cure the non-performance and reasonable time to cure the non-performance, and state a date upon which the Agreement shall be terminated if there is a failure to timely cure the non-performance. For purpose of this Section 4.4, "reasonable time" shall be not less than five (5) business days. In the event of a failure to timely cure a non-performance and upon the date of the resulting termination for non-performance, the Consultant shall prepare a final accounting and final invoice of charges for all performed but unpaid Services and authorized reimbursable expenses. Such final accounting and final invoice shall be delivered to the Town within fifteen (15) days of the date of termination; thereafter, no other invoice, bill, or other form of statement of charges owing to the Consultant shall be submitted to or accepted by the Town. Provided that notice of non-performance is provided in accordance with this Section 4.4, nothing in this Section 4.4 shall prevent, preclude, or limit any claim or action for default or breach of contract resulting from non-performance by a Party.

4.5 Unilateral Suspension of Services. The Town may suspend the Consultant's performance of the Services at the Town's discretion and for any reason by delivery of written notice of suspension to the Consultant which notice shall state a specific date of suspension. Upon receipt of such notice of suspension, the Consultant shall immediately cease performance of the Services on the date of suspension except: (1) as may be specifically authorized by the notice of suspension (e.g., to secure the work area from damage due to weather or to complete a specific report or study); or (2) for the submission of an invoice for Services performed prior to the date of suspension in accordance with this Agreement.

4.6 Delivery of Notice of Termination. Any notice of termination permitted by this Section 4.0 and its subsections shall be addressed to the person signing this Agreement on

behalf of either Town or Consultant at the address shown below or such other address as either party may notify the other of and shall be deemed given upon delivery if personally delivered, or forty-eight (48) hours after deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested.

5.0 INSURANCE

5.1 Insurance Generally. During the term of this Agreement, the Consultant shall obtain and shall continuously maintain, at the Consultant's expense, insurance of the kind and in the minimum amounts specified as follows by checking the appropriate boxes:

- The Consultant shall obtain and maintain the types, forms, and coverage(s) of insurance deemed by the Consultant to be sufficient to meet or exceed the Consultant's minimum statutory and legal obligations arising under this Agreement ("Consultant Insurance"); or
- The Consultant shall secure and maintain the following ("Required Insurance"):
 - Worker's Compensation Insurance in the minimum amount required by applicable law for all employees and other persons as may be required by law. Such policy of insurance shall be endorsed to include the Town as a Certificate Holder.
 - Comprehensive General Liability insurance with minimum combined single limits of One Million Dollars (\$1,000,000.00) each occurrence and of two million Dollars (\$1,000,000.00) aggregate. The policy shall be applicable to all premises and all operations of the Consultant. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, independent contractors, products, and completed operations. The policy shall contain a severability of interests provision. Coverage shall be provided on an "occurrence" basis as opposed to a "claims made" basis. Such insurance shall be endorsed to name the Town as Certificate Holder and name the Town, and its elected officials, officers, employees and agents as additional insured parties.
 - Comprehensive Automobile Liability insurance with minimum combined single limits for bodily injury and property damage of not less than One Million Dollars (\$1,000,000.00) each occurrence with respect to each of the Consultant's owned, hired and non-owned vehicles assigned to or used in performance of the Services. The policy shall contain a severability of interests provision. Such insurance coverage must extend to all levels of subcontractors. Such coverage must include all automotive equipment used in the performance of the Agreement, both on the work site and off the work site, and such coverage shall include non-ownership and hired cars coverage. Such insurance shall be endorsed to name the Town as Certificate Holder and name the Town, and its elected officials, officers, employees and agents as additional insured parties.
 - Professional Liability (errors and omissions) Insurance with a minimum limit of coverage of One Million Dollars (\$1,000,000) per claim and annual

aggregate. Such policy of insurance shall be obtained and maintained for one (1) year following completion of all Services under this Agreement. Such policy of insurance shall be endorsed to include the Town as a Certificate Holder.

The Required Insurance shall be procured and maintained with insurers with an A- or better rating as determined by Best's Key Rating Guide. All Required Insurance shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Consultant.

