

**TOWN OF JOHNSTOWN
PROFESSIONAL SERVICES AGREEMENT**

THIS PROFESSIONAL SERVICES AGREEMENT (the "Agreement") is made and entered into this 14 day of October 2022 (the "Effective Date") by and between the Town of Johnstown, Colorado, a Colorado home-rule municipal corporation (the "Town") and Moltz Construction, Inc, a Colorado Corporation ("Contractor") (collectively, the "Parties").

RECITALS

WHEREAS, the Town desires to engage the services of Contractor and Contractor desires to provide those services more fully described on Exhibit A, attached hereto and incorporated herein by reference ("Services"), to the Town; and

WHEREAS, the Parties wish to memorialize their contractual relationship.

AGREEMENT

NOW, THEREFORE, incorporating the foregoing Recitals herein and in consideration of the mutual promises, agreements, undertakings and covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby mutually agree as follows:

SECTION 1: PARTIES

1.01 Town. The Town is a home-rule municipal corporation located in Johnstown, Colorado.

1.02 Contractor. Contractor is a private, independent business entity who will exercise discretion and judgment of an independent contractor in the performance and exercise of its rights and obligations under this Agreement.

SECTION 2: SERVICES, COMPENSATION AND TERM

2.01 Services. Contractor agrees to perform the Services for the Town.

2.02 Compensation. In consideration of Contractor's performance of the Services contemplated herein, the Town agrees to pay Contractor the compensation set forth on Exhibit A in the amount not to exceed the sum of **\$76,704.00**. Contractor shall submit detailed invoices reflecting the portion of the Services completed to the date of the invoice. The Town shall provide payment for Services to Contractor within thirty (30) days of receipt of the invoice. In its discretion, the Town may withhold payment for disputed portions of invoices on the condition that the Town provides written notice to Contractor of the dispute. Upon delivery of notice, the Town and Contractor shall promptly endeavor to resolve such dispute.

2.03 Expenses: Contractor shall not incur any expense or debt on behalf of the Town

without the Town's prior written authorization.

2.04 Term. Unless otherwise terminated in accordance with Section 5, the term of this Agreement shall be from the Effective Date through March 2023 and shall not extend beyond that date absent the written approval of the Town.

SECTION 3: OPERATIONS

3.01 Contractor Status. Contractor avers that it has the background, expertise and education to provide the Services. Contractor shall be responsible for the proper performance of the Services in accordance with the terms hereof. Contractor shall obtain the necessary permits, if any, and maintain all required licenses, including but not limited to a Town business license.

3.02 Schedule. Unless otherwise set forth in Exhibit A, Contractor shall provide the Services in accordance with the timeline requested by the Town

SECTION 4: INSURANCE AND INDEMNITY PROVISIONS

4.01 Insurance.

A. Contractor understands and agrees that Contractor shall have no right of coverage under any existing or future Town comprehensive or personal injury liability insurance policies. As a material term of this Agreement, Contractor agrees to maintain and keep in force during the term of this Agreement one or more policies of insurance written by one or more responsible insurance carrier(s) authorized to do business in the State of Colorado in the following amounts:

1. Workers' compensation insurance as required by law;
2. Commercial general or business liability insurance with minimum combined single limits of ONE MILLION DOLLARS (\$1,000,000.00) each occurrence and TWO MILLION DOLLARS (\$2,000,000.00) general aggregate;
3. Automobile liability insurance with minimum combined single limits for bodily injury and property damage of not less than ONE MILLION DOLLARS (\$1,000,000) for any one occurrence, with respect to each of Contractor's owned, hired or non-owned vehicles assigned to or used in performance of the Services. In the event that Contractor's insurance does not cover non-owned automobiles, the requirements of this paragraph shall be met by each employee of Contractor who utilizes an automobile in providing services to Town under this Agreement; and
4. Professional liability insurance with minimum limits of ONE MILLION DOLLARS (\$1,000,000.00) each claim and TWO MILLION DOLLARS (\$2,000,000.00) general aggregate.

