

**PROFESSIONAL SERVICES AGREEMENT
BETWEEN
The CITY OF MARSHALL and AMERICAN ENGINEERING TESTING, INC.**

THIS PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into by and between the City of Marshall, Minnesota ("CLIENT") and American Engineering Testing, Inc., St. Paul, Minnesota ("AET").

TERM

This Agreement will become effective upon signature of both CLIENT and AET. Unless terminated earlier in accordance with Section IV.C, this Agreement will terminate on December 31, 2020, but may be extended for additional one-year terms upon mutual agreement by CLIENT and AET.

RECITALS

- A. CLIENT has need from time to time for various services offered by AET, including environmental services, geotechnical engineering, subsurface exploration, materials engineering, testing, forensic services and laboratory services ("Services").
- B. CLIENT and AET mutually desire to enter into this Agreement, setting forth the standard terms and conditions pursuant to which AET will perform Services for CLIENT, upon request of the CLIENT.

NOW THEREFORE in consideration of the foregoing, and the covenants contained herein, CLIENT and AET hereby mutually agree as follows:

SECTION I - SERVICES TO BE PERFORMED BY AET

A. **Basic Services**

1. When CLIENT requests Services for a specific project ("Project"), AET will issue a letter proposal ("Letter Proposal") setting forth additional terms and conditions for such Project pursuant to which AET will perform the Services, including but not limited to the scope of Services, estimated fees, project schedule and additional or alternate payment provisions. The Letter Proposal, the terms and conditions set forth in this Agreement and any appendices attached hereto shall comprise the complete Agreement between AET and CLIENT for Services for a Project and are binding upon the CLIENT, its successors, assignees, joint venturers and third-party beneficiaries.
2. Billing rates and invoicing for the Services will be in accordance with Section III of this Agreement—Payment to AET.
3. AET requests written acceptance of the Letter Proposal(s), but the following actions shall also constitute CLIENT's acceptance of the Letter Proposal for a Project: 1) issuing an authorizing purchase order for any of the Services, 2) authorizing AET's presence on site, or 3) written or electronic notification for AET to proceed with any of the Services.
4. The scope of Services may include, but shall not be limited to environmental services, geotechnical engineering, subsurface exploration, materials engineering, testing, forensics, and laboratory services.
5. AET shall perform its Services as an independent contractor. Except where otherwise provided in this Agreement, AET shall be responsible for the means and methods used in performing Services under this Agreement, and is not in a joint-venture with CLIENT. CLIENT or its designated representative shall coordinate AET's Services and shall facilitate the exchange of information among AET and the independent professional associates and consultants engaged by CLIENT.
6. AET will perform Services consistent with the level of care and skill normally performed by other firms in its profession at the time of the Services and in the same geographic area, under similar budgetary constraints.
7. AET shall request and obtain from CLIENT the data and information considered important for the performance of AET's Services. Documents prepared by AET and the Services will conform to applicable Federal, State, and

local laws, rules, regulations, ordinances, codes, orders, and other legal requirements. AET's communications to or with CLIENT's other independent professional associates and consultants will be through or with the knowledge of CLIENT.

8. AET will inform CLIENT when AET is unable to perform exploration Services in the event private underground improvements cannot be located. CLIENT agrees that in such case, CLIENT, at its sole expense, will locate private underground improvements or arrange for location of such improvements, including arranging for hand excavation (potholing) for openings to substantiate utility locations. CLIENT releases and holds AET harmless from all liability for damages, costs, repairs or injury to person or property due to contact with non-located improvements (collectively, "Claims"). Further, CLIENT agrees, as a condition of requesting AET to perform exploration Services in such case, to execute a written waiver in form satisfactory to AET in its discretion, of all liability for such Claims.
9. AET shall contact State notification centers, where available, or individual utility owners where a State notification center is not available, to request location of public underground utilities.
10. AET shall locate borings, excavations, or other penetrations such that they maintain a safe distance from known and marked underground improvements.
11. CLIENT acknowledges that, in the normal course of fieldwork, some damage to the site may occur. AET shall take reasonable precautions to minimize such damage and shall patch bore holes placed through pavement or slab areas after performance of borings. Except for the foregoing, restoration of the site shall be the responsibility of CLIENT.
12. To the extent required by law, AET shall report to CLIENT any contamination detected or of which AET becomes aware during the course of providing Services on a Project. Discovery of actual or suspected hazardous materials shall entitle AET to take immediate measures it deems necessary in its sole discretion, including regulatory notification, to protect human health and safety, and/or the environment. Further, discovery of such materials constitutes a changed condition for which CLIENT agrees to pay associated additional costs and/or which entitle AET to terminate Services on the Project.
13. Known or suspected hazardous material samples obtained by AET shall remain the property of CLIENT. AET reserves the right to return such samples to CLIENT.
14. AET shall only be responsible for safety of AET employees at the site.

