

**City of Sweet Home  
Personal Services Contract for  
Operations, Maintenance, and Management Services**

**THIS AGREEMENT** is entered into this \_\_\_\_ day of \_\_\_\_\_, 2020, by and between the City of Sweet Home, a municipal corporation in the State of Oregon, with its mailing address at 3225 Main St, Sweet Home OR, 97386 (hereinafter the “OWNER”)

and

Inframark, LLC, with its principal address at 2002 West Grandparkway North, Suite 100, Katy, TX 77449 (hereinafter “CONTRACTOR”).

**WHEREAS**, OWNER owns and provides for the operation of a wastewater system, including maintenance, repair, expansion administration, billing, collection, customer service and permitting functions; and,

**WHEREAS**, OWNER owns and provides for the operation of a water system, including maintenance, repair, expansion administration, billing, distribution, customer service and permitting functions; and,

**WHEREAS**, OWNER desires to employ CONTRACTOR to perform the operation, maintenance, repair functions for the compensation provided for herein.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth, OWNER and CONTRACTOR agree as follows:

**1. General**

- 1.1 Definitions of words and phrases used in this Agreement and the attachments are contained in Exhibit A.
- 1.2 The following exhibits are hereby incorporated by reference into this Agreement:
  - Exhibit A – Definitions
  - Exhibit B – Oregon Public Contracting Requirements
  - Exhibit C – Scope of Services
  - Exhibit D – NPDES Permit and Wastewater Treatment Characteristics
  - Exhibit E – Request for Proposals
  - Exhibit F – CONTRACTOR’s Proposal
- 1.3 All land, buildings, facilities, easements, licenses, rights-of-way, equipment and vehicles presently or hereinafter acquired or owned by OWNER shall remain the exclusive property of OWNER unless specifically provided for otherwise in this Agreement.
- 1.4 This Agreement shall be governed by and interpreted in accordance with the laws of the State of Oregon.
- 1.5 This Agreement shall be binding upon the successors and assigns of each of the parties, but neither party shall assign this Agreement without the prior written consent of the

other party. Consent shall not be unreasonably withheld. CONTRACTOR may assign this Agreement to a parent, subsidiary, or affiliate without such prior written consent.

- 1.6 All notices shall be in writing and transmitted to the party's address stated above. All notices shall be deemed given when delivered, if delivered personally or by courier mail service, delivered after such notice has been deposited in the United States mail postage prepaid, if mailed certified or registered U.S. mail, return receipt requested; or received by the party for which notice is intended if given in any other manner.
- 1.7 This Agreement, including Exhibits A through F, is the entire Agreement between the parties. This Agreement may be modified only by written agreement signed by both parties. Wherever used, the terms "CONTRACTOR" and "OWNER" shall include the respective officers, agents, directors, elected or appointed officials and employees and, where appropriate, subcontractors or anyone acting on their behalf.
- 1.8 Any provision of this Agreement which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision hereof, and such remaining provisions shall remain in full force and effect.
- 1.9 CONTRACTOR shall be an independent contractor for all purposes and shall be entitled to no compensation other than the compensation provided for under this Agreement. While OWNER reserves the right to set various schedules and evaluate the quality of CONTRACTOR's completed work, OWNER cannot and will not control the means and manner of CONTRACTOR's performance. CONTRACTOR is responsible for determining the appropriate means and manner of performing work. CONTRACTOR is responsible for all federal and state taxes applicable to compensation and payment paid to CONTRACTOR under the Contract and will not have any amounts withheld by OWNER to cover CONTRACTOR's tax obligations. CONTRACTOR is not eligible for any OWNER fringe benefit plans.
- 1.10 The Services provided under this Agreement are of a professional nature and shall be provided in a safe, secure, effective and efficient manner and shall meet the highest standards prevalent in the industry, the provisions of this Agreement, Applicable Law, and the NPDES Permit and Wastewater Treatment Characteristics attached hereto as Exhibit D. Such services shall not be considered engineering services and nothing herein is intended to imply that CONTRACTOR is to supply professional engineering services to OWNER unless specifically stated in this Agreement to the contrary.
- 1.11 If any litigation is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees which are directly attributed to such litigation in addition to any other relief to which it may be entitled.
- 1.12 Nothing in this Agreement shall be construed to create in any third party or in favor of any third party any right(s), license(s), power(s) or privilege(s).
- 1.13 This Agreement shall be interpreted in accordance with its plain meaning and not strictly for or against either party hereto.
- 1.14 The provisions of Sections 1 (General), 8 (Indemnity, Liability and Insurance), 9 (Term, Termination, and Default), and 10 (Disputes and Force Majeure) shall survive the expiration or termination of this Agreement. Any and all other provisions of this

Agreement that would reasonably be expected to survive the termination of this Agreement will do so.

- 1.15 This Agreement includes fulfilling the requirements identified in the Scope of Services listed in Exhibit C.
- 1.16 This Agreement may be executed and delivered (including by facsimile transmission, pdf or other means of electronic signature) in any number of counterparts, each of which will be deemed an original, but all of which together will constitute but one and the same instrument.

