

# PROFESSIONAL SERVICES AGREEMENT

Between

THE CITY OF MARSHALL, MINNESOTA

and

TOLTZ, KING, DUVALL, ANDERSON AND ASSOCIATES, INCORPORATED

THIS AGREEMENT is effective this 24th day of March, 2020, by and between THE CITY OF MARSHALL, MINNESOTA, a governmental unit with a regular place of business 344 West Main Street, Marshall, Minnesota, 56258, hereinafter referred to as the OWNER, and TOLTZ, KING, DUVALL, ANDERSON AND ASSOCIATES, INCORPORATED, a Minnesota corporation with principal offices at 444 Cedar Street, Suite 1500, St. Paul, Minnesota 55101, hereinafter referred to as TKDA.

WITNESSETH:

That the OWNER and TKDA, for the consideration hereinafter named, agree as follows:

## **ARTICLE 1. GENERAL DESCRIPTION OF WORK TO BE DONE**

The OWNER agrees to and hereby does retain TKDA and TKDA agrees to perform Professional Services (Engineering, Architectural, and Planning) at the Southwest Minnesota Regional Airport, all as described by subsequent "Authorization(s)."

Professional Services may in general include studies and reports, design, preparation of working drawings and specifications; construction observations, checking of shop drawings and estimates and recommendations regarding acceptance of work; and other related tasks of a type normally associated with facility planning, design, construction, operation and/or maintenance. Some of these services may be financed in part by grant-in-aid programs of the Minnesota Department of Transportation, Office of Aeronautics (MnDOT), and/or the Federal Aviation Administration (FAA).

Individual Authorizations for services to be provided for specific projects shall be duly approved by the OWNER and accepted by TKDA; and all records and documents for services with respect thereto shall be appropriately referenced to each specific Authorization. TKDA shall provide the OWNER with a written work scope and associated fees for each project for authorization by the OWNER.

## **ARTICLE 2. INDEPENDENT CONTRACTOR**

TKDA, in performance of work hereunder operates as an independent contractor and 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 OWNER by reason hereof, and that it will not, by reason hereby, make any claim, demand or shall it apply for any right or privilege applicable to an officer or employee of the OWNER, including, but not limited to, workmen's compensation coverage, unemployment insurance benefits, social security coverage or retirement membership or credit.

### **ARTICLE 3. PERIOD OF SERVICE**

TKDA is hereby retained on a continuing basis through March 24, 2025, subject, however, to termination by either party in accordance with ARTICLE 17. A period of service for each project shall be set forth in specific Authorization as appropriate.

### **ARTICLE 4. COMPENSATION TO TKDA**

- A. Compensation to TKDA for services described in this Agreement shall be consistent with the contracting methods described in FAA Advisory Circular 150/5100-14E (dated Sept. 25, 2015) (the FAA Advisory Circular). Compensation shall be specified in each Authorization on either a Lump Sum basis, an Hourly Cost Reimbursement Plus Fixed Fee basis, or an Hourly Rate basis. Compensation shall also include Direct Non-Salary Expenses.
1. A Lump Sum method of payment for TKDA's services shall apply to all or parts of an authorized project scope where TKDA's tasks can be readily defined and/or where the level of effort required to accomplish such tasks can be estimated with a reasonable degree of accuracy. Reimbursement for Direct Non-Salary Expenses incurred in the performance of this Lump Sum work shall be included in the Lump Sum amount, unless otherwise set forth in the Authorization. The OWNER shall make monthly payments to TKDA within 30 days of date of invoice based on an estimated percentage of completion of TKDA'S services.
  2. An Hourly Cost Reimbursement Plus Fixed Fee method of payment for TKDA's services may apply to all or parts of a work scope where TKDA's tasks cannot be readily defined and/or where the level of effort required to accomplish such tasks cannot be established with any reasonable degree of accuracy. Under an Hourly Cost Reimbursement Plus Fixed Fee method of payment, TKDA shall be paid Direct Salary Costs, Overhead Costs, Direct Non-Salary Costs, and a fixed fee payment.
    - (a) TKDA shall be paid a fixed fee calculated as a percentage of the Direct Salary Cost and Overhead Costs initially approved in an Authorization, at the rate set forth in ATTACHMENT A.
    - (b) OWNER shall make monthly payments to TKDA within 30 days of the date of invoice based on computations made in accordance with the above charges for services provided and expenses incurred to date, including a proportionate amount of the fixed fee. Invoices shall be accompanied by supporting evidence as required.
  3. An Hourly Rate method of payment for TKDA's services may apply to all or parts of a work scope where TKDA's tasks cannot be readily defined and/or where the level of effort required to accomplish such tasks cannot be estimated with any reasonable degree of accuracy. Under an Hourly Rate method of payment, TKDA shall be paid for the actual hours worked on an authorization by TKDA technical personnel times an hourly billing rate established for each employee. Each TKDA employee's hourly billing rate shall be based on their direct hourly rate times the Hourly Rate Multiplier defined in ATTACHMENT A. The Hourly Rate Multiplier includes all Overhead Costs and a professional fee (profit). TKDA will furnish an updated rate schedule to OWNER annually.

B. Terms defined.

1. Direct Salary Costs: Direct Salary Costs incurred by TKDA for employees' time directly chargeable to a project, and in accordance with TKDA's schedule included in ATTACHMENT A. Periodic revisions to the schedule may be made and any such revisions shall be submitted by TKDA to the OWNER for approval.
2. Overhead Costs include overhead on direct labor, including, but not limited to, employment taxes, fringe benefits, holidays, vacation, and sick leave, and all allowable general and administrative overhead costs. Overhead Costs shall be calculated as a percentage of Direct Salary Costs, with such percentage based on TKDA's audited records. The Overhead Multiplier Rate to be applied to this Agreement and any special provisions relating thereto shall be set forth in ATTACHMENT A.
3. Direct Non-Salary Expenses incurred by TKDA for costs directly chargeable to a project include, but are not limited to, the following:
  - (a) Travel and subsistence.
  - (b) OWNER-approved outside professional and technical services.
  - (c) Identifiable reproduction and reprographic charges.
  - (d) Expendable field supplies and special field equipment rental.
  - (e) Other acceptable costs for such additional items and services as may be required by the OWNER to fulfill the terms of this Agreement.