B. Additional Services

Any additional Services requested by CLIENT for a Project shall be subject to the terms and conditions of this Agreement. A supplemental Letter Proposal may set forth the nature of the additional Services to be performed, the schedule, if appropriate, in which the Services must be completed, any variance in the amount or terms for payment for the Services from such amounts or terms set forth in an initial Letter Proposal and such other terms and conditions and appendices upon which the parties may mutually agree.

SECTION II - CLIENT'S RESPONSIBILITIES

A. CLIENT shall:

1. Make available to AET drawings, specifications, schedules, and other information, interpretation, and data which were prepared for or by CLIENT, or its consultants, and which CLIENT and AET consider pertinent to AET's responsibilities hereunder, all of which AET may rely upon in performing Services hereunder except as may be specifically provided in writing.
2. Provide AET information known by CLIENT concerning possible site contamination.
3. Make arrangements for safe and legal access to and make necessary provisions for AET to enter upon public and private property as required for AET to perform Services under this Agreement.

4. Give prompt written notice to AET whenever CLIENT observes or otherwise becomes aware of any development that in CLIENT's determination may affect the scope or timing of AET Services or any defect or non-conformance in the work of AET that may in CLIENT's determination affect the Project.
5. Advise AET of the identity of other independent professional associates or consultants participating in the design or construction administration of this part of the Project and the scope of such third party services.
6. Be responsible for the safety of CLIENT's employees at the work site.

SECTION III - PAYMENT TO AET

A. General (Annual Fee Schedule)

Except as described in Paragraph B of this Section III, CLIENT shall compensate AET for all Services at rates set forth in the Fee Schedule attached as Exhibit A to this Agreement. AET shall submit an updated Fee Schedule for approval by CLIENT on an annual basis for the subsequent calendar year (January to December).

B. Specific Projects

Any variance from AET's current Fee Schedule or terms of payment shall be as set forth in the Letter Proposal attached hereto or any additional or supplemental Letter Proposal issued by AET and accepted by CLIENT.

C. General

1. If CLIENT disputes any matter or information contained in an AET invoice for the Services, CLIENT shall so notify AET within fifteen (15) days of receipt of the AET invoice. If CLIENT fails to notify AET of any dispute to an invoice within fifteen (15) days, invoices will be deemed accepted by CLIENT, and no longer subject to dispute.
2. Invoices for Services will be processed and payments made by CLIENT to AET within thirty (30) days of the date of receipt of invoice.
3. Service charges for unpaid invoices shall be imposed at the rate of 1.5% per month or the highest rate permissible by law, whichever is less.
4. CLIENT shall indemnify and hold AET harmless for all costs of collection of unpaid invoices, including reasonable attorneys' fees.

SECTION IV - GENERAL CONSIDERATIONS

A. Personnel and Timing

1. AET has, or will secure, qualified personnel, equipment, and facilities to complete the Services it agrees to provide pursuant to this Agreement.
2. No Services will commence until written notice to proceed is given to AET by CLIENT.
3. The Services shall be commenced and carried out in accordance with a schedule which AET and CLIENT shall agree upon. The time and compensation within which AET shall perform its services shall be extended and/or adjusted for delays caused by acts of God or other circumstances beyond the control of AET.

B. Project and Agreement Changes

The terms of this Agreement or a Letter Proposal may be changed only by the written mutual consent of CLIENT and AET.

C. Termination

Either CLIENT or AET may terminate this Agreement without cause by giving thirty (30) days' prior written notice to the other party of such termination and specifying the effective date of termination. In such event, copies of documents, data, reports, work papers, studies, drawings, maps, models, and photographs prepared by AET shall become the property of CLIENT. AET retains the right to maintain a complete file in its archiving system. This Agreement may be terminated by either party for material breach, including without limitation, failure by CLIENT to pay invoices, upon seven (7) days written notice to the other party. Regardless of the reasons for termination or the party electing termination, CLIENT shall pay AET for all work performed pursuant to this Agreement and any

Letter Proposals prior to the effective date of termination and for costs incurred as a result of any early termination, including demobilization and reporting costs to complete the file. CLIENT's use of AET's work for any purpose other than that set forth in a Letter Proposal shall be unauthorized by AET, at CLIENT's sole risk and shall constitute CLIENT's waiver of any obligation by AET to indemnify CLIENT pursuant to Section IV, paragraph H, following.

D. Records

1. Fiscal records of AET pertinent to AET's compensation and payments under this Agreement will be kept in accordance with standard accounting practices.
2. AET shall maintain all original records (fiscal and other) and design calculations on file in legible form for a period of not less than two (2) years.
3. AET's records and design calculations will be available at AET's office at reasonable business hours upon reasonable notification for examination and audit if required.