5.2 Additional Requirements for All Policies. In addition to specific requirements imposed on insurance by this Section 5.0 and its subsections, insurance shall conform to all of the following:

- A. For both Consultant Insurance and Required Insurance, all policies of insurance shall be primary insurance, and any insurance carried by the Town, its officers, or its employees shall be excess and not contributory insurance to that provided by the Consultant; provided, however, that the Town shall not be obligated to obtain or maintain any insurance whatsoever for any claim, damage, or purpose arising from or related to this Agreement and the Services. The Consultant shall not be an insured party for any Town-obtained insurance policy or coverage.
- B. For both Consultant Insurance and Required Insurance, the Consultant shall be solely responsible for any deductible losses.
- C. For Required Insurance, no policy of insurance shall contain any exclusion for bodily injury or property damage arising from completed operations.
- D. For Required Insurance, every policy of insurance shall provide that the Town will receive notice no less than thirty (30) days prior to any cancellation, termination, or a material change in such policy or in the alternative, the Consultant shall provide such notice as soon as reasonably practicable and in no event less than thirty (30) days prior to any cancellation, termination, or a material change in such policy.

5.3 Failure to Obtain or Maintain Insurance. The Consultant's failure to obtain and continuously maintain policies of insurance in accordance with this Section 5.0 and its subsections shall not limit, prevent, preclude, excuse, or modify any liability, claims, demands, or other obligations of the Consultant arising from performance or non-performance of this Agreement. Failure on the part of the Consultant to obtain and to continuously maintain policies providing the required coverage, conditions, restrictions, notices, and minimum limits shall constitute a material breach of this Agreement upon which the Town may immediately terminate this Agreement, or, at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the Town shall be repaid by Consultant to the Town immediately upon demand by the Town, or at the Town's sole discretion, the Town may offset the cost of the premiums against any monies due to the Consultant from the Town pursuant to this Agreement.

5.4 Insurance Certificates. Prior to commencement of the Services, the Consultant shall submit to the Town certificates of insurance for all Required Insurance

and all necessary endorsements. Insurance limits, term of insurance, insured parties, and other information sufficient to demonstrate conformance with this Section 5.0 and its subsections shall be indicated on each certificate of insurance. **Certificates of insurance shall reference the Project/Services Name as identified on the first page of this Agreement.** The Town may request and the Consultant shall provide within three (3) business days of such request a current certified copy of any policy of Required Insurance and any endorsement of such policy. The Town may, at its election, withhold payment for Services until the requested insurance policies are received and found to be in accordance with the Agreement.

6.0 CLAIMS, INDEMNIFICATION, HOLD HARMLESS AND DEFENSE

- 6.1 **Notices of Claim.** A Party shall notify the other Party immediately and in writing in the event that a Party learns of a third-party claim or an allegation of a third-party claim arising or resulting from the Parties' performance or failure to perform pursuant to this Agreement. The Parties shall reasonably cooperate in sharing information concerning potential claims.
- 6.2 **Claims Challenging Town Law, Ordinance, Rule, or Policy/Procedure.** In the event any claim is asserted by a third party against the Town and/or the Consultant alleging that any law, statute, ordinance, rule or approved Town policy or procedure is unlawful, unconstitutional or otherwise improper, then:
 - A. The Consultant shall not be entitled to and shall not defend such claim; and
 - B. The Town may, at its sole discretion, elect to defend, not defend, settle, confess, compromise, or otherwise direct the manner in which such claim is addressed; and
 - C. The Consultant shall reasonably cooperate with the Town in any Town defense of such claim although the Consultant shall bear any cost or expense incurred by the Consultant in such cooperation, including but not limited to the Consultant's cost and expense incurred in consultation with its own legal counsel; and
 - D. Only if authorized by law and without waiving the provisions of the Colorado Constitution or the Colorado Governmental Immunity Act, the Town shall indemnify and hold Consultant harmless for any damages, liability, expenses, or court awards, including costs and attorney's fees that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by any third party, including but not limited to, any person, firm, partnership, or corporation, in connection with or arising out of such claim.
- 6.3 **Indemnification for Certain Claims.** For any claim not within the scope of Section 6.2 above, Consultant expressly agrees to indemnify and hold harmless the Town, and any of its council members, board members, commissioners, officials, officers, agents, Contractors, attorneys, or employees from any and all damages, liability, expenses, or court awards, including costs and attorney's fees that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by any third party, including but not limited to, any person, firm, partnership, or corporation, in connection with or arising out of any intentional,