## **2. CONTRACTOR's Services – General**

- 2.1 Within fifteen (15) days after CONTRACTOR begins service under this Agreement, CONTRACTOR will provide a physical inventory of the OWNER's equipment in use at the Project and a general statement as to the condition of each vehicle or piece of equipment.
- 2.2 CONTRACTOR will provide OWNER with a physical inventory of chemicals and other consumables on hand when CONTRACTOR begins services under this Agreement. CONTRACTOR will provide OWNER with the same quantity of chemicals or equivalent upon termination of this Agreement.
- 2.3 Visits may be made at a reasonable time by OWNER's officers so designated by the OWNER's representative. Keys for the Project shall be provided to OWNER by CONTRACTOR for such visits. All visitors to the Project shall comply with CONTRACTOR's operating and safety procedures.
- 2.4 In any emergency affecting the safety of persons or property, CONTRACTOR shall take good faith, reasonable actions without written amendment or change order, at CONTRACTOR's discretion, to prevent threatened damage, injury or loss. CONTRACTOR shall be compensated by OWNER for any such emergency work notwithstanding the lack of a written amendment. Such compensation shall include CONTRACTOR's non-labor direct Costs for the emergency work. Nothing contained in this Section shall impose upon CONTRACTOR a duty to perform any emergency work absent a change order and failure to perform any such emergency work shall not impose upon CONTRACTOR any liability for errors and omissions.
- 2.5 CONTRACTOR shall be responsible for all Maintenance and Repair expenditures not to exceed the Maintenance and Repair Limit (which Maintenance and Repair Limit shall be included in the Annual Compensation). CONTRACTOR will track Maintenance and Repair expenditures incurred against the Maintenance and Repair Limit. All expenditures charged to the Maintenance and Repair Limit shall be itemized and referenced to related work orders. If, at any point during an Agreement Year, the actual Maintenance and Repair expenditures would exceed the Maintenance and Repair Limit, the CONTRACTOR shall request OWNER approval prior to the expenditure. Such approval shall be requested and considered for each instance. The approval of any particular expenditure request does not guarantee the approval of other expenditures. Upon receipt of OWNER approval CONTRACTOR will proceed with the expenditure. CONTRACTOR will invoice OWNER after completion of the work in accordance with Section 6.5.

### **3. CONTRACTOR's Scope of Services – Wastewater & Water**

- 3.1 CONTRACTOR shall perform the services as set forth in Exhibit C for the OWNER's wastewater treatment system and water treatment system (the "Services").

### **4. OWNER's Duties**

- 4.1 All grounds, facilities, equipment and vehicles now owned by OWNER or acquired by OWNER shall remain the property of OWNER. OWNER grants CONTRACTOR, free of charge, a license to use said grounds, facilities, equipment and vehicles, including all owned by OWNER and which have been assigned by OWNER to the Project.
- 4.2 The OWNER shall fund all necessary Capital Expenditures, which will be performed by CONTRACTOR under a written change order to this Agreement. Priority shall be given to safety and the ADA related expenses. Any loss, damage, or injury resulting from OWNER's failure to provide capital improvements and/or funds in excess of the Maintenance and Repair Limit when reasonably requested by CONTRACTOR shall be the sole responsibility of OWNER.
- 4.3 The OWNER shall keep in force all Project warranties, guarantees, easements and licenses that have been granted to OWNER and are not transferred to CONTRACTOR under this Agreement.
- 4.4 The OWNER shall provide CONTRACTOR, within a reasonable time after request and on an "as available" basis, with the temporary use of any piece of OWNER's heavy equipment that is available so that CONTRACTOR may discharge its obligations under this Agreement in the most cost effective manner.
- 4.5 OWNER warrants that during the interim period between the initial Project inspection by CONTRACTOR and the Commencement Date, the plants, facilities and equipment have been operated only in the normal course of business.
- 4.6 The OWNER shall continue to be responsible and pay for the general administration and enforcement of (i) the water distribution and wastewater collection systems, and (ii) long-term System and Service Area planning. Typical administration costs associated with the above activities include costs such as the services of the auditor, lawyer, and liability insurance.
- 4.7 The OWNER shall perform all duties and discharge all responsibilities and obligations relating to the operation and maintenance of the Project not contemplated by the parties within Exhibit C to this Agreement.

### **5. Compensation**

- 5.1 CONTRACTOR's Annual Compensation under this Agreement shall consist of an Annual Fee plus a Maintenance and Repair Limit. The Annual Fee for the period \_\_\_\_\_ through June 30, 2022 shall be \$778,564, and the Maintenance and Repair Limit for the same period shall be \$70,000, the total of which is payable in equal monthly installments of \$70,713.67.