C. The OWNER will pay the balance stated on the invoice unless OWNER notifies TKDA in writing of the particular item that is alleged to be incorrect within 15 days from the date of invoice, in which case, only the disputed item will remain undue until resolved by the parties. All accounts unpaid after 30 days from the date of original invoice shall be subject to a service charge of 1-1/2% per month, or the maximum amount authorized by law, whichever is less. In addition, TKDA may after giving seven days' written notice to the OWNER, suspend services under this Agreement until TKDA has been paid in full for all amounts then due for services, expenses and charges. OWNER acknowledges that TKDA shall not be responsible for any claim for consequential damages arising from suspension of services hereunder.

D. Pursuant to 2 CFR §§ 200.326 & 200.333, TKDA must maintain an acceptable cost accounting system. TKDA agrees to provide the OWNER, the FAA, and the Comptroller General of the United States or any of their duly authorized representatives access to any books, documents, papers, and records of TKDA which are directly pertinent to the specific contract for the purpose of making audit, excerpts, examination, and transcriptions. TKDA agrees to maintain all books, records and reports required under this contract for a period of not less than three years after final payment is made and all pending matters are closed.

**ARTICLE 5.**            **EXTRA WORK**

In the event that a lump sum or maximum payment amount is specified in an Authorization and TKDA is of the opinion that any services it has been directed to perform are beyond the scope of the Authorization, or that the level of effort required significantly exceeds that estimated due to changed conditions and thereby constitutes Extra Work, TKDA shall promptly notify the OWNER of that fact. Extra Work, additional compensation for same, and extension of time for completion shall

be covered by a supplemental Authorization entered into by both parties, and approved by MnDOT and FAA if required, prior to proceeding with any Extra Work or related expenditures.

#### **ARTICLE 6. OPINIONS OF COST**

Opinions of probable project cost, construction cost, financial evaluations, feasibility studies, economic analyses of alternate solutions and utilitarian considerations of operations and maintenance costs prepared by TKDA under an Authorization will be made on the basis of TKDA's experience and qualifications and represent TKDA's best judgment as an experienced and qualified design professional. It is recognized, however, that TKDA does not have control over the cost of labor, material, equipment or services furnished by others or over market conditions or TKDA's methods of determining their prices, and that any evaluation of any facility to be constructed, or acquired, or work to be performed on the basis of TKDA's cost opinions, must of necessity, be speculative until completion of construction or acquisition. Accordingly, TKDA does not guarantee that proposals, bids or actual costs will not substantially vary from opinions, evaluations or studies submitted by TKDA under an Authorization.

#### **ARTICLE 7. CONSTRUCTION PHASE SERVICES**

OWNER acknowledges that it is customary for the architect or engineer who is responsible for the preparation and furnishing of Drawings and Specifications and other construction-related documents to be employed to provide professional services during the Bidding and Construction Phases of a project, (1) to interpret and clarify the documentation so furnished and to modify the same as circumstances revealed during bidding and construction may dictate, (2) in connection with acceptance of substitute or or-equal items of materials and equipment proposed by bidders and TKDA, (3) in connection with approval of shop drawings and sample submittals, and (4) as a result of and in response to TKDA's detecting in advance of performance of affected work inconsistencies or irregularities in such documentation. OWNER agrees that unless TKDA is employed to provide such services during the Bidding (if the work is out for bids) and the Construction Phases of a project authorized under this Agreement, TKDA will not be responsible for damages or claims arising out of or resulting from interpretation, clarification, substitution acceptance, shop drawing or sample approval or modification of such documentation issued or carried out by owner or others. Nothing contained in this paragraph shall be construed to release TKDA (or TKDA's professional associates or consultants) from liability for failure to perform in accordance with professional standards any duty or responsibility which TKDA has undertaken or assumed under an Authorization and this Agreement.

#### **ARTICLE 8. DISPOSITION OF PLANS, REPORT AND OTHER DATA**

At the time of completion or termination of an Authorization TKDA shall make available to the OWNER, upon request, all maps, tracings, reports, resource materials and other documents pertaining to the work described in an Authorization. All such documents are not intended or represented to be suitable for reuse by the OWNER or others on extensions of the work or to any other project. Any reuse without written verification or adaptation by TKDA for the specific purpose intended will be at OWNER'S sole risk and without liability or legal exposure to TKDA. In this regard, the OWNER will indemnify and hold harmless TKDA from any and all suits or claims of third parties arising out of such reuse, which is not specifically verified, adapted, or authorized by TKDA.

In the event electronic copies of documents are made available to the OWNER pursuant to the foregoing paragraph, the OWNER acknowledges that the useful life of electronic media such as DVDs or CD-ROMs may be limited because of deterioration of the media or obsolescence of the computer hardware and/or software systems. Therefore, TKDA makes no representation that such media will be fully usable beyond 30 days from date of delivery to OWNER.

