

**CITY OF WILSONVILLE
PROFESSIONAL SERVICES AGREEMENT - OWNER'S
REPRESENTATIVE AND CONSTRUCTION MANAGEMENT SERVICES**

This Professional Services Agreement (“Agreement”) for an Owner’s Representative to oversee the construction work associated with the City of Wilsonville’s new Public Works Operations Complex Project is made and entered into on this _____ day of _____ 2022 (“Effective Date”) by and between the **City of Wilsonville**, a municipal corporation of the State of Oregon (hereinafter referred to as the “City”), and **Cumming Management Group, Inc.**, a California corporation (hereinafter referred to as “Contractor”).

RECITALS

WHEREAS, the City requires project and construction management services for the Public Works Operations Complex Project (“Project”), which Contractor is capable of providing, under terms and conditions hereinafter described; and

WHEREAS, Contractor represents that Contractor is qualified to perform the services described herein on the basis of specialized experience and technical expertise; and

WHEREAS, Contractor is prepared to provide such services as the City does hereinafter require.

NOW, THEREFORE, in consideration of these mutual promises and the terms and conditions set forth herein, the parties agree as follows:

AGREEMENT

Section 1. Roles, Responsibilities, and Scope of Work

Contractor shall serve as the Owner’s Representative for the City to this Project and shall perform all of those tasks and activities described in the Scope of Work, attached hereto as **Exhibit A** and incorporated by reference herein (the “Services”). Specifically, as the Owner’s Representative for this Project, Contractor will be the City’s eyes and ears on the construction site as the construction work progresses. Contractor will assist the City’s Project Manager in ensuring this Project is completed on time, on budget, and to the standards required by the construction contract, from start to finish. Bid Documents are included by reference herein. Where the Bid Documents and this Agreement, including the Scope of Work, directly conflict, the provision(s) most favorable to the City will control. Contractor is advised to point out any perceived conflicts before signing this Agreement so they may be resolved.

Notwithstanding the foregoing and consistent with industry practice, Contractor, in its capacity as the Owner’s Representative, is not responsible for controlling the City’s contract(s) or dictating the means or methods any contractor employs to construct the work. Contractor is, however, responsible to advise the City if Contractor observes what Contractor believes to be unsafe, illegal, or unreasonable behavior so that the City is aware of the concern. At all times, the contractors hired by the City are responsible for the safety of the Project and Contractor’s responsibility is limited to reasonable

diligent observation and reporting any perceived unsafe conditions to the City. In the case of an emergency, Contractor is also authorized to issue a Stop Work Order and shall promptly notify the City of having done so. Contractor shall be liable for any Stop Work Order issued by it.

Section 2. Term

The term of this Agreement shall be from the Effective Date until the Project is completed and final acceptance is made by the City, unless earlier terminated in accordance herewith.

Section 3. Contract Documents

3.1. All written documents prepared by Contractor in conjunction with the Services shall bear the signature, name, or logo of, or otherwise be identified as coming from, Contractor's authorized Project Manager.

3.2. Contractor shall maintain the confidentiality of any confidential information that is exempt from disclosure under state or federal law to which Contractor may have access by reason of this Agreement. Contractor warrants that Contractor's employees assigned to the Services provided in this Agreement shall be clearly instructed to maintain this confidentiality. All agreements with respect to confidentiality shall survive the termination or expiration of this Agreement.

Section 4. Compensation

4.1. Except as otherwise set forth in this **Section 4**, the City agrees to pay Contractor THREE HUNDRED FIVE THOUSAND SEVEN HUNDRED SEVENTY DOLLARS (\$305,770) for performance of the Services ("Compensation Amount"). Any compensation in excess of the Compensation Amount will require an express written Addendum to be executed between the City and Contractor.

4.2. During the course of Contractor's performance, if the City, through its City Project Manager, specifically requests Contractor to provide additional services that are beyond the Scope of Work described on **Exhibit A**, a written Addendum to this Agreement must be executed in compliance with the provisions of **Section 18**.

4.3. Except for amounts withheld by the City pursuant to this Agreement, Contractor will be paid for Services for which an itemized invoice is received by the City within thirty (30) days of receipt, unless the City disputes such invoice. In that instance, the undisputed portion of the invoice will be paid by the City within the above timeframe. The City will set forth its reasons for the disputed claim amount and make good faith efforts to resolve the invoice dispute with Contractor as promptly as is reasonably possible.

4.4. The City will be responsible for the direct payment of required fees payable to governmental agencies, including but not limited to plan checking, land use, zoning, permitting, and all other similar fees resulting from this Project, that are not specifically covered by **Exhibit A**.