- 5.2 The services being provided under this Agreement are based on reasonably expected overtime for normal breakdowns or services required after hours. Any additional expenses including straight or over time wages caused by severe weather, a disaster or unplanned event that may be recovered through billing any third party including the State or Federal Government FEMA funds will be billed to the OWNER for reimbursement.
- 5.3 The Annual Fee shall be negotiated each year at least four (4) months prior to the beginning of the City's fiscal year on July 1 of each year. Negotiated fee adjustments shall take effect on July 1 of each year. Should OWNER and CONTRACTOR fail to agree, the Annual Fee will be adjusted by multiplying the existing Annual Fee by the percentage increase in the Consumer Price Index for all Urban Consumers – Water and Sewerage Maintenance (CPI-U) for the U.S. City Average, 1982-84=100 (series ID CUUR0000SEHG01) as published monthly by the U.S. Department of Commerce, Bureau of Labor Statistics for the twelve (12) months prior to the beginning of the period for which an adjusted Annual Fee is being calculated not to exceed 3%.
- 5.4 If the Maintenance and Repair Limit is exceeded by twenty-five percent (25%) or the Maintenance and Repair expenditures do not exceed seventy-five percent (75%) of the Maintenance and Repair Limit for two (2) consecutive Agreement Years, the parties shall negotiate in good faith to adjust the Maintenance and Repair Limit.

## **6. Payment of Compensation**

- 6.1 One-twelfth (1/12) of the total of the Annual Fee plus the Maintenance and Repair Limit for the current year shall be due and payable on the first of the month for each month that services are provided.
- 6.2 All other compensation to CONTRACTOR is due upon receipt of CONTRACTOR's invoice and payable within thirty (30) days.
- 6.3 OWNER shall pay interest at an annual rate equal to 18% (1.5% per month), said rate of interest not to exceed any limitation provided by law, on payments not paid and received within thirty (30) calendar days of the due date, such interest being calculated from the due date of the payment. In the event the charges hereunder might exceed any limitation provided by law, such charges shall be reduced to the highest rate or amount within such limitation.
- 6.4 Any disputes regarding invoices shall be raised, in writing setting forth sufficient detail regarding the nature of the dispute, within twenty (20) business days of the receipt of said CONTRACTOR'S invoice by OWNER. If OWNER does not properly raise a dispute with an invoice within twenty (20) business days from the date of said invoice, any such disputes will be waived.
- 6.5 OWNER shall either directly pay for Maintenance and Repair expenses that exceed the Maintenance and Repair Limit or reimburse or compensate the CONTRACTOR for such costs that exceed the Maintenance and Repair Limit plus an administrative fee of 8% of the cost thereof. Such costs must be pre-approved by OWNER as described in Section 2.5 in order to qualify as reimbursable or compensable. OWNER shall pay the CONTRACTOR such amounts within 30 days of receipt of an invoice by CONTRACTOR. CONTRACTOR shall reimburse OWNER an amount, if any, equal to

all unexpended amounts remaining in the Maintenance and Repair Limit by August 31 of each year.

- 6.6 The Annual Fee and any additional service rates provided in this Agreement have been derived under the premise and understanding that the Services to be furnished hereunder do not require the CONTRACTOR to pay its employees prevailing wage rates pursuant to Applicable Law. If a determination is made by the OWNER or by any governmental agency with competent jurisdiction thereof that the nature of the Services are such that the CONTRACTOR is required to pay any of its employees who are performing the Services prevailing wage rates, then the OWNER shall immediately notify CONTRACTOR and be responsible for the increase in the CONTRACTOR's cost of providing the Services as a result thereof. OWNER may consider such changes in the prevailing wage determination as a Scope Change under Section 7.1.4 for which OWNER may initiate renegotiation of the Services to mitigate the impact to OWNER'S costs.

## **7. Scope Changes**

- 7.1 A Change in Scope of services shall occur when and as CONTRACTOR's costs of providing services under this Agreement change as a result of:
- 7.1.1 Any change in Project operations or personnel minimum qualifications, or other cost which is a result of an Unforeseen Circumstance;
  - 7.1.2 Increases or decreases of not less than ten percent (10%) in the influent flow or loadings as demonstrated by a twelve month floating average compared to the twelve month period ending on the effective date of this Agreement (baseline flow and loading information is located in Exhibit D); or increases or decreases of not less than ten percent (10%) in the raw water flow, or raw water characteristics as demonstrated by the twelve month average.
  - 7.1.3 OWNER's request of CONTRACTOR and CONTRACTOR's consent to provide additional services.
  - 7.1.4 Issuance of a new permit from a governmental agency having jurisdiction; statute or rule interpretations/determinations by a governmental agency having jurisdiction; prevailing wage determinations by a governmental agency having jurisdiction; or a change in the Applicable Laws or other factors, which causes an increase in the cost of providing the Services.
- 7.2 For Changes in Scope described in Sections 7.1.1 and 7.1.2, the Annual Fee shall be increased (or decreased) by an amount equal to CONTRACTOR's additional (reduced) Cost associated with the Change in Scope plus ten percent (10%). Modifications of the Annual Fee as a result of conditions described in Section 7.1.2 shall be retroactive to the beginning of the twelve-month comparison period.
- 7.3 OWNER and CONTRACTOR shall negotiate a change in CONTRACTOR's Annual Fee for Changes in Scope based on Section 7.1.3.