## **ARTICLE 9.            OWNER'S RESPONSIBILITIES**

- A. To permit TKDA to perform the services required hereunder, the OWNER shall supply, in proper time and sequence, the following for each Authorization at no expense to TKDA:
1. Provide all necessary information regarding its requirements as necessary for orderly progress of the work.
  2. Designate in writing, a person to act as the OWNER'S representative with respect to the services to be rendered hereunder. Such person shall have authority to transmit instructions, receive instructions, receive information, and interpret and define OWNER'S policies with respect to TKDA'S services.
  3. Furnish, as required for performance of TKDA's services (except to the extent provided otherwise in an Authorization), data prepared by or services of others, including without limitation, core borings, probings and subsurface explorations, hydrographic and geohydrologic surveys, laboratory tests and inspections of samples, materials and equipment; appropriate professional interpretations of all of the foregoing; environmental assessment and impact statements; property, boundary, easement, right-of-way, topographic and utility surveys; property descriptions; zoning, deed and other land use restriction; and other special data not covered in an Authorization.
  4. Provide access to, and make all provisions for, TKDA to enter upon publicly or privately owned property as required to perform their services.
  5. Act as liaison with other agencies to carry out necessary coordination and negotiations; furnish approvals and permits from all governmental authorities having jurisdiction over a project described in an Authorization, and such approvals and consents from others as may be necessary for completion of a project.
  6. Examine all reports, sketches, drawings, specifications and other documents prepared and presented by TKDA, obtain advice of an attorney, insurance counselor or others as OWNER deems necessary for such examination and render in writing, decisions pertaining thereto within a reasonable time so as not to delay the services of TKDA.
  7. Give prompt written notice to TKDA whenever OWNER observes or otherwise becomes aware of any development that affects the scope or timing of TKDA's services or any defect in the work of Construction Contractor(s), Consultants or TKDA.
  8. Provide record drawings and specifications for all existing physical plants or facilities which are pertinent to an Authorization.
  9. Provide other services, materials, or data as may be set forth in an Authorization.
  10. Initiate action, where appropriate, to identify and investigate the nature and extent of asbestos and/or pollution in the project and to abate and/or remove the same as may be required by federal, state or local statute, ordinance, code, rule, or regulation now existing or hereinafter enacted or amended. For purposes of these General Provisions, "pollution" and "pollutant" shall mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, alkalis, chemicals and hazardous or toxic waste. Hazardous or toxic waste means any substance, waste, pollutant or contaminant now or hereafter included within such terms under any federal, state or local statute, ordinance, code, rule or regulation now existing

or hereinafter enacted or amended. Waste further includes materials to be recycled, reconditioned or reclaimed.

If TKDA encounters, or reasonably suspects that it has encountered, asbestos or pollution in a project, TKDA shall cease activity on the project and promptly notify the OWNER who shall proceed as set forth above. Unless otherwise specifically provided in the Authorization, the services to be provided by TKDA do not include identification of asbestos or pollution and TKDA has no duty to identify or attempt to identify the same within the area of any project.

11. Provide such accounting, independent cost estimating and insurance counseling services as may be required for a project described in an Authorization, such legal services as OWNER may require or TKDA may reasonably request with regard to legal issues pertaining to a project including any that may be raised by contractors such auditing service as OWNER may require to ascertain how or for what purpose any contractor has used the moneys paid under a construction contract, and such inspection services as OWNER may require to ascertain that contractors are complying with any law, rule, regulation, ordinance, code or order applicable to their furnishing and performing the work.
  12. When applicable, provide written notice to TKDA when a project has been financially closed-out by FAA.
- B. TKDA shall be entitled to rely on the accuracy and completeness of information furnished by OWNER. If TKDA finds that any information furnished by OWNER is in error or is inadequate for its purpose, TKDA shall promptly notify OWNER.

#### **ARTICLE 10. FEDERAL AND STATE PARTICIPATION**

Services to be performed under an Authorization pursuant to this Agreement may be financed in part by State and/or Federal Funds. However, payments to TKDA will be made by the OWNER.

The State of Minnesota and the United States are not parties to this Agreement and no reference herein to MnDOT and to the Federal Aviation Administration or any representatives thereof makes the State of Minnesota or the United States a party to this Agreement.

#### **ARTICLE 11. FEDERAL CONTRACT COMPLIANCE**

If any services under an Authorization pursuant to this Agreement are to be financed in part by Federal funds, TKDA shall comply with those provisions of 49 CFR §18.36(i) and the FAA Provisions, attached hereto as ATTACHMENT B, which specifically relate to the furnishing and procurement of professional services.

#### **ARTICLE 12. GENERAL CIVIL RIGHTS**

TKDA agrees to comply with pertinent statutes, Executive Orders and such rules as are promulgated to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance.

This provision binds the Contractor and subcontractors from the bid solicitation period through the completion of the contract. This provision is in addition to that required by Title VI of the Civil Rights Act of 1964.

### **ARTICLE 13.**            **EQUAL EMPLOYMENT OPPORTUNITY ASSURANCES**

TKDA provides affirmative action and equal opportunity for all employees and applicants for employment. To implement this commitment, TKDA has adopted an Affirmative Action Plan conforming to the requirements of Executive Order 11246, 41 CFR § 60.1.4, and Minnesota laws. TKDA's Affirmative Action Plan shall be made available for review upon request.

### **ARTICLE 14.**            **INDEMNIFICATION**

TKDA shall indemnify and hold harmless OWNER and all of its officers, agents and employees for all liability from suits, actions or claims of any character brought for or on account of any injuries or damages received by any person or property, including OWNER, to the extent they result from a negligent error, act, or omission of TKDA or any persons for whom TKDA is legally liable, in carrying out the terms of this Agreement.

OWNER shall indemnify and hold harmless TKDA and all of its officers, agents and employees for all liability from suits, actions or claims of any character brought for or on account of any injuries or damages received by any person or property, including TKDA, resulting from or arising out of an error, act, or omission of OWNER or any persons for whom OWNER is legally liable, in carrying out the terms of this Agreement.

It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement shall survive any termination of this Agreement.

### **ARTICLE 15.**            **INSURANCE**

Subject to the provisions of ARTICLE 14, TKDA shall also procure and maintain professional and commercial general liability insurance, and auto and excess insurance, for all damages arising out of the performance of services caused by a negligent error, omission or act for which TKDA is legally liable.

TKDA shall procure and maintain insurance for protection from claims against it under worker's compensation acts (statutory limits), claims for damages because of bodily injury including personal injury, sickness or disease or death of any and all employees or of any person other than such employees, and from claims against it for damages because of injury to or destruction of property including loss of use resulting therefrom. Certificates of insurance will be provided to the OWNER upon request.

### **ARTICLE 16.**            **ASBESTOS/POLLUTION INDEMNIFICATION**

TKDA hereby states, and the OWNER acknowledges, that TKDA has no professional liability (errors and omissions) or other insurance, and is unable to reasonably obtain such insurance, for claims arising out of the performance or failure to perform professional services, including, but not limited to, the preparation of reports, designs, drawings, and specifications, related to the investigation, detection, abatement, replacement, modification, removal or dispersal of (1) pollutants or of (2) products, materials, or processes containing asbestos. Accordingly, the OWNER hereby agrees to bring no claim for negligence, breach of contract, indemnity or other claim or cause of action against TKDA, its principals, employees, agents and consultants if such claim in any way arises out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, or the investigation of remedial work related to such pollutants or asbestos a project. The OWNER further agrees to defend, indemnify and hold TKDA and its principals, employees, agents, and consultants harmless from any such pollutant or asbestos related claim that may be brought by third parties as a result of the services provided by TKDA pursuant to this Agreement.