B. Contractor shall procure and maintain the minimum insurance coverages

listed herein. All coverages shall be continuously maintained to cover all liability, claims, demands and other obligations assumed by Contractor pursuant to this Agreement. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage. The Town shall have the right to request and receive a certified copy of any policy and any endorsement thereto. Except for workers compensation insurance, the Town shall be listed as an additional insured party on Contractor's insurance policies.

C. A certificate of insurance shall be completed by Contractor's insurance agent(s) as evidence that policies providing the required coverages, conditions and minimum limits are in full force and effect, and, upon request by the Town, shall be subject to review and approval by the Town. The certificate shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be canceled, terminated or materially changed until at least thirty (30) days prior written notice has been given to Town. If the words "endeavor to" appear in the portion of the certificate addressing cancellation, those words shall be stricken from the certificate by the agent(s) completing the certificate. The completed certificate of insurance shall be provided to the Town.

4.02 Damage and Indemnity. Contractor assumes full responsibility for any and all damages caused by Contractor's exercise of its activities, or failures to act, under this Agreement. Contractor agrees that it will at all times protect, defend, indemnify and hold harmless the Town, its elected officials, employees, agents, and their successors and assigns, from and against all liabilities, losses, claims, demands, actions and costs (including reasonable attorneys' fees), arising from or related to loss or damage to property or injury to or death to any persons arising from or resulting in any manner from the actions or failures to act of Contractor or any invitees, guests, agents, employees or subcontractors of Contractor, whether brought by any of such persons or any other person.

SECTION 5: TERMINATION

5.01 Termination. The Town or Contractor may terminate this Agreement, with or without cause, by providing thirty (30) days prior written notice to the other Party. Notwithstanding the foregoing, if the Town terminates this Agreement for cause and determines that a notice period is not in the best interests of the Town, the Town may terminate this Agreement by providing written notice to Contractor effective immediately.

SECTION 6: INDEPENDENT CONTRACTOR

6.01 Independent Contractor. Contractor understands and agrees that Contractor is an independent contractor and not an employee of the Town. The Town shall not provide benefits of any kind to Contractor. The Town shall not be responsible for withholding any portion of Contractor's compensation for the payment of Federal Insurance Contributions Act (FICA) tax, workers' compensation, or other taxes or benefits. **CONTRACTOR IS NOT ENTITLED TO UNEMPLOYMENT COMPENSATION COVERAGE FROM THE TOWN. CONTRACTOR IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON MONEYS PAID PURSUANT TO THIS AGREEMENT.** As long as there is not a conflict of interest with the

Town, Contractor may engage in any other lawful business activities during the term of this Agreement.

SECTION 7: NOTICE

7.01 Notices. All notices required under this Agreement shall be in writing and shall be: 1) hand-delivered; 2) sent by registered or certified mail, return receipt requested, postage prepaid, to the addresses of the Parties herein set forth; or 3) sent by electronic mail ("email") return receipt or written acknowledgment requested and received. All notices by hand-delivery shall be effective upon receipt. All notices by mail shall be considered effective seventy-two (72) hours after deposit in the United States mail with the proper address as set forth below. All notices by email shall be effective upon acknowledgment of receipt by the intended recipient. Either party, by notice to be given, may change the address to which future notices shall be sent.

TO THE TOWN:
Town of Johnstown
Attn: Ellen Hilbig
450 S. Parish Avenue
P.O. Box 609
Johnstown, CO 80534
Email: ehilbig@johnstownco.gov

TO CONTRACTOR:
Moltz Construction
Attn: Mike Butler
975 Merchant Court
Windsor, CO 80550
Email: mike@moltzconstruction.com

SECTION 8: MISCELLANEOUS

8.01 Time. Time is of the essence of this Agreement and of each covenant hereof.

8.02 Non-Appropriation of Funds. Pursuant to Section 29-1-110, C.R.S., as amended, financial obligations of the Town payable as set forth herein, after the current fiscal year, are contingent upon funds for that purpose being budgeted, appropriated and otherwise made available. This Agreement shall be terminated effective January 1 of the first fiscal year for which funds are not budgeted and appropriated.

8.03 Laws and Regulations. In the conduct of the Services, Contractor shall comply with all applicable laws, rules and regulations, and the directives or instructions issued by the Town or its designated representatives.