E. Insurance

1. AET maintains insurance with coverage and limits shown below. AET will furnish certificates of insurance to CLIENT upon request.

2. AET maintains the following insurance coverage and limits of liability:

Workers' Compensation	Statutory Limits
Employer's Liability	\$100,000 each accident
	\$500,000 disease policy limit
	\$100,000 disease each employee
Commercial General Liability	\$1,000,000 each occurrence
	\$1,000,000 aggregate
Automobile Liability	\$1,000,000 each accident
Professional Liability Insurance	\$1,000,000 per claim
	\$1,000,000 aggregate

3. Commercial General Liability insurance will include coverage for Products/Completed Operations extending one (1) year after final acceptance of the Project by Owner, Property Damage including Completed Operations, Personal Injury, and Contractual Liability insurance applicable to AET's Indemnity obligations under this Agreement.
4. Automobile Liability insurance shall include coverage for all owned, hired and non-owned automobiles.
5. Professional Liability Insurance is written on a claims-made basis and coverage will be maintained for one (1) year after final acceptance of the Project by Owner. Renewal policies during this period shall maintain the same retroactive date.
6. To the extent permitted by applicable state law, and only upon CLIENT's signing of the Letter Proposal and return of the same to AET, CLIENT and Owner shall be named an "additional insured" on AET's Commercial General Liability Policy (Form CG D4 14 04 08, which includes blanket coverage for Products/Completed Operations and on a Primary and Non-Contributory basis). Any other endorsement, coverage or policy requirement may result in additional charges.
7. AET will maintain in effect all insurance coverage required by this Service Agreement at its sole expense, provided such insurance is reasonably available, with insurance carriers licensed to do business in the state in which the Project is located and having a current A.M. Best rating of no less than A minus (A-). Such insurance shall provide for thirty (30) days prior written notice to CLIENT for notice of cancellation or material limitations for the policy or ten (10) days' notice for non-payment of premium.

8. AET reserves the right to charge CLIENT for AET's costs for additional coverage requirements unknown on the date of the Letter Proposal.

F. Mediation

1. Except for enforcement of AET's rights to payment for Services rendered or to assert and/or enforce its lien rights, including without limitation assertion and enforcement of mechanic's lien rights and foreclosure of the same, (including costs of collection and reasonable attorneys' fees) CLIENT and AET agree that any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.
2. Unless CLIENT and AET mutually agreed otherwise, mediation shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association. The mediator shall be acceptable to both parties and shall have experience in construction matters.
3. The parties shall share the mediator's fee and any filing fees equally. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

G. Limitation of Liability

In order to offer AET's Services at a reasonable price, AET limits its liability to CLIENT and anyone claiming through CLIENT for any claims resulting from Services provided pursuant to this Agreement. CLIENT agrees that in no event shall AET or its agents or employees be liable to CLIENT, any holder of any real property interest in the real property on which the project is located, or anyone claiming through CLIENT, for (1) incidental, indirect, special or consequential damages, or (2) any damages whatsoever resulting from personal injury, death, damage to or loss of use of property, or loss of profits, resulting from the performance of or non-performance of the Services, negligent acts, errors or omissions, even if the possibility of such damage was foreseeable. CLIENT agrees that the total liability of AET and its agents and employees hereunder is limited solely to CLIENT's direct damages and in no event shall it exceed the amount of the stated insurance limits listed in Section E – Insurance.

H. Indemnification

1. AET agrees to indemnify CLIENT from and against liability resulting from AET's negligent performance of the Services, subject to any limitations, other indemnifications or other provisions CLIENT and AET have agreed to in writing.
2. CLIENT agrees to indemnify AET from and against liability resulting from CLIENT's, CLIENT's Contractors/Subcontractors or other third parties' negligent conduct, including without limitation the owner of any interest in the real property on which the Project is located, subject to any limitations, other indemnifications or other provisions CLIENT and AET have agreed to in writing.
3. AET's indemnification is limited to costs for loss or damage caused by its failure to meet the standard of care and only to the extent of its negligence.
4. AET will not accept any obligation to defend CLIENT other than to meet the standard of care. If a court of competent jurisdiction rules that defense is implied or if required by law, AET's obligation for the cost of defense is only to the extent due to AET's negligent acts, errors or omissions.