Notwithstanding the foregoing, the OWNER shall not be prohibited from bringing suit against TKDA for its alleged negligence, breach of contract, or other cause of action arising out of its professional services rendered in connection with the design and construction of potable water systems, storm water systems and sewerage systems, including those receiving industrial waste pre-treated in accordance with EPA standards, nor is the OWNER required to indemnify and hold harmless TKDA for claims and suits brought against it by third parties arising out of such professional services.

OWNER further agrees that, in the event a court of competent jurisdiction determines that the foregoing indemnification provision is unenforceable, TKDA's total liability to OWNER or third parties for pollution or asbestos related claims arising out of an authorization shall not exceed the total compensation paid by OWNER to TKDA for services rendered under an authorization pursuant to this Agreement or \$25,000 per authorization, whichever is less.

## **ARTICLE 17. ABANDONMENT, CHANGE OF PLAN AND TERMINATION**

The OWNER may, by written notice to TKDA, terminate this Agreement for its convenience and without cause or default on the part of TKDA. Upon receipt of the notice of termination, except as explicitly directed by the OWNER, TKDA must immediately discontinue all services affected.

Upon termination of the Agreement, TKDA must deliver to the OWNER all data, surveys, models, drawings, specifications, reports, maps, photographs, estimates, summaries, and other documents and materials prepared by TKDA under this contract, whether complete or partially complete.

OWNER agrees to make just and equitable compensation to TKDA for satisfactory work completed up through the date TKDA receives the termination notice. Compensation will not include anticipated profit on non-performed services.

OWNER further agrees to hold TKDA harmless for errors or omissions in documents that are incomplete as a result of the termination action under this clause.

### **A. Termination for Default (Professional Services)**

Either party may terminate this Agreement for cause if the other party fails to fulfill its obligations that are essential to the completion of the work per the terms and conditions of the Agreement. The party initiating the termination action must allow the breaching party an opportunity to dispute or cure the breach.

The terminating party must provide the breaching party seven days advance written notice of its intent to terminate the Agreement. The notice must specify the nature and extent of the breach, the conditions necessary to cure the breach, and the effective date of the termination action. The rights and remedies in this clause are in addition to any other rights and remedies provided by law or under this agreement.

1. **Termination by OWNER:** The OWNER may terminate this Agreement in whole or in part, for the failure of TKDA to:
  - a. Perform the services within the time specified in this contract or by OWNER approved extension;
  - b. Make adequate progress so as to endanger satisfactory project performance;
  - c. Fulfill the obligations of the Agreement essential to project completion.



2. Upon receipt of the notice of termination, TKDA must immediately discontinue all services affected unless the notice directs otherwise. Upon termination of the Agreement, TKDA must deliver to the OWNER all data, surveys, models, drawings, specifications, reports, maps, photographs, estimates, summaries, and other documents and materials prepared by TKDA under this contract, whether complete or partially complete.
  - a. OWNER agrees to make just and equitable compensation to TKDA for satisfactory work completed up through the date TKDA receives the termination notice. Compensation will not include anticipated profit on non-performed services.
  - b. OWNER further agrees to hold TKDA harmless for errors or omissions in documents that are incomplete as a result of the termination action under this clause.
  - c. If, after finalization of the termination action, the OWNER determines TKDA was not in default of the Agreement, the rights and obligations of the parties shall be the same as if the OWNER issued the termination for the convenience of the OWNER.
3. **Termination by TKDA:** TKDA may terminate this Agreement in whole or in part, if the OWNER:
  - a. Defaults on its obligations under this Agreement;
  - b. Fails to make payment to TKDA in accordance with the terms of this Agreement;
  - c. Suspends the project for more than [180] days due to reasons beyond the control of TKDA.
4. Upon receipt of a notice of termination from TKDA, OWNER agrees to cooperate TKDA for the purpose of terminating the agreement or portion thereof, by mutual consent. If OWNER and TKDA cannot reach mutual agreement on the termination settlement, TKDA may, without prejudice to any rights and remedies it may have, proceed with terminating all or parts of this Agreement based upon the OWNER's breach of the contract.
5. In the event of termination due to OWNER breach, TKDA is entitled to invoice OWNER and to receive full payment for all services performed or furnished in accordance with this Agreement and all justified reimbursable expenses incurred by TKDA through the effective date of termination action. OWNER agrees to hold TKDA harmless for errors or omissions in documents that are incomplete as a result of the termination action under this clause.

## **ARTICLE 18. COVENANT AGAINST CONTINGENT FEES**

TKDA warrants that no person or legal entity has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee excepting bona-fide employees or bona-fide established commercial or selling agencies maintained by TKDA for the purpose of securing business. For breach or violation of this warranty, the OWNER shall have the right to annul this Agreement without liability or in its discretion, to deduct from payment to TKDA, the full amount of each commission, percentages, brokerage or contingent fee.

**ARTICLE 19.**            **NOTICES**

All notices required by law or by this Agreement to be given to TKDA must be written and may be given personally or by depositing the same in the United States mail, postage prepaid, and addressed to TKDA at such premises and at the following address:

TKDA President/CEO  
444 Cedar Street, Suite 1500  
St. Paul, Minnesota 55101

All notices required or permitted to be given to the OWNER hereunder shall be given by United States mail, postage prepaid, and addressed to:

Director of Public Works/City Engineer  
City of Marshall  
344 West Main Street  
Marshall, Minnesota 56258-1313

Notice shall be deemed given as of the date said notice is deposited in the mail or personally delivered.

The parties must notify each other promptly in the event of a change in name or address.

**ARTICLE 20.**            **ASSIGNMENT**

This Agreement, being intended to secure the personal service of the individuals employed by and through whom TKDA performs work hereunder, shall not be assigned, sublet or transferred without the written consent of the OWNER.