8.04 Assignment; Third Party Rights. Contractor may not assign, delegate or subcontract any part of its rights, duties or obligations under this Agreement. The Parties do not intend to confer any benefit hereunder on any person or entity other than the Parties hereto.

8.05 Amendment. This Agreement may not be amended or modified except by a subsequent written instrument signed by the Parties. Course of performance, no matter how long, shall not constitute an amendment to this Agreement.

8.06 Severability. If any part, term or provision of this Agreement is declared unlawful or unenforceable, the remainder of this Agreement shall remain in full force and effect, except that, in the event any state or federal governmental agency or court determines that the relationship between the Town and Contractor is one of employment rather than independent contractor, this Agreement shall become null and void in its entirety.

8.07 Waiver. No consent or waiver, express or implied, by the Town to or of any breach or default by Contractor in the performance by Contractor of its obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default by the Town. Failure on the part of the Town to complain of any act or failure to act or to declare Contractor in default, irrespective of how long such failure continues, shall not constitute a waiver by the Town of its rights hereunder.

8.08 Governmental Immunity. The Parties agree that the Town is relying on, and does not waive or intend to waive by any provision of the Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, §§ 24-10-101 *et seq.*, C.R.S., as amended from time, or otherwise available to the Town, its elected officials, employees or agents.

8.09 Applicable Law and Venue. This Agreement shall be construed according to the laws of the State of Colorado. Venue for any claim, proceeding or action arising out of this Agreement shall be in Weld County, State of Colorado.

8.10 Mediation. In the event of any dispute arising under this Agreement, except in the case of an action for injunctive relief, the Parties shall submit the matter to mediation prior to commencing legal action and shall share equally in the cost of the mediation.

8.11 Costs and Attorney's Fees. If any judicial proceedings may hereafter be brought to enforce any of the provisions of this Agreement, the Town, if the prevailing party, shall be entitled to recover the costs of such proceedings, including reasonable attorney's fees and reasonable expert witness fees.

8.12 Entire Agreement. The provisions of this Agreement represent the entire and integrated agreement between the Town and Contractor and supersede all prior negotiations, representations and agreements, whether written or oral.

8.13 Public Official Personal Liability. Nothing herein shall be construed as creating any personal liability on the part of any elected official, employee or agent of the Town.

8.14 No Presumption. Each Party acknowledges that it has carefully read and reviewed the terms of this Agreement. Each Party acknowledges that the entry into and execution of this Agreement is of its own free and voluntary act and deed, without compulsion. Each Party acknowledges that it has obtained, or has had the opportunity to obtain, the advice of

legal counsel of its own choosing in connection with the negotiation and execution of this Agreement and with respect to all matters set forth herein. The Parties agree that this Agreement reflects the joint drafting efforts of all Parties and in the event of any dispute, disagreement or controversy arising from this agreement, the Parties shall be considered joint authors and no provision shall be interpreted against any Party because of authorship.

8.15 Controlling Document. In the event of a conflict between the provisions in this Agreement and Exhibit A, the provisions in this Agreement shall control.

8.16 Headings. The headings in this Agreement are inserted only for the purpose of convenient reference and in no way define, limit or prescribe the scope or intent of this Agreement or any part thereof.

8.17 Counterparts. This Agreement may be executed in counterparts, each of which shall be an original, but all of which, together, shall constitute one and the same instrument.

[Remainder of page intentionally left blank.]

EXHIBIT A
SERVICES

**EXHIBIT A
CONSTRUCTION MANAGER AT RISK
CMAR DESIGN PHASE SERVICES**

**TOWN OF JOHNSTOWN
CENTRAL WASTEWATER TREATMENT PLANT EXPANSION PROJECT**

1. SCOPE OF SERVICES

1.1. DESIGN PHASE SERVICES

The selected CMAR will be provided a contract for professional design phase services with the Town. That agreement will provide for specific services and compensation for project team activities other than construction phase services. The Design Phase services and activities are listed below, in addition to requirements included in the attached CMAR Contract.