reckless, negligent or tortious conduct, error, omission, or act of commission by Consultant or any of its employees, agents, or others acting on Consultant's behalf in performance of the Services. Nothing in this Agreement shall be construed as constituting a covenant, promise, or agreement by the Consultant to indemnify or hold the Town, its elected officials, board members, commissioners, officials, officers, agents, contractors, attorneys, or employees harmless for any negligence solely attributable to the Town, its elected officials, boards, commissions, officials, officers, agents, Contractors, attorneys, or employees. The Consultant's obligation to indemnify pursuant to this Section shall survive the completion of the Services and shall survive the termination of this Agreement.

6.4 Defense of Claims.

- A. **Claims Against Both the Town and Consultant.** In the event any claim is asserted by a third party against both the Town and Consultant arising out of any Party's performance of the Services which claim is not within the scope of Section 6.2 above, the Town shall be entitled to elect to defend such claim on behalf of both the Town and Consultant subject to the provisions governing indemnification set forth in this Section. In the event that the Town elects to defend such claim, the Town shall consult with Consultant in such defense but the Town is entitled to exercise its independent discretion in the manner of defense, including but not limited to the selection of litigation counsel and the discretion to settle, confess, compromise, or otherwise direct and dispose of any claim. In the event that the Town elects to defend such claim, Consultant may at its own cost and expense elect to assume the defense of Consultant, in which case Consultant shall bear its own attorneys' fees, costs, and expenses in such defense and such fees, costs, and expenses shall not be subject to indemnification pursuant to this Section.
- B. **Claims Against Only One Party.** In the event of any claim asserted by a third party against only one Party to this Agreement arising out of any Party's performance of the Services which claim is not within the scope of Section 6.2 above, the Party shall be entitled to elect to defend such claim on behalf of such Party subject to the provisions governing indemnification set forth in this Section. Where appropriate, the defending Party may also elect to join the other Party through third-party practice or otherwise in accordance with the Colorado Rules of Civil Procedure or other applicable rules, in which case the joined Party may defend such claim subject to indemnification pursuant to this Section. In the event that a Party elects to intervene voluntarily in any claim asserted against the other Party arising out of any Party's performance of the Services or any claim that any law, statute, ordinance, rule or approved Town policy or procedure is unlawful, unconstitutional or otherwise improper, the intervening Party shall bear its own attorneys' fees, costs, and expenses in such intervention and such fees, costs, and expenses shall not be subject to indemnification pursuant to this Section.

7.0 RECORDS AND OWNERSHIP OF DOCUMENTS

- 7.1 **Retention and Open Records Act Compliance.** All records of the Consultant related to the provision of Services hereunder, including public records as defined in the Colorado Open Records Act ("CORA"), and records produced or maintained in accordance with this Agreement, are to be retained and stored in accordance with the Town's records retention and disposal policies. Those

records which constitute “public records” under CORA are to be at the Town offices or accessible and opened for public inspection in accordance with CORA and Town policies. Public records requests for such records shall be processed in accordance with Town policies. Consultant agrees to allow access by the Town and the public to all documents subject to disclosure under applicable law. Consultant’s willful failure or refusal to comply with the provisions of this Section shall result in the immediate termination of this Agreement by the Town. For purposes of CORA, the Town Clerk is the custodian of all records produced or created as a result of this Agreement. Nothing contained herein shall limit the Consultant’s right to defend against disclosure of records alleged to be public.

- 7.2 Town’s Right of Inspection. The Town shall have the right to request that the Consultant provide to the Town a list of all records of the Consultant related to the provision of Services hereunder retained by the Consultant in accordance with this subsection and the storage location and method. Consultant agrees to allow inspection at reasonable times by the Town of all documents and records produced or maintained in accordance with this Agreement.
- 7.3 Ownership. Any work product, materials, and documents produced by the Consultant pursuant to this Agreement shall become property of the Town of Lyons upon delivery and shall not be made subject to any copyright unless authorized by the Town. Other materials, methodology and proprietary work used or provided by the Consultant to the Town not specifically created and delivered pursuant to the Services outlined in this Agreement may be protected by a copyright held by the Consultant and the Consultant reserves all rights granted to it by any copyright. The Town shall not reproduce, sell, or otherwise make copies of any copyrighted material, subject to the following exceptions: (1) for exclusive use internally by Town staff and/or Town contractors; or (2) pursuant to a request under the Colorado Open Records Act, C.R.S. § 24-72-203, to the extent that such statute applies; or (3) pursuant to law, regulation, or court order. The Consultant waives any right to prevent its name from being used in connection with the Services.
- 7.4 Return of Records to Town. At the Town’s request, upon expiration or termination of this Agreement, all records of the Consultant related to the provision of Services hereunder, including public records as defined in the Colorado Open Records Act (“CORA”), and records produced or maintained in accordance with this Agreement, are to be returned to the Town in a reasonable format and with an index as determined and requested by the Town.