**ARTICLE 21.**            **SEVERABILITY**

Any provision or portion thereof in this Agreement which is held to be void or unenforceable under any law shall be deemed stricken. All remaining provisions shall continue to be valid and binding between OWNER and TKDA.

**ARTICLE 22.**            **CONTROLLING LAW**

This Agreement to be governed by the laws of the State of Minnesota.

**ARTICLE 23.**            **DISPUTE RESOLUTION**

In the event of an irreconcilable dispute under this Agreement, which cannot be resolved through informal means, the parties may, upon written agreement, submit to the resolution process set out in this provision. Once the parties have agreed to the resolution process, each party shall have seven calendar days to designate one representative, who shall have authority to act on this Agreement. If either party fails within that time to inform the other party in writing of its designation, the other party is free to pursue all other legal and equitable remedies.

Within ten calendar days of designation of the representative, the representatives shall meet and shall entertain such presentation of testimony and other evidence as TKDA and the OWNER may wish to present with respect to the dispute. Within seven calendar days after the close of such presentation, the representatives shall resolve the dispute or either party is free to pursue all other legal and equitable remedies.

When the representatives resolve the dispute, their decision shall be final and conclusive. Should the representatives be unable to agree on a resolution of the dispute, then the parties are free to

pursue all other legal and equitable remedies. Each party's costs for the dispute resolution shall be borne by the respective party.

If the parties do not agree in writing to the resolution process set out above, either party is entitled to pursue any other legal or equitable remedies available.

**ARTICLE 24.**            **DOCUMENTS FORMING THE CONTRACT**

The contract documents shall be deemed to include this Agreement with all accompanying Attachments a part hereof, and any subsequent authorizations issued pursuant to the terms of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective the day and year first above written.

CITY OF MARSHALL

TOLTZ, KING, DUVALL, ANDERSON  
AND ASSOCIATES, INCORPORATED

By \_\_\_\_\_

By \_\_\_\_\_  
John W. Ahern, PE  
Vice President, Aviation

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

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

ATTACHMENTS:    ATTACHMENT A:    RATE SCHEDULE  
                         ATTACHMENT B:    FAA REQUIRED CONTRACT PROVISIONS

# ATTACHMENT A



## 2020 SCHEDULE OF HOURLY BILLING RATES

<u>Classification</u>	<u>Range of Hourly Billing Rates*</u>			
Senior Registered Engineer, Architect, Landscape Architect, Senior Scientist, Senior GIS Analyst or Senior Planner	\$ 40.00	to	\$ 94.00	
Engineering, Architectural, Planning, or GIS Specialist II	\$ 36.00	to	\$ 83.00	
Engineering, Architectural, Planning, or GIS Specialist I	\$ 26.00	to	\$ 52.00	
Registered Engineer, Architect, Landscape Architect, Planner, GIS Analyst, Professional Land Surveyor, Scientist, or Certified Interior Designer	\$ 28.00	to	\$ 62.00	
Graduate Engineer, Planner, Interior Designer, Scientist, GIS Analyst, or Land Surveyor	\$ 22.00	to	\$ 42.00	
Architectural Designer or Landscape Architectural Designer	\$ 22.00	to	\$ 35.00	
Technician III	\$ 22.00	to	\$ 41.00	**
Technician II	\$ 22.00	to	\$ 31.00	**
Technician I	\$ 15.00	to	\$ 25.00	**

\* Rates effective until December 26, 2020.

\*\* For hours worked over 40 hours per week individuals are billed at one and one-half times the above rates.

*In addition to hourly charges, TKDA shall be reimbursed for direct expenses when incurred in the performance of the work. Direct expenses for travel and subsistence will be billed at or up to applicable IRS and US GSA published rates. Unless provided otherwise in the master services agreement or a project agreement, TKDA shall be reimbursed for subconsultant fees at the amount billed TKDA plus 10%.*

### Notes:

- Overhead Costs shall be calculated as the Direct Hourly Rate times TKDA's audited Overhead Multiplier Rate of 167.87%.
- For Hourly Rate Authorizations, Direct Rates will be subject to an Hourly Rate Multiplier of 2.95, which includes Overhead Costs and Fee (Profit).
- For Hourly Cost Reimbursement Plus Fixed Fee Authorizations, the Fixed Fee shall be 15% of the Direct Salary Costs and Overhead Costs amount initially approved under the Authorization.

## ATTACHMENT B

### **FAA AIRPORT IMPROVEMENT PROGRAM** **REQUIRED CONTRACT PROVISIONS**

For additional information regarding the following Provisions, please refer to FAA, Contract Provisions Guidelines for Obligated Sponsors and Airport Improvement Program Projects (issued June 19, 2018).

For the purposes of these Provisions, **Capitalized Terms** shall have the definitions intended by the referenced federal requirement and/or the Agreement to which these Provisions are attached. "Contractor" and "Consultant" mean TKDA, unless otherwise specified.

#### **1. ACCESS TO RECORDS AND REPORTS**

The Contractor must maintain an acceptable cost accounting system. The Contractor agrees to provide the Owner, the Federal Aviation Administration and the Comptroller General of the United States or any of their duly authorized representatives access to any books, documents, papers and records of the Contractor which are directly pertinent to the specific contract for the purpose of making audit, examination, excerpts and transcriptions. The Contractor agrees to maintain all books, records and reports required under this contract for a period of not less than three years after final payment is made and all pending matters are closed.

#### **2. CONSTRUCTION, ALTERATIONS, OR REPAIRS**

The emergence of different project delivery methods has created situations where Professional Service Agreements (PSAs) include tasks that meet the definition of construction, alteration, or repair as defined in 29 CFR Part 5. If any Authorization under this Agreement result in work that qualifies as construction, alteration, or repair and it exceeds \$2,000, the Authorization shall incorporate the following provisions:

1. **The Copeland Anti-Kickback** provisions required by the FAA pursuant to 18 USC 874 and 40 USC 3145, as supplemented by Department of Labor regulation 29 CFR part 3.

2. **The Davis-Bacon Act** and implementing regulations.