7.4 OWNER and CONTRACTOR shall negotiate a change in CONTRACTOR's Annual Fee and/or a change in the Scope of Services for Changes in Scope based on Section 7.1.4. In the event of a change in the Applicable Law or other factor which causes an increase in the CONTRACTOR's cost of providing the Services, the CONTRACTOR may provide notice to the OWNER and the parties shall negotiate in good faith to adjust the Annual Fee to account for such change in CONTRACTOR's costs. If the parties are unable to reach a negotiated agreement within sixty (60) days of the date of notice, then the contract may be terminated by the CONTRACTOR with sixty (60) days termination notice.

In the event the OWNER is issued a new permit that changes the requirements set forth in Exhibit D, the CONTRACTOR may provide notice to the OWNER and the parties shall negotiate in good faith to adjust this Agreement to account for such change in the permit requirement. If the parties are unable to reach a negotiated agreement within sixty (60) days of the date of notice, then the contract may be terminated by the CONTRACTOR with sixty (60) days termination notice.

In the event that a governmental agency with jurisdiction determines that Prevailing Wage Rates apply to the performance of any of the Services, the OWNER may initiate renegotiation of the Services with the CONTRACTOR to mitigate the impact to OWNER'S costs.

## **8. Indemnity, Liability and Insurance**

8.1 During the term of this Agreement, CONTRACTOR shall maintain, at its own expense, the following types of insurance in the following amounts:

8.1.1 Comprehensive general liability insurance, including coverage for premises operations, independent contractors, protected products, completed operations, contractual liability, personal injury, and broad form for property damage (including coverage for explosion, collapse, and underground hazards, if applicable):

- Worker's Compensation \$2,000,000 policy limit and \$2,000,000 employee limit.
- Business Automobile Liability \$2,000,000 combined single limit coverage.
- Commercial General Liability \$1,000,000 per occurrence and \$2,000,000 aggregate.
- Pollution Liability \$2,000,000 per claim and aggregate
- Umbrella Liability Coverage \$8,000,000 per claim and \$12,000,000 in the aggregate.
- Coverage shall also include contractual liability coverage for the indemnity provided under this Agreement.

8.1.2 The limits required in this Section 8.1 may be met with a combination of underlying and umbrella coverage.

8.2 Policies shall provide that OWNER, its council, officers, representatives, employees, and agents will be included as an additional insured with respect to the coverages required in Section 8.1.1 and a waiver of subrogation against them shall be obtained for all coverages.

8.3 All coverages under Section 8.1 shall be primary over any insurance OWNER may carry on its own.

- 8.4 All policies of insurance shall be issued by companies with a rating A+ or better and that are qualified to do business in the state of Oregon.
- 8.5 CONTRACTOR shall furnish OWNER with certificates of insurance evidencing all required coverages prior to commencing any work or services under this Agreement. If requested by OWNER, CONTRACTOR shall furnish OWNER with executed copies of such policies of insurance. CONTRACTOR shall furnish OWNER with at least 30 days' written notice of cancellation of, or any modification to, the required insurance coverages. Failure to maintain any required insurance coverages in the minimum required amounts shall constitute a material breach of this Agreement and shall be grounds for immediate termination of this Agreement.
- 8.6 All liability insurance, except for Workers' Compensation, Professional Liability, and Network Security and Privacy Liability (if applicable), required under this Agreement must include an additional insured endorsement with the certificate of insurance specifying the OWNER, its council, officers, representatives, employees, and agents as Additional Insureds, including additional insured status with respect to liability arising out of ongoing operations and completed operations, but only with respect to Contractor's activities to be performed under this Agreement. Coverage shall be primary and non-contributory with any other insurance and self-insurance. The Additional Insured endorsement with respect to liability arising out of your ongoing operations must be on ISO Form CG 20 10 07 04 or equivalent and the Additional Insured endorsement with respect to completed operations must be on ISO form CG 20 37 04 13 or equivalent and attached to Certificate of Insurance.
- 8.7 CONTRACTOR, its subcontractors, if any, and all employers working under this Agreement are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage for all subject workers.
- 8.8 CONTRACTOR warrants that all persons engaged in Contract work and subject to the Oregon Workers' Compensation Law are covered by a workers' compensation plan or insurance policy that fully complies with Oregon law. CONTRACTOR shall indemnify OWNER for any liability incurred by OWNER as a result of CONTRACTOR's breach of the warranty under this paragraph.
- 8.9 OWNER hereby agrees to indemnify and hold CONTRACTOR harmless from any liability for damages from third party claims for bodily injury, including death, property damages and pollution damages to the extent such claims arise from OWNER's negligence or willful misconduct under this Agreement; provided, OWNER shall be liable only for that percentage of total damages that corresponds to its percentage of total negligence or fault.
- 8.10 CONTRACTOR shall be liable for those fines or civil penalties imposed by a regulatory or enforcement agency for violations occurring on or after \_\_\_\_\_, 20[\_\_\_], of the wastewater effluent quality requirements provided for in Exhibit D to the extent that such fines or civil penalties are a result of CONTRACTOR's negligence or willful misconduct.
- 8.11 CONTRACTOR shall be liable for those fines or civil penalties imposed by a regulatory or enforcement agency for violations occurring on or after \_\_\_\_\_, 20[\_\_\_], of the drinking water treatment effluent quality requirements provided for in Oregon Health

Authority rules to the extent that such fines or civil penalties are a result of CONTRACTOR's negligence or willful misconduct.