8.0 FORCE MAJEURE

Neither the Consultant nor the Town shall be liable for any delay in, or failure of performance of, any covenant or promise contained in this Agreement, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to extent that, such delay or failure is caused by “force majeure.” As used in this Agreement, “force majeure” means acts of God, acts of the public enemy, acts of terrorism, unusually severe weather, fires, floods, epidemics, quarantines, strikes, labor disputes and freight embargoes, to the extent such events were not the result of, or were not aggravated by, the acts or omissions of the non-performing or delayed party.

9.0 REMEDIES

In addition to any other remedies provided for in this Agreement, and without limiting its remedies available at law, the Town may exercise the following remedial actions if the Consultant substantially fails to perform the duties and obligations of this Agreement. Substantial failure to perform the duties and obligations of this Agreement shall mean a significant, insufficient, incorrect, or improper performance, activities or inactions by the Consultant. The remedial actions include:

- A. Suspend the Consultant's performance pending necessary corrective action as specified by the Town without the Consultant's entitlement to an adjustment in any charge, fee, rate, price, cost, or schedule; and/or
- B. Withhold payment to the Consultant until the necessary services or corrections in performance are satisfactorily completed; and/or
- C. Deny payment for those services which have not been satisfactorily performed, and which, due to circumstances caused by the Consultant, cannot be performed, or if performed would be of no value to the Town; and/or
- D. Terminate this Agreement in accordance with this Agreement; and/or
- E. Other remedies as may be provided by attached addendum or addenda.

The foregoing remedies are cumulative and the Town, in its sole discretion, may exercise any or all of the remedies individually or simultaneously.

10.0 MISCELLANEOUS PROVISIONS

- 10.1 **No Waiver of Rights.** A waiver by any Party to this Agreement of the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by either Party. The Town's approval or acceptance of, or payment for, services shall not be construed to operate as a waiver of any rights or benefits to be provided under this Agreement. No covenant or term of this Agreement shall be deemed to be waived by the Town except in writing signed by the Town Board of Trustees or by a person expressly authorized to sign such waiver, and any written waiver of a right shall not be construed to be a waiver of any other right or to be a continuing waiver unless specifically stated.
- 10.2 **No Waiver of Governmental Immunity.** Nothing in this Agreement shall be construed to waive, limit, or otherwise modify any governmental immunity that may be available by law to the Town, its officials, employees, contractors, or agents, or any other person acting on behalf of the Town and, in particular, governmental immunity afforded or available pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10 of the Colorado Revised Statutes.