4.5. Contractor's Compensation Amount and Rate Schedule are all inclusive and include, but are not limited to, all work-related costs, expenses, salaries or wages, plus fringe benefits and contributions, including payroll taxes, workers compensation insurance, liability insurance, profit,

pension benefits and similar contributions and benefits, technology and/or software charges, licensing, trademark, and/or copyright costs, office expenses, travel expenses, mileage, and all other indirect and overhead charges, including, but not limited to, the recently enacted Oregon Corporate Activity Tax (CAT).

Section 5. Prevailing Wages

This is a contract for a Public Works Project subject to ORS 279C.800 to 279C.870. Therefore, for those employees and/or subcontractors working on this Project who are subject to prevailing wage rates on public works contracts, not less than the current applicable state prevailing wage must be paid on this Project. Wage rates for this Project are those published by the Bureau of Labor and Industries (BOLI), effective January 1, 2022, and all subsequent amendments. The BOLI prevailing wage rate for public works contracts can be found at the following website: http://www.oregon.gov/boli/WHD/PWR/Pages/pwr_state.aspx. Because this is a public works contract subject to payment of prevailing wages, each worker in each applicable trade or occupation employed in the performance of the Project must be paid not less than the applicable state prevailing wage for an hour's work in the same trade or occupation in the locality where such labor is performed, in accordance with ORS 279C.838 and 279C.840, if applicable. Contractor must comply with all public contracting wages required by law. Contractor shall file a certificate of rate of wage as required by ORS 279C.845, if applicable. If the City determines at any time that the prevailing rate of wages has not been or is not being paid as required herein, it may retain from the moneys due to Contractor an amount sufficient to make up the difference between the wages actually paid and the prevailing rate of wages, and may also cancel the contract for breach. Contractor shall be liable to the workers affected for failure to pay the required rate of wage, including all fringe benefits under ORS 279C.840(5). Contractor shall include a contract provision in compliance with this paragraph in every subcontract and shall require each subcontractor to include it in subcontract(s).

Section 6. City's Rights and Responsibilities

6.1. The City will designate a Project Manager to facilitate day-to-day communication between Contractor and the City, including timely receipt and processing of invoices, requests for information, and general coordination of City staff to support the Project.

6.2. Award of this contract is subject to budget appropriation. Funds are approved for Fiscal Year 2021-22. If not completed within this fiscal year, funds may not be appropriated for the next fiscal year. The City also reserves the right to terminate this contract early, as described in **Section 16**.

Section 7. City's Project Manager

The City's Project Manager is Martin Montalvo. The City shall give Contractor prompt written notice of any re-designation of its Project Manager.

Section 8. Contractor's Project Manager

Contractor's Project Manager is Gerry Mulrooney. It is expected that this Contractor's Project Manager will not change throughout the course of construction. In the event that Contractor's designated Project Manager is changed, Contractor shall give the City prompt written notification of

such re-designation. Recognizing the need for consistency and knowledge in the administration of the Project, Contractor's Project Manager will not be changed without the written consent of the City, which consent shall be within the sole discretion of the City. In the event the City receives any communication from Contractor that is not from Contractor's designated Project Manager, the City may request verification by Contractor's Project Manager, which verification must be promptly furnished. Failure to appoint a Project Manager acceptable to the City may result in termination of this Agreement, at the City's sole option.

Section 9. Project Information

Except for confidential information designated by the City as information not to be shared, Contractor agrees to share Project information with, and to fully cooperate with, those corporations, firms, contractors, public utilities, governmental entities, and persons involved in or associated with the Project. No information, news, or press releases related to the Project, whether made to representatives of newspapers, magazines, or television and radio stations, shall be made without the written authorization of the City's Project Manager.

Section 10. Duty to Inform

Contractor must promptly report to the City Project Manager any actual or potential problems, faults, or defects in the Project or Scope of Work, or any portion thereof; or of any nonconformance with federal, state, or local laws, rules, or regulations; or if Contractor has any objection to any decision or order made by the City with respect to such laws, rules, or regulations, Contractor shall give prompt written notice thereof to the City's Project Manager. (Note: what Contractor handles on the spot and what must be reported shall be detailed in the Scope of Work.)

Section 11. Subcontractors and Assignments

11.1. Contractor shall not subcontract with others for any of the Services prescribed herein. Contractor shall not assign any of Contractor's rights acquired hereunder without obtaining prior written approval from the City, which approval may be granted or denied in the City's sole discretion.

11.2. The City shall have the right to enter into other agreements for the Project, to be coordinated with this Agreement. Contractor shall cooperate with the City and other firms, engineers or subcontractors on the Project so that all portions of the Project may be completed in the least possible time and within normal working hours.