- 8.12 OWNER shall be liable for those fines or civil penalties imposed by any regulatory or enforcement agencies on OWNER and/or CONTRACTOR that are not a result of CONTRACTOR's negligence or willful misconduct or are otherwise directly related to the ownership of the Project and shall indemnify and hold CONTRACTOR harmless from the payment of any such fines and/or penalties.
- 8.13 If the OWNER's wastewater treatment system and water treatment system loading exceed its design parameters or if influent contains: i) abnormal, toxic or other substances which cannot be removed or treated by the existing OWNER's wastewater treatment system and water treatment system; or ii) discharges which violate applicable ordinances, the CONTRACTOR will use its best efforts to maximize performance of the OWNER's wastewater treatment system and water treatment system but shall not be responsible for associated effluent characteristics or damages, fines or penalties which result.
- 8.14 Contractor shall save, hold harmless, and indemnify the OWNER and their officers, employees and agents from and against all third party claims, suits, actions, losses, damages, liabilities, costs (including attorneys' fees) and expenses (collectively, "Claims") of any nature whatsoever resulting from, arising out of, or relating to the activities of Contractor or its officers, employees, subcontractors, or agents under this Agreement, including but not limited to, unauthorized disclosure of Confidential Information, professional malfeasance, infringement of intellectual property rights, negligence, intentional, willful, or wanton wrongful acts, and acts outside the scope of Services set forth in this Agreement; provided, CONTRACTOR shall be liable only for that percentage of total damages that corresponds to its percentage of total negligence or fault.
- 8.15 Contractor is liable for all Claims for personal injury (including death), damage to real property and damage to tangible and intangible personal property of the OWNER or any of its employees, officers, subcontractors or agents resulting from, arising out of, or relating to the intentional, reckless or negligent acts or omissions of CONTRACTOR or its officers, employees, subcontractors, or agents under this Agreement.
- 8.16 Except for liability arising out of or related to Section 8.14 or 8.15, CONTRACTOR's liability for damages for any cause whatsoever shall be limited to twice the Annual Compensation of this Agreement, exclusive of any insurance and bonding.
- 8.17 Except for liability to third persons arising out of or related to Section 8.14 or 8.15, neither party will be liable to the other for any lost profits, lost savings, or punitive, indirect, exemplary, consequential, or incidental damages.
- 8.18 Under no circumstances shall CONTRACTOR be responsible for any damages, losses, settlement, payment deficiencies, liabilities, costs and expenses arising directly or indirectly because of the execution or implementation of instruction or directions provided by the OWNER or any of its directors, officers, employees, agents, or representatives.

- 8.19 CONTRACTOR shall not be liable for any liabilities, losses, damages, expenses, fines, or penalties incurred by the OWNER or any third party as a result of a data security breach or other cyber security breach to the Project or the OWNER's computer systems, operating systems, and all other technological or information systems related to the Project and Services provided hereunder, except to the extent such liability, loss, damage, expense, fine, or penalty is the direct result of CONTRACTOR's willful or negligent acts or omissions.
- 8.20 The warranties and/or performance guarantees for any components, parts, materials, and equipment provided under this Agreement shall be limited to those as provided by the manufacturer or supplier; CONTRACTOR shall be responsible for maintaining all manufacturers' warranties on the equipment provided hereunder. In addition, the CONTRACTOR shall assist the OWNER in enforcing the warranties and guarantees, if any, for the services, parts, materials, and equipment provided hereunder. The OWNER's remedies for the manufacturer or supplier's breach of its warranty obligations or performance guarantees shall be limited to those provided by the manufacturer or supplier and the CONTRACTOR shall not have additional liability beyond the remedies provided for by the manufacturer or supplier.
- 8.21 If any information, opinions, recommendations, advice, or other work product or any data, information, procedures, charts, spreadsheets, logs, instruments, documents, plans, designs, specifications, customer data, billing information, regulatory filings, permits, authorizations, licenses, or other records are provided by the OWNER or any third party acting on behalf the OWNER (excluding OWNER's prior operator for the Facility) are provided to and used or relied on by CONTRACTOR, the OWNER will be liable for any damages resulting directly or indirectly from such use and reliance.