- 10.3 **Binding Effect.** The Parties agree that this Agreement, by its terms, shall be binding upon the successors, heirs, legal representatives, and assigns; provided that this Section 10.3 shall not authorize assignment.
- 10.4 **No Third-Party Beneficiaries.** Nothing contained in this Agreement is intended to or shall create a contractual relationship with, cause of action in favor of, or claim for relief for, any third party, including any agent, sub-consultant or subcontractor of Consultant. Absolutely no third-party beneficiaries are intended by this Agreement. Any third party receiving a benefit from this Agreement is an incidental and unintended beneficiary only.
- 10.5 **Article X, Section 20/TABOR.** The Parties understand and acknowledge that the Town is subject to Article X, § 20 of the Colorado Constitution ("TABOR"). The Parties do not intend to violate the terms and requirements of TABOR by the execution of this Agreement. It is understood and agreed that this Agreement does not create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and, therefore, notwithstanding anything in this Agreement to the contrary, all payment obligations of the Town are expressly dependent and conditioned upon the continuing availability of funds beyond the term of the Town's current fiscal period ending upon the next succeeding December 31. Financial obligations of the Town payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available in accordance with the rules, regulations, and resolutions of Town of Lyons, and other applicable law. Upon the failure to appropriate such funds, this Agreement shall be terminated.
- 10.6 **Governing Law, Venue, and Enforcement.** This Agreement shall be governed by and interpreted according to the law of the State of Colorado. Venue for any action arising under this Agreement shall be in the appropriate court for Boulder County, Colorado. To reduce the cost of dispute resolution and to expedite the resolution of disputes under this Agreement, the Parties hereby waive any and all right either may have to request a jury trial in any civil action relating primarily to the enforcement of this Agreement. The Parties agree that the rule that ambiguities in a contract are to be construed against the drafting party shall not apply to the interpretation of this Agreement. If there is any conflict between the language of this Agreement and any exhibit or attachment, the language of this Agreement shall govern.
- 10.7 **Survival of Terms and Conditions.** The Parties understand and agree that all terms and conditions of the Agreement that require continued performance, compliance, or effect beyond the termination date of the Agreement shall survive such termination date and shall be enforceable in the event of a failure to perform or comply.
- 10.8 **Assignment and Release.** All or part of the rights, duties, obligations, responsibilities, or benefits set forth in this Agreement shall not be assigned by the Consultant without the express written consent of the Town. Any written assignment shall expressly refer to this Agreement, specify the particular rights, duties, obligations, responsibilities, or benefits so assigned, and shall not be effective unless approved by the Town through the authorizing agent executing this Agreement. No assignment shall release the Consultant from performance

of any duty, obligation, or responsibility unless such release is clearly expressed in such written document of assignment.

- 10.9 **Interpretation and Mutual Negotiation.** It is the intent of the Parties that this Agreement shall in all instances be interpreted to reflect the Consultant's status as an independent contractor with the Town and that in no event shall this Agreement be interpreted as establishing an employment relationship between the Town and either Consultant or Consultant's employees, agents, or representatives. The Parties agree that this Agreement is the result of mutual negotiation between the Parties and that the Agreement shall not be construed against the Town on grounds relating to drafting, revision, review, or recommendation by any agent or representative of the Town. The Parties further agree that all warranties in this Agreement are made by the Consultant to induce the Town to accept the Consultant's offer to enter into this Agreement and have been incorporated into the Agreement at the Consultant's request.
- 10.10 **Paragraph Captions.** The captions of the paragraphs and sections are set forth only for the convenience and reference of the Parties and are not intended in any way to define, limit or describe the scope or intent of this Agreement.
- 10.11 **Agreement Controls.** In the event a conflict exists between this Agreement and any term in any exhibit attached or incorporated into this Agreement, the terms in this Agreement shall supersede the terms in such exhibit.
- 10.12 **Integration and Amendment.** This Agreement represents the entire and integrated agreement between the Town and the Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral. Any amendments to this Agreement must be in writing and be signed by both the Town and the Consultant.
- 10.13 **Severability.** Invalidation of any of the provisions of this Agreement or any paragraph, sentence, clause, phrase, or word herein or the application thereof in any given circumstance shall not affect the validity of any other provision of this Agreement.
- 10.14 **Incorporation of Exhibits.** Unless otherwise stated in this Agreement, exhibits, applications, or documents referenced in this Agreement shall be incorporated into this Agreement for all purposes. In the event of a conflict between any incorporated exhibit and this Agreement, the provisions of this Agreement shall govern and control.
- 10.15 **Notices.** Unless otherwise specifically required by a provision of this Agreement, any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified mail or registered mail, postage and fees prepaid, addressed to the Party to whom such notice is to be given at the address set forth below or at such other address as has been previously furnished in writing, to the other Party. Such notice shall be deemed to have been given when deposited in the United States Mail properly addressed to the intended recipient.

If to the Town :**If to Consultant:**

Town Administrator Lyons Town Hall PO Box 49 432 5th Ave, Lyons, CO 80540	Capitol Asset & Paving Services Attn: Joel Conder 204 North 1 st St, Suite C Silverton, OR 97381
With Copy to: Attn: Town of Lyons Town Attorney Kissinger & Fellman, P.C. Ptarmigan Place, Suite 900 3773 Cherry Creek North Drive Denver, CO 80209	With Copy to:

10.16 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which shall constitute one and the same document. In addition, the Parties specifically acknowledge and agree that electronic signatures shall be effective for all purposes, in accordance with the provisions of the Uniform Electronic Transactions Act, Title 24, Article 71.3 of the Colorado Revised Statutes.