I. Unionization

AET represents that its employees and personnel providing Services under this Agreement are non-union personnel and that the fees to be charged for the Services are calculated accordingly. In the event that AET is required to provide unionized personnel for performance of the Services, AET reserves the right to charge an appropriate fee increase or to terminate this Service Agreement on three (3) days written notice to CLIENT and CLIENT agrees that AET shall not be liable for any penalties or costs charged or incurred by CLIENT, and CLIENT's successors, assignees, joint-venturers, contractors and subcontractors, or any other parties involved with the Project for claims, liabilities, damages or consequential damages directly or indirectly related to AET's fee increase, termination of the Service Agreement or failure to perform the Services. This reservation of right on the part of AET represents only a reflection of additional costs anticipated to be incurred by AET in connection with assigning unionized personnel to the Project and shall not be considered either approval nor disapproval of unions in general or the use of collective bargaining agreements.

J. Posting of Notices on Employee Rights

Effective June 21, 2010, prime contracts with a value of \$100,000 or more and signed by federal contractors on projects with any agency of the United States government must comply with 29 CFR Part 471, which requires physical posting of a notice to employees of their rights under Federal labor laws. The required notice may be found at 29 Code of Federal Regulations Part 471, Appendix A to Subpart A. The regulation also has a "flow-down" requirement for subcontractors under the prime agreement for subcontracts with a value of \$10,000 or more. AET requires strict compliance of its subcontractors working on federal contracts subject to this regulation. The regulation has specific requirements for location of posting and language(s) for the poster.

K. Severability

Any provisions of this Service Agreement later held to violate a law or regulation shall be deemed of no force and effect, and all remaining provisions shall continue in force; provided, however, CLIENT and AET will in good faith attempt to replace an invalid or unenforceable provision with one that is valid and enforceable, and which comes as close as possible to expressing the intent of the original provision.

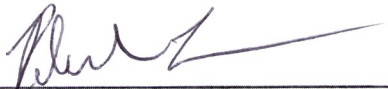
L. Governing Law

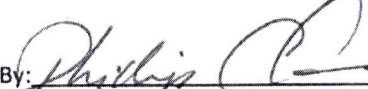
This Agreement, the Letter Proposal(s) and any appendices or amendments to either shall be construed, and the rights of the parties shall be determined, in accordance with the laws of the State of Minnesota.

IN WITNESS WHEREOF, this Agreement is herewith executed effective the date and year first above written by the undersigned, who are authorized representatives of Client and AET.

CLIENT:

American Engineering Testing, Inc.

By: 

By: 

Type or Printed Name: Robert J. Byrnes

Philip Chivian

Title: Mayor

Contract Manager

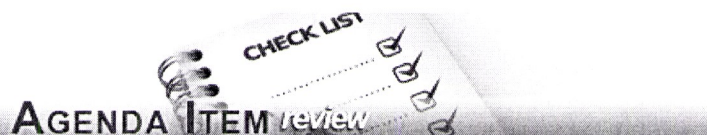
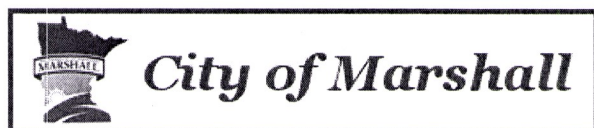
Date Signed: 12-12-17

Date Signed: 11/21/17

Address and Phone:

344 W. Main St.
Marshall, MN 56258
507-537-6775

American Engineering Testing, Inc.
550 Cleveland Avenue North
St. Paul, MN 55114
Telephone: 651.659.1330



Meeting Date: 12/12/2017 - 5:30 PM

Category: NEW BUSINESS



Type: Action

Subject: 18. Professional Services Agreement for Testing Services with American Engineering Testing, Inc. (AET) for Various Inspection Services for the period ending December 31, 2020.

Revised Comments:

Policy:

Enclosure:

File Attachment:  AET Agreement for Various Projects (Expires 2020_12_31).pdf
 2018 Fee Schedule.pdf

At the meeting on May 12, 2015, the City Council authorized entering into a Professional Services Agreement for Testing Services with American Engineering Testing, Inc. (AET) for various inspection services ending December 31, 2017.

Background Information: A request was submitted to AET for a renewal agreement for a 3-year term with the rates for the various tests being re evaluated on an annual basis (January-December of each year) with approval of the rates approved by City Council in December for the following year.

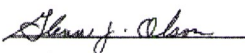
Attached is a draft a proposed 3-year agreement through December 31, 2020 for these services for consideration by the City along with the 2018 fee schedule (Exhibit A).

Fiscal Impact: In accordance with the actual work done per project.

Alternative/Variations: No alternative actions recommended.

Recommendations: Recommendation #1 that the Council authorize entering into a Professional Services Agreement for Testing Services with American Engineering Testing, Inc. (AET) for various inspection services ending December 31, 2020.

Recommended By:

Approvals: **Signed By:** 

Glenn Olson - Dir Public Works

Signed By: 
Sharon Hanson Signer - City Administrator