## **9. Term, Termination, Default, and Remedies**

- 9.1 The initial term of this Agreement shall be five (5) years commencing on the Commencement Date and ending June 30, 2026 ("Initial Term"). Thereafter, this Agreement shall be automatically renewed for successive terms of five (5) years each unless canceled in writing by either party no less than one hundred and twenty (120) days prior to expiration.
- 9.2 OWNER may terminate this Agreement for convenience as follows:
- 9.2.1 During the Initial Term: The Agreement may not be terminated for convenience prior to the start of the fourth year of the Agreement except for Unforeseen Circumstances. If OWNER terminates the contract for convenience during the fourth or fifth year of the Agreement, OWNER shall provide CONTRACTOR with at least six (6) months prior written notice of termination and OWNER shall pay CONTRACTOR a demobilization fee equal to 5% of the current base fee.
- 9.2.2 After the Initial Term: If OWNER terminates the contract for convenience during a successive term as described in Section 9.1, OWNER shall provide CONTRACTOR with at least one hundred and twenty (120) days prior written notice of termination and there shall be no demobilization fee.

### 9.3 Termination for Cause.

9.3.1 A party may terminate this Agreement for a material breach of the Agreement by the other party; only after giving written notice of breach; and, except as provided in 9.3.2, only after allowing the other party thirty (30) days to cure or commence taking reasonable steps to cure the breach.

9.3.2 In case of a breach by OWNER for nonpayment of CONTRACTOR's invoices, CONTRACTOR shall provide sixty (60) days prior written notice of termination.

9.4 In the event that this Agreement is terminated for any reason prior to the ending date of the Initial Term or successive terms, OWNER shall pay to CONTRACTOR any funds identified in Section 7.2 that have not been paid to CONTRACTOR through the date of termination.

9.5 Upon notice of termination by OWNER, CONTRACTOR shall assist OWNER in assuming operation of the Project. If additional Cost is incurred by CONTRACTOR at request of OWNER, OWNER shall pay CONTRACTOR such Cost within 30 days of invoice receipt.

9.6 Upon termination of this Agreement and all renewals and extensions of it, CONTRACTOR will return the Project to OWNER in the same condition as it was upon the effective date of this Agreement, with improvements made thereto, ordinary wear and tear excepted. Equipment and other personal property purchased by CONTRACTOR for use in the operation or maintenance of the Project shall remain the property of CONTRACTOR upon termination of this Agreement unless the property was directly paid for by OWNER or OWNER specifically reimbursed CONTRACTOR for the cost incurred to purchase the property or this Agreement provides to the contrary.

9.7 Upon CONTRACTOR's failure to perform the scope of work or meet established performance standards, and after complying with Section 9.3 cure process, the OWNER may use the remedies set out in ORS279B.060(2)(h) in the best interests of the City and any other remedies allowed by law.

## 10. Disputes and Force Majeure

10.1 In the event activities by employee groups or unions cause a disruption in CONTRACTOR's ability to perform at the Project, OWNER, with CONTRACTOR's assistance or CONTRACTOR at its own option, may seek appropriate injunctive court orders. During any such disruption, CONTRACTOR shall operate the facilities on a best efforts basis until any such disruptions cease.

10.2 Neither party shall be liable for its failure to perform its obligations under this Agreement if such failure is due to any Unforeseen Circumstances beyond its reasonable control or force majeure. However, this Section may not be used by either party to avoid, delay or otherwise affect any payments due to the other party.

**11. Nondiscrimination**

During the term of this Agreement, CONTRACTOR shall not discriminate against any employee or applicant for employment on the basis of any protected class as defined in ORS279A.112(b).

**12. Governing Law, Jurisdiction, Venue**

12.1 This Agreement shall be governed by and construed in accordance with the laws of the state of Oregon without regard to principles of conflicts of law.

12.2 In the event of any disputes hereunder, the parties shall first attempt to resolve the situation by good faith discussions which shall take place in a timely manner. If the dispute cannot be resolved within sixty (60) days, the parties may mediate their dispute before a mediator acceptable to both parties. If they cannot agree on the selection of a mediator, they shall ask the Director of the Federal Mediation and Conciliation Service to nominate a mediator. The parties shall bear their own costs of the mediation but the parties shall share equally the costs of the mediator and the mediation facilities.

12.3 If the parties are unable to resolve any disputes through good faith discussions or mediation, such dispute may be submitted for binding arbitration as mutually agreed upon by the parties, which shall be governed by the rules of the American Arbitration Association or such other rules as the parties may agree. The parties agree that any judgment issued as a result of arbitration may be entered in the court having jurisdiction thereof.

12.4 Any claim, action, suit or proceeding (collectively "Claim") between OWNER and CONTRACTOR that arises from or relates to this Agreement that the parties do not to submit to arbitration shall be brought and conducted solely and exclusively within the Circuit Court of Linn County for the state of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. CONTRACTOR BY EXECUTION OF THIS AGREEMENT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.

Nothing herein shall be construed as a waiver of OWNER's protections under the Oregon Tort Claims Act.

**13. Time is of the Essence**

Time is of the essence under this Agreement.

**14. Waivers**

No waiver by OWNER or CONTRACTOR of any provision of this Agreement shall be deemed to be a waiver of any other provision hereof or of any subsequent breach by the other party of the same or any other provision. OWNER'S consent to or approval of any act by CONTRACTOR requiring OWNER'S consent or approval shall not be deemed to render unnecessary the obtaining of OWNER'S consent to or approval of any subsequent act by CONTRACTOR, whether or not similar to the act so consented to or approved.