Sponsors are required to set goals for minority and female participation in all construction projects. To the extent an Authorization exceeds \$10,000 and includes tasks that meet the definition of construction work, such as the installation of monitoring systems, the Authorization shall incorporate the **Affirmative Action Requirements** of 41 CFR part 60-4 and Executive Order 11246, and federal requirements prohibiting the segregation of facilities.

#### **3. BUY AMERICAN PREFERENCE**

TKDA agrees to comply with 49 USC § 50101 ("Buy American Requirements"), which provides that Federal funds may not be obligated unless all steel and manufactured goods used in AIP-funded projects are produced in the United States, unless the FAA has issued a waiver for the product; the product is listed as an Excepted Article, Material Or Supply in Federal Acquisition Regulation subpart 25.108; or is included in the FAA Nationwide Buy American Waivers Issued list. At this time, there is no deliverable steel and manufactured goods contemplated by this Agreement. To the extent an Authorization contemplates such a deliverable, TKDA shall certify compliance with Buy American Requirements at that time.

#### **4. CIVIL RIGHTS – GENERAL**

The Contractor agrees to comply with pertinent statutes, Executive Orders and such rules as are promulgated to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance.

This provision binds the Contractor and subcontractors from the bid solicitation period through the completion of the contract. This provision is in addition to that required by Title VI of the Civil Rights Act of 1964.

## 5. CIVIL RIGHTS – TITLE VI ASSURANCE

### A. Title VI Solicitation Notice:

All AIP funded solicitations for bids, requests for bids, requests for proposals, or any work subject to Title VI regulations, and all sponsor proposals for negotiated agreements must contain the following:

The **[SPONSOR]**, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 USC §§ 2000d to 2000d-4) and the Regulations, hereby notifies all bidders or offerors that it will affirmatively ensure that any contract entered into pursuant to this advertisement, [select disadvantaged business enterprises or airport concession disadvantaged business enterprises] will be afforded full and fair opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

### B. Compliance with Nondiscrimination Requirements:

During the performance of this contract, the Contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the “Contractor”), agrees as follows:

1. **Compliance with Regulations:** The Contractor (hereinafter includes consultants) will comply with the Title VI List of Pertinent Nondiscrimination Acts and Authorities, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.
2. **Nondiscrimination:** The Contractor, with regard to the work performed by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Contractor will not participate directly or indirectly in the discrimination prohibited by the Nondiscrimination Acts and Authorities, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR part 21.
3. **Solicitations for Subcontracts, including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding or negotiation made by the Contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the Contractor of the contractor’s obligations under this contract and the Nondiscrimination Acts and Authorities on the grounds of race, color, or national origin.
4. **Information and Reports:** The Contractor will provide all information and reports required by the Acts, the Regulations, and directives 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 sponsor or the Federal Aviation Administration to be pertinent to ascertain compliance with such Nondiscrimination Acts and Authorities and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the Contractor will so certify to the sponsor or the Federal Aviation Administration, as appropriate, and will set forth what efforts it has made to obtain the information.
5. **Sanctions for Noncompliance:** In the event of a Contractor’s noncompliance with the non-discrimination provisions of this contract, the sponsor will impose such contract sanctions as it or the Federal Aviation Administration may determine to be appropriate, including, but not limited to:
  - a. Withholding payments to the Contractor under the contract until the Contractor complies; and/or
  - b. Cancelling, terminating, or suspending a contract, in whole or in part.
6. **Incorporation of Provisions:** The Contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations, and directives issued pursuant thereto. The Contractor will take action with

respect to any subcontract or procurement as the sponsor or the Federal Aviation Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the Contractor may request the sponsor to enter into any litigation to protect the interests of the sponsor. In addition, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

### C. Title VI List of Pertinent Nondiscrimination Acts and Authorities

During the performance of this contract, TKDA, for itself, its assignees, and successors in interest (hereinafter referred to as the “Contractor”) agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

- Title VI of the Civil Rights Act of 1964 (42 USC § 2000d *et seq.*, 78 stat. 252) (prohibits discrimination on the basis of race, color, national origin);
- 49 CFR part 21 (Non-discrimination in Federally-assisted programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964);
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 USC § 4601) (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Section 504 of the Rehabilitation Act of 1973 (29 USC § 794 *et seq.*), as amended (prohibits discrimination on the basis of disability); and 49 CFR part 27;
- The Age Discrimination Act of 1975, as amended (42 USC § 6101 *et seq.*) (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982 (49 USC § 471, Section 47123), as amended (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987 (PL 100-209) (broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 USC §§ 12131 – 12189) as implemented by U.S. Department of Transportation regulations at 49 CFR parts 37 and 38;
- The Federal Aviation Administration’s Nondiscrimination statute (49 USC § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures nondiscrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 USC 1681 *et seq.*).

## 6. CLEAN AIR AND WATER POLLUTION CONTROL

TKDA agrees to comply with all applicable standards, orders, and regulations issued pursuant to the Clean Air Act (42 USC § 740-7671q) and the Federal Water Pollution Control Act as amended (33 USC § 1251-1387). The Contractor agrees to report any violation to the Owner immediately upon discovery. The Owner assumes responsibility for notifying the Environmental Protection Agency (EPA) and the Federal Aviation Administration.

TKDA must include this requirement in all subcontracts that exceed \$150,000.

## 7. CONTRACT WORKHOURS AND SAFETY STANDARDS ACT REQUIREMENTS

The following provisions apply to Authorizations that exceed \$100,000 and employ laborers, mechanics, watchmen, and guards, including survey crews and exploratory drilling operations.

1. **Overtime Requirements.** No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer

or mechanic, including watchmen and guards, in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

2. **Violation; Liability for Unpaid Wages; Liquidated Damages.** In the event of any violation of the clause set forth in paragraph (1) of this clause, the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1) of this clause, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this clause.
3. **Withholding for Unpaid Wages and Liquidated Damages.** The Federal Aviation Administration (FAA) or the Owner shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this clause.
4. **Subcontractors.** The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraphs (1) through (4) and also a clause requiring the subcontractor to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1) through (4) of this clause.

## 8. DEBARMENT AND SUSPENSION

### Certification of Offerer/Bidder Regarding Debarment

By submitting a bid/proposal under this solicitation, TKDA certifies that neither it nor its principals are presently debarred or suspended by any Federal department or agency from participation in this transaction.