- Participate as a member of the project team in meetings and in evaluating alternative facility arrangements, construction materials, and sequencing of construction which may affect the selection, design and arrangement of project components.
- Provide input and feedback regarding comparative cost of implementation of required facilities as defined by the project team.
- Provide value engineering assistance to determine options that may reduce the total construction costs of the project (for example, help determine location of proposed headworks to reduce shoring and construction costs).
- Identify appropriate subcontractors and material suppliers that will be invited to participate/bid in the pricing and/or construction of the project. Suitability will be determined by concurrence of the entire project team.
- Assist and participate as a member of the project team through completion of construction documents providing a revised estimate of probable costs at approximately one or two additional intervals during completion of the drawings and specifications.
- Participate as a member of the project team in evaluating Building Code compliance issues for proposed construction. This will be a responsibility of the CMAR who shall meet the contractor licensing requirements of the Town.
- Based on a mutually agreed upon completion level of the drawings and specification, prepare a final construction project cost in the form of a guaranteed maximum price (GMP). The Town may accept the GMP and use it as a cost basis for the CMAR contract, or reject the GMP, which would terminate the design phase agreement.

2. FUTURE POTENTIAL ADDITIONAL SERVICES

2.1. CONSTRUCTION PHASE SERVICES

Upon completion of the Design Phase and at the Town's discretion, the Town and CMAR Firm may enter a separate Construction Phase CMAR contract, on a cost-plus basis with a Guaranteed Maximum Price. These services may include the following, in addition to the requirements included in the attached CMAR Contract.

- All construction management and construction services required for construction, implementation and start-up of operation of the new facilities.
- Project management and superintendent services.
- Subcontractor bid package preparation, advertisement, pre-bid meeting, bidding services, contracting, coordination, payments, and reproduction services.
- Self-performed construction work as elected after bidding processes.
- Preparing monthly payment applications.
- Organizing weekly (or as required) construction progress meetings.
- Responsible for all temporary construction facilities, job site management, clean-up, access, deliveries, and safety.
- Change Order preparation, coordination, and execution.
- QA/QC, materials testing, start-up, commissioning and training of systems.
- Close-out documentation (O&M manuals, As-built drawings/documents, Warranty, Mechanics Lien release and Bonds as required).
- Project permitting.
- Maintenance of performance and payment bonds during the project execution and maintenance of the performance bond through the warranty period following substantial completion.
- Maintenance of necessary and specified insurances during the project implementation and execution.
- Other required services for project completion outlined in the CMAR contract and general/supplemental conditions.

2.2. SCOPE OF WORK BY AQUA ENGINEERING

As part of the Project Team, AQUA (and its subconsultants) will be responsible for coordinating the design, progress review(s), preparing a coordinated set of Final Design Documents, and limited construction phase engineering services. Specifically, AQUA will provide the following services as follows:

- ***Design Phase:*** Organize project kickoff meeting, subsequent design progress meetings, and produce drawings and specifications. Present detailed project scope, request and review CMAR's GMP, and participate in GMP negotiations as required.
- ***Construction Phase:*** Attend periodic construction progress meetings; produce bid package drawing and specification sets; review schedules, pay applications and change orders; review submittal and O&M data; perform periodic construction inspection services, recommend Substantial and Final completion; other related duties to support the contract between the CMAR and the Town.

3. PROJECT SCHEDULE AND KEY DATES

The project schedule is generally outlined in the table below. It is anticipated that design work, equipment and material procurement and construction work may proceed in phases. Continuation of design, constructability review, and scheduling for the project is expected to begin immediately after a CMAR is selected and a design phase agreement is executed with the Town. Key dates are summarized in the table below.

Activity	Date
Design Phase CMAR Selection/PSA	October 2022
Design Completion	December 2022
Final GMP	January 2023
Construction Start	February 2023
Project Substantial Completion	To Be Determined (TBD)
Project Final Completion	TBD

4. CMAR DESIGN PHASE SERVICES FEE

The CMAR design phase services will be complete on a Time and Materials basis for a maximum-not-to-exceed fee of **\$76,704.00** at the following hourly rates:

Title/Role	Burdened Hourly Rate
Senior Project Manager	\$92.00
Preconstruction Lead	\$82.00
Project Manager	\$82.00
Estimator	\$75.00

The above fee is inclusive of incidentals and other indirect costs. Town reserves the right to utilize any portion of the design services fee. The Moltz "Pre-Construction Services" fee sheet is attached for reference.