**15. Non-Solicitation**

Neither party may actively solicit, for hire, the employees of the other party during the term of this Agreement or for one year following the termination of this Agreement.

**16. Certificate of Compliance with Oregon Tax Laws**

By executing this Agreement, CONTRACTOR certifies under penalty of perjury that CONTRACTOR is, to the best of CONTRACTOR's knowledge, not in violation of any Oregon tax laws described in ORS 305.385(6) and (7).

Both parties indicate their approval of this Agreement by their signatures below, and each party warrants that all corporate or governmental action necessary to bind the parties to the terms of this Agreement has been taken. The representatives signing on behalf of the parties certify that they are duly authorized by the party for which they sign to make this Agreement.

CITY OF SWEET HOME

CONTRACTOR

By: \_\_\_\_\_

By: \_\_\_\_\_

Authorized Signature

Name: Ray Towry

Name: \_\_\_\_\_

Title: City Manager

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Authorized & Approved by the City Council.  
City Manager approves contract.

Approved as to form.

By: \_\_\_\_\_

Name: Robert Snyder

Title: City Attorney

Date: \_\_\_\_\_

## Exhibit A

### Definitions

- A.1 “Adequate Nutrients” means plant influent nitrogen, phosphorus and iron contents proportional to BOD<sub>5</sub> in the ratio of five (5) parts nitrogen, one (1) part phosphorus, and one-half (0.5) part iron for each one hundred (100) parts BOD<sub>5</sub>.
- A.2 “Annual Fee” means a predetermined, fixed sum for CONTRACTOR’s services. The Annual Fee includes Cost and profit.
- A.3 “Applicable Law” means laws, rules, regulations, codes, administrative and judicial orders, directives, guidelines, judgments, rulings, interpretations or similar requirements or actions of any federal, state, local government, agency or executive or administrative body of any of the above, in each case that relate to the (a) parties’ respective responsibilities under this Agreement; (b) operation or maintenance of the Project; (c) health and welfare of individuals working at or visiting the Project; and (d) the collection, delivery and treatment of the OWNER’s raw and finished water.
- A.4 “Biologically Toxic Substances” means any substance or combination of substances contained in the plant influent in sufficiently high concentration so as to interfere with the biological processes necessary for the removal of the organic and chemical constituents of the wastewater required to meet the discharge requirements of OWNER’s Certificate of Approval. Biologically toxic substances include, but are not limited to, heavy metals, phenols, cyanides, pesticides and herbicides.
- A.5 “Capital Expenditures” means any expenditures for (1) the purchase of new equipment or facility items that cost more than One Thousand Dollars (\$1,000); or (2) major repairs which significantly extend equipment or facility service life and cost more than Five Thousand Dollars (\$5,000) or (3) expenditures that are planned, nonroutine and budgeted by OWNER.
- A.6 “Commencement Date” shall mean \_\_\_\_\_.
- A.7 “Cost” means all Direct Cost and indirect cost determined on an accrual basis in accordance with generally accepted accounting principles.
- A.8 “Direct Cost” means the actual cost incurred for the direct benefit of the Project including, but not limited to, expenditures for project management and labor, employee benefits, chemicals, lab supplies, repairs, repair parts, maintenance parts, safety supplies, gasoline, oil, equipment rental, legal and professional services, quality assurance, travel, office supplies, other supplies, uniforms, telephone, postage, utilities, tools, memberships and training supplies.
- A.9 “Maintenance” means those routine and/or repetitive activities required or recommended by the equipment or facility manufacturer or by CONTRACTOR to maximize the service life of the equipment, sewer, vehicles and facilities.
- A.10 “Maintenance and Repair Limit” means the total Maintenance and Repair expenditures that are not included in the Annual Fee. Such expenditures exclude any labor costs for CONTRACTOR’s staff assigned to the Project. CONTRACTOR’s specialized

maintenance personnel, not assigned at the Project, who provide such specialized services such as, but not limited to, vibration, thermographic and electrical analyses, instrumentation maintenance and repair will be charged to the Maintenance and Repair Limit.

- A.11 “Project” means all equipment, vehicles, grounds, rights of way, and facilities described in Exhibit C and, where appropriate, the operations and maintenance of such.
- A.12 “Repairs” means those nonroutine/nonrepetitive activities required for operational continuity, safety and performance generally due to failure or to avert a failure of the equipment, sewer, vehicles or facilities or some component thereof.
- A.13 “Unforeseen Circumstances” shall mean any event or condition which has an effect on the rights or obligations of the parties under this Agreement, or upon the Project, which is beyond the reasonable control of the party relying thereon and constitutes a justification for a delay in or non-performance of action required by this Agreement, including but not limited to (i) an act of God, landslide, lightning, earthquake, tornado, pandemic/epidemic, fire, explosion, flood, failure to possess sufficient property rights, acts of the public enemy, war, blockade, sabotage, insurrection, riot or civil disturbance, (ii) preliminary or final order of any local, state, administrative agency or governmental body of competent jurisdiction, (iii) any change in law, regulation, rule, requirement, interpretation or statute adopted, promulgated, issued or otherwise specifically modified or changed by any local, state or governmental body, (iv) labor disputes, strikes, work slowdowns or work stoppages, but excluding labor disputes, strikes, work slowdowns or work stoppages by employees of CONTRACTOR; and (v) loss of or inability to obtain service from a utility necessary to furnish power for the operation and maintenance of the Project.