11.0 ATTACHMENTS

11.1 **Attachments.** The following are attached to and incorporated into this Agreement by reference:

- Scope of Work (**Exhibit A**)
- Compensation (**Exhibit B**)
- Federal Emergency Management Agency ("FEMA") Grant Program Requirements for Procurement Contracts (**Attachment ____**)
- Colorado Community Development Block Grant Disaster Recovery Program ("CDBG-DR") Requirements for Contracts (**Attachment ____**)
- Economic Development Administration ("EDA") Requirements for Procurement Contracts (**Attachment ____**)
- Patent Rights for Small Business Firms and Non-Profit Organizations (**Attachment ____**)

Consultant's Certificate(s) of Insurance
 Consultant Proof of Professional Licensing
 Other: _____

11.2 Applicability of Davis-Bacon Act and Other Terms in Attachments. If the Town is receiving CDBG-DR Funds and/or funding from the EDA for the Project that is the subject of this Agreement, then both funding sources require certain terms and conditions to be integrated into this Agreement through the Attachments. However, certain terms of the required Attachments apply to construction contracts only.

A. If this box is checked, this Agreement is a contract for professional services for the Town of Lyons and certain terms or provisions in the required Attachments to this Agreement do not apply because this Agreement is not a construction contract. Terms and provisions in the Attachments setting forth requirements for the following do not apply to this Agreement:

- The Davis-Bacon Act, § 40 U.S.C. 3141 – 3148, as supplemented by U.S. Department of Labor regulations (29 CFR, Part 5); and
- Any other term or provision applicable only to construction contracts.

B. Provisions Required by Law Deemed Inserted. Each and every provision of law and clause required by law to be inserted in this Agreement shall be deemed to be inserted herein and the Agreement shall be read and enforced as though it were included herein, and if through mistake or otherwise any provision is not inserted, or is not correctly inserted, then upon the application of either Party the Agreement shall forthwith be physically amended to make such insertion or correction.

C. Agreement to Execute Other Required Documents. Consultant and all subcontractors, by entering into the Agreement, understand and agree that funding for the Project is provided under federal and/or state programs with specific contracting requirements. To the extent any such requirement is not otherwise set forth herein, Consultant agrees to execute such amendments or further agreements as may be necessary to ensure that the Town funding for the Work is provided

D. Compliance with Laws. If the Agreement is funded in whole or in part with CDBG funds through the Town's Community Development Block Grant Program as administered by the Colorado Division of Local Government, Department of Local Affairs and/or with funds administered by the Division of Homeland Security and Emergency Management in the Department of Public Safety, then Consultant shall comply with those regulations and restrictions normally associated with federally-funded programs and any other requirements that the state may prescribe, whether or not herein recited. The Consultant shall comply with all applicable laws, ordinances and codes of the state and local government.

12.0 AUTHORITY

The individuals executing this Agreement represent that they are expressly authorized to enter into this Agreement on behalf of Town of Lyons and the Consultant and bind their respective entities.

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SIGNATURE PAGE FOLLOWS

THIS AGREEMENT is executed and made effective as provided above.

TOWN OF LYONS, COLORADO:

Approval by Town Board of Trustees

Not Required

By:

Mayor or Mayor Pro Tem

Approval by Town Administrator

Not Required

By:

Victoria Simonsen, Town Administrator

ATTEST:

Debra K. Anthony Town Clerk

APPROVED AS TO FORM (*Excluding Exhibits*)

Not Required

For Town Attorney's Office

CONTRACTOR:

By: _____

Printed name: _____

Its: _____

STATE OF _____)
COUNTY OF _____) ss.

The foregoing Professional Services Agreement was acknowledged before me this _____ day of
_____, 20____, by _____ as _____ of
_____, a _____.

Witness my hand and official seal.

My commission expires: _____.

Notary Public

(Required for all contracts (C.R.S. § 8-40-202(2)(b)(IV)))