### Certification of Lower Tier Contractors Regarding Debarment

The successful bidder, by administering each lower tier subcontract that exceeds \$25,000 as a “covered transaction”, must verify each lower tier participant of a “covered transaction” under the project is not presently debarred or otherwise disqualified from participation in this federally assisted project. The successful bidder will accomplish this by:

1. Checking the System for Award Management at website: <http://www.sam.gov>.
2. Collecting a certification statement similar to the Certification of Offerer /Bidder Regarding Debarment, above.
3. Inserting a clause or condition in the covered transaction with the lower tier contract.

If the Federal Aviation Administration later determines that a lower tier participant failed to disclose to a higher tier participant that it was excluded or disqualified at the time it entered the covered transaction, the FAA may pursue any available remedies, including suspension and debarment of the non-compliant participant.



## 9. DISADVANTAGED BUSINESS ENTERPRISES

**Contract Assurance (§ 26.13)** – The Contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of Department of Transportation-assisted contracts. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Owner deems appropriate, which may include, but is not limited to:

- 1) Withholding monthly progress payments;
- 2) Assessing sanctions;
- 3) Liquidated damages; and/or
- 4) Disqualifying the Contractor from future bidding as non-responsible.

**Prompt Payment (§26.29)** – The Contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 10 days from the receipt of each payment the prime contractor receives from Sponsor. The prime contractor agrees further to return retainage payments to each subcontractor within 10 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the Sponsor. This clause applies to both DBE and non-DBE subcontractors.

## 10. DISTRACTED DRIVING

In accordance with Executive Order 13513, "Federal Leadership on Reducing Text Messaging While Driving", (10/1/2009) and DOT Order 3902.10, "Text Messaging While Driving", (12/30/2009), the Federal Aviation Administration encourages recipients of Federal grant funds to adopt and enforce safety policies that decrease crashes by distracted drivers, including policies to ban text messaging while driving when performing work related to a grant or subgrant.

In support of this initiative, the Owner encourages the Contractor to promote policies and initiatives for its employees and other work personnel that decrease crashes by distracted drivers, including policies that ban text messaging while driving motor vehicles while performing work activities associated with the project. The Contractor must include the substance of this clause in all sub-tier contracts exceeding \$3,500 that involve driving a motor vehicle in performance of work activities associated with the project.

## 11. ENERGY CONSERVATION REQUIREMENTS

Contractor and Subcontractor agree to comply with mandatory standards and policies relating to energy efficiency as contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 USC 6201*et seq*).

## 12. EQUAL EMPLOYMENT OPPORTUNITY

### A. EQUAL OPPORTUNITY CLAUSE

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

1. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identify, 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. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

2. The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
3. The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Contractor's commitments under this section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
4. The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
5. The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
6. In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
7. The Contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however*, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

## **B. CONSTRUCTION CONTRACT SPECIFICATIONS**

1. As used in these specifications:
  - a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;
  - b. "Director" means Director, Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, or any person to whom the Director delegates authority;
  - c. "Employer identification number" means the Federal social security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941;
  - d. "Minority" includes: (1) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin); (2) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin regardless of race); (3) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and (4) American Indian or Alaskan native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.
3. If the Contractor is participating (pursuant to 41 CFR part 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors shall be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each contractor or subcontractor participating in an approved plan is individually required to comply with its obligations under the EEO clause and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other contractors or subcontractors toward a goal in an approved Plan does not excuse any covered contractor's or subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.
4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7a through 7p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered construction contractors performing construction work in a geographical area where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.
5. Neither the provisions of any collective bargaining agreement nor the failure by a union with whom the Contractor has a collective bargaining agreement to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.
6. In order for the non-working training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees shall be employed by the Contractor during the training period and the Contractor shall have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees shall be trained pursuant to training programs approved by the U.S. Department of Labor.
7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully and shall implement affirmative action steps at least as extensive as the following:
  - a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other onsite supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.
  - b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

- c. Maintain a current file of the names, addresses, and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source, or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefore along with whatever additional actions the Contractor may have taken.
- d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or female sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.
- e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.
- f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
- g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions, including specific review of these items, with onsite supervisory personnel such as superintendents, general foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
- h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other contractors and subcontractors with whom the Contractor does or anticipates doing business.
- i. Direct its recruitment efforts, both oral and written, to minority, female, and community organizations, to schools with minority and female students; and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations, such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
- j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer, and vacation employment to minority and female youth both on the site and in other areas of a contractor's workforce.
- k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR part 60-3.
- l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel, for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

- m. Ensure that seniority practices, job classifications, work assignments, and other personnel practices do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.
  - n. Ensure that all facilities and company activities are non-segregated except that separate or single user toilet and necessary changing facilities shall be provided to assure privacy between the sexes. **(A19)**
  - o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.
  - p. Conduct a review, at least annually, of all supervisor's adherence to and performance under the Contractor's EEO policies and affirmative action obligations.
8. Contractors are encouraged to participate in voluntary associations, which assist in fulfilling one or more of their affirmative action obligations (7a through 7p). The efforts of a contractor association, joint contractor union, contractor community, or other similar groups of which the Contractor is a member and participant may be asserted as fulfilling any one or more of its obligations under 7a through 7p of these specifications provided that the Contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.
  9. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, if the particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally), the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized.
  10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.
  11. The Contractor shall not enter into any subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.
  12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination, and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.
  13. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR part 60-4.8.
  14. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government, and to keep records. Records shall at least include for each employee,

the name, address, telephone number, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g. those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

### **13. FAIR LABOR STANDARDS ACT (FLSA)**

All contracts and subcontracts that result from this solicitation incorporate by reference the provisions of 29 CFR part 201, the Federal Fair Labor Standards Act (FLSA), with the same force and effect as if given in full text. The FLSA sets minimum wage, overtime pay, recordkeeping, and child labor standards for full and part-time workers.

The Consultant has full responsibility to monitor compliance to the referenced statute or regulation. The Consultant must address any claims or disputes that arise from this requirement directly with the U.S. Department of Labor – Wage and Hour Division.