## Exhibit B

### Oregon Public Contracting Requirements

#### ORS CHAPTERS 279B AND 279C REQUIREMENTS

B.1 CONTRACTOR shall pay promptly, as due, all persons supplying labor or materials for the prosecution of the work provided for in the contract, and shall be responsible for such payment of all persons supplying such labor or material to any Subcontractor.

B.2 CONTRACTOR shall promptly pay all contributions or amounts due the Industrial Accident Fund from such CONTRACTOR or Subcontractor incurred in the performance of the contract.

B.3 CONTRACTOR shall not permit any lien or claim to be filed or prosecuted against the OWNER on account of any labor or material furnished and agrees to assume responsibility for satisfaction of any such lien so filed or prosecuted.

B.4 CONTRACTOR and any Subcontractor shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.617.

B.5 If CONTRACTOR fails, neglects or refuses to make prompt payment of any claim for labor or materials furnished to the CONTRACTOR or a Subcontractor by any person in connection with the contract as such claim becomes due, the OWNER may pay such claim to the persons furnishing the labor or material and charge the amount of payment against funds due or to become due CONTRACTOR by reason of the contract. The payment of a claim in the manner authorized hereby shall not relieve the CONTRACTOR or his surety from his or its obligation with respect to any unpaid claim. If the OWNER is unable to determine the validity of any claim for labor or material furnished, the OWNER may withhold from any current payment due CONTRACTOR an amount equal to said claim until its validity is determined and the claim, if valid, is paid.

B.6 CONTRACTOR shall promptly, as due, make payment to any person, copartnership, association, or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to employees of such CONTRACTOR, of all sums which the CONTRACTOR agrees to pay for such services and all monies and sums which the CONTRACTOR collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.

B.7 CONTRACTOR shall pay CONTRACTOR's employees who work under the public contract at least time and a half for all overtime the employees work in excess of 40 hours in any one week, except for employees under a personal services public contract who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

B.8 The CONTRACTOR must give notice to employees who work on this Agreement in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and the days per week that the employees may be required to work.

B.9 All subject employers working under the CONTRACTOR are either employers that will comply with ORS 656.017, or employers that are exempt under ORS 656.126.

B.10 All sums due the State Unemployment Compensation Fund from the CONTRACTOR or any Subcontractor in connection with the performance of the contract shall be promptly so paid.

B.11 The contract may be canceled at the election of OWNER for any willful failure on the part of CONTRACTOR to faithfully perform the contract according to its terms.

B.12 CONTRACTOR certifies compliance with all applicable Oregon tax laws, in accordance with ORS 305.385.

B.13 CONTRACTOR certifies that it has not discriminated against minorities, women or emerging small business enterprises in obtaining any required subcontractors.

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Exhibit C  
Scope of Services

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Exhibit D

NPDES PERMIT AND  
WASTEWATER TREATMENT CHARACTERISTICS

- D.1 CONTRACTOR will operate so that effluent will meet the requirement of NPDES Permit No. 101657 (issued April 22, 2005), a full and complete copy of which is adopted by reference herein as of the date hereof. CONTRACTOR shall be responsible for meeting the effluent quality requirements of the Permit unless one or more of the following occurs: (1) the wastewater influent does not contain Adequate Nutrients to support operation of Project biological processes and/or contains Biologically Toxic Substances which cannot be removed by the existing process and facilities; (2) dischargers into OWNER's sewer system violate any or all regulations as stated in OWNER's Industrial Water and Sewer Ordinance(s) or as required by law; (3) the flow or influent BOD<sub>5</sub> and/or suspended solids exceeds the Project design parameters identified in Exhibit C Scope of Work Section 2.2 Wastewater Treatment Plant; (4) if the wastewater treatment facility and/or associated appurtenances is inoperable or can operate only at a reduced capacity on account of construction activities, fire, flood, adverse weather conditions, labor disputes or other causes beyond CONTRACTOR's control.
- D.2 CONTRACTOR shall not be responsible for fines or legal action as a result of discharge violations within the period that influent exceeds design parameters, does not contain Adequate Nutrients, contains Biologically Toxic Substances or is inoperable, and the subsequent recovery period.
- D.3 The Annual Fee for services under this Agreement is based upon the project influent characteristics as described in Exhibit C Section 2.3. Any change of 10 percent (10%) or more in any of these characteristics, based upon a twelve (12) month moving average, will constitute a Change in Scope (See Article 9).

Exhibit E  
Request for Proposals

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Exhibit F  
CONTRACTOR's Proposal

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