### **14. CERTIFICATION REGARDING LOBBYING**

The Bidder or Offeror certifies by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

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

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into 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.

### **15. OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970**

This Agreement incorporates by reference the requirements of 29 CFR Part 1910 with the same force and effect as if given in full text. The employer must provide a work environment that is free from recognized hazards that may cause death or serious physical harm to the employee. The employer retains full responsibility to monitor its compliance and their subcontractor's compliance with the applicable requirements of the Occupational Safety and Health Act of 1970 (20 CFR Part 1910). The employer must address any claims or disputes that pertain to a referenced requirement directly with the U.S. Department of Labor – Occupational Safety and Health Administration.

**16. PROCUREMENT OF RECOVERED MATERIALS**

Contractor and subcontractor agree to comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and the regulatory provisions of 40 CFR Part 247. In the performance of this contract and to the extent practicable, the Contractor and subcontractors are to use products containing the highest percentage of recovered materials for items designated by the Environmental Protection Agency (EPA) under 40 CFR Part 247 whenever:

1. The contract requires procurement of \$10,000 or more of a designated item during the fiscal year; or,
2. The contractor has procured \$10,000 or more of a designated item using Federal funding during the previous fiscal year.

The list of EPA-designated items is available at [www.epa.gov/smm/comprehensive-procurement-guidelines-construction-products](http://www.epa.gov/smm/comprehensive-procurement-guidelines-construction-products).

Section 6002(c) establishes exceptions to the preference for recovery of EPA-designated products if the contractor can demonstrate the item is: (a) not reasonably available within a timeframe providing for compliance with the contract performance schedule; (b) fails to meet reasonable contract performance requirements; or (b) is only available at an unreasonable price.

**17. RIGHTS TO INVENTIONS**

Contracts or agreements that include the performance of experimental, developmental, or research work must provide for the rights of the Federal Government and the Owner in any resulting invention as established by 37 CFR part 401, Rights to Inventions Made by Non-profit Organizations and Small Business Firms under Government Grants, Contracts, and Cooperative Agreements. This contract incorporates by reference the patent and inventions rights as specified within 37 CFR §401.14. Contractor must include this requirement in all sub-tier contracts involving experimental, developmental, or research work.

**18. SEISMIC SAFETY**

In the performance of design services, the Consultant agrees to furnish a building design and associated construction specification that conform to a building code standard that provides a level of seismic safety substantially equivalent to standards as established by the National Earthquake Hazards Reduction Program (NEHRP). Local building codes that model their building code after the current version of the International Building Code (IBC) meet the NEHRP equivalency level for seismic safety. At the conclusion of the design services, the Consultant agrees to furnish the Owner a "certification of compliance" that attests conformance of the building design and the construction specifications with the seismic standards of NEHRP or an equivalent building code.

**19. TAX DELINQUENCY AND FELONY CONVICTIONS****Certifications**

TKDA makes the following representations:

1. TKDA has no unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.
2. TKDA is not a corporation that was convicted of a criminal violation under any Federal law within the preceding 24 months.

TKDA shall require substantially similar representations of all lower tier subcontracts.

**Term Definitions**

**Felony conviction:** Felony conviction means a conviction within the preceding twenty four (24) months of a felony criminal violation under any Federal law and includes conviction of an offense defined in a section

of the U.S. code that specifically classifies the offense as a felony and conviction of an offense that is classified as a felony under 18 U.S.C. § 3559.

**Tax Delinquency:** A tax delinquency is any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.

## **20. TRADE RESTRICTION CERTIFICATION**

By submission of an offer, the Offeror certifies that with respect to this solicitation and any resultant contract, the Offeror –

1. is not owned or controlled by one or more citizens of a foreign country included in the list of countries that discriminate against U.S. firms as published by the Office of the United States Trade Representative (USTR);
2. has not knowingly entered into any contract or subcontract for this project with a person that is a citizen or national of a foreign country included on the list of countries that discriminate against U.S. firms as published by the USTR; and
3. has not entered into any subcontract for any product to be used on the Federal project that is produced in a foreign country included on the list of countries that discriminate against U.S. firms published by the USTR.

This certification concerns a matter within the jurisdiction of an agency of the United States of America and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18 USC Section 1001.

The Offeror/Contractor must provide immediate written notice to the Owner if the Offeror/Contractor learns that its certification or that of a subcontractor was erroneous when submitted or has become erroneous by reason of changed circumstances. The Contractor must require subcontractors provide immediate written notice to the Contractor if at any time it learns that its certification was erroneous by reason of changed circumstances.

Unless the restrictions of this clause are waived by the Secretary of Transportation in accordance with 49 CFR 30.17, no contract shall be awarded to an Offeror or subcontractor:

1. who is owned or controlled by one or more citizens or nationals of a foreign country included on the list of countries that discriminate against U.S. firms published by the USTR or
2. whose subcontractors are owned or controlled by one or more citizens or nationals of a foreign country on such USTR list or
3. who incorporates in the public works project any product of a foreign country on such USTR list.

Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by this provision. The knowledge and information of a contractor is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

The Offeror agrees that, if awarded a contract resulting from this solicitation, it will incorporate this provision for certification without modification in all lower tier subcontracts. The Contractor may rely on the certification of a prospective subcontractor that it is not a firm from a foreign country included on the list of countries that discriminate against U.S. firms as published by USTR, unless the Offeror has knowledge that the certification is erroneous.

This certification is a material representation of fact upon which reliance was placed when making an award. If it is later determined that the Contractor or subcontractor knowingly rendered an erroneous certification, the Federal



Aviation Administration (FAA) may direct through the Owner cancellation of the contract or subcontract for default at no cost to the Owner or the FAA.

**21. VETERAN'S PREFERENCE**

In the employment of labor (excluding executive, administrative, and supervisory positions), the Contractor and all sub-tier contractors must give preference to covered veterans as defined within Title 49 United States Code Section 47112. Covered veterans include Vietnam-era veterans, Persian Gulf veterans, Afghanistan-Iraq war veterans, disabled veterans, and small business concerns (as defined by 15 USC 632) owned and controlled by disabled veterans. This preference only applies when there are covered veterans readily available and qualified to perform the work to which the employment relates.