Section 12. Contractor Is Independent Contractor

12.1. Contractor is an independent contractor for all purposes and shall be entitled to no compensation other than the Compensation Amount provided for under **Section 4** of this Agreement. Contractor will be solely responsible for determining the manner and means of accomplishing the end result of Contractor's Services. The City does not have the right to control or interfere with the manner or method of accomplishing said Services. The City, however, will have the right to specify and control the results of Contractor's Services so such Services meet the requirements of the Project, including the Scope of Work and the ongoing diligent oversight requirements.

12.2. No subcontracting or assignment of this Agreement is allowed.

Section 13. Contractor Responsibilities

13.1. As applicable, Contractor must make prompt payment for any claims for labor, materials, or services furnished to Contractor by any person in connection with this Agreement as such claims become due. Contractor shall not permit any liens or claims to be filed or prosecuted against the City on account of any labor or material furnished to or on behalf of Contractor. If Contractor fails, neglects, or refuses to make prompt payment of any such claim, the City may, but shall not be obligated to, pay such claim to the person furnishing the labor, materials, or services and offset the amount of the payment against funds due or to become due to Contractor under this Agreement. The City may also recover any such amounts directly from Contractor.

13.2. Contractor must comply with all applicable Oregon and federal wage and hour laws, including BOLI wage requirements, if applicable. Contractor shall make all required workers compensation and medical care payments on time. Contractor shall be fully responsible for payment of all employee withholdings required by law, including but not limited to taxes, including payroll, income, Social Security (FICA), and Medicaid. Contractor shall also be fully responsible for payment of salaries, benefits, taxes, Industrial Accident Fund contributions, and all other charges on account of any employees. Contractor shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167. All costs incident to the hiring of assistants or employees shall be Contractor's responsibility. Contractor shall defend, indemnify, and hold the City harmless from claims for payment of all such expenses.

13.3. No person shall be discriminated against by Contractor in the performance of this Agreement on the basis of sex, gender, race, color, creed, religion, marital status, age, disability, sexual orientation, gender identity, or national origin. Any violation of this provision shall be grounds for cancellation, termination, or suspension of the Agreement, in whole or in part, by the City.

13.4. COVID-19 Safety Measures. Contractor must have a written policy in place to comply with all applicable local, state, and federal laws, regulations, and executive orders related to the COVID-19 coronavirus outbreak to ensure the protection of Contractor's employees, City employees, other contractors, and the public. Contractor must provide its written policy to the City Project Manager at the commencement of the Project. In the event that Contractor is required to stop or delay work due to a COVID-19 related event, Contractor shall not be entitled to any additional payment or delay damages.

Section 14. Indemnity

14.1. Indemnification. Contractor acknowledges responsibility for liability arising out of the performance of this Agreement, and shall defend, indemnify, and hold the City harmless from any and all liability, settlements, loss, costs, and expenses in connection with any action, suit, or claim resulting or allegedly resulting from Contractor's negligent acts, omissions, errors, or willful or reckless misconduct pursuant to this Agreement, or from Contractor's failure to perform its responsibilities as set forth in this Agreement. The review, approval, or acceptance by the City, its Project Manager, or any City employee of documents or other work performed, prepared, or submitted by Contractor shall not be considered a negligent act, error, omission, or willful misconduct on the part of the City, and none of the foregoing shall relieve Contractor of its responsibility to perform in full conformity with the City's requirements, as set forth in this Agreement, and to indemnify the City as provided above and to reimburse the City for any and all costs and damages suffered by the City

as a result of Contractor's negligent performance of this Agreement, failure of performance hereunder, violation of state or federal laws, or failure to adhere to the standards of performance and care described in **Subsection 14.2**. Contractor shall defend the City (using legal counsel reasonably acceptable to the City) against any claim that alleges negligent acts, omissions, errors, or willful or reckless misconduct by Contractor. As used herein, the term "Contractor" applies to Contractor and its own agents, employees, and suppliers.

14.2. Standard of Care. In the performance of the Services, Contractor agrees to use that degree of care and skill exercised by other professional owner's representatives under similar circumstances by reputable members of Contractor's profession practicing in the Portland metropolitan area. Contractor will re-perform any Services not meeting this standard without additional compensation. Contractor's re-performance of any Services, even if done at the City's request, shall not be considered as a limitation or waiver by the City of any other remedies or claims it may have arising out of Contractor's failure to perform in accordance with the applicable standard of care of this Agreement and within the prescribed timeframe.

14.3. Notwithstanding the foregoing indemnity requirements, neither party shall be liable to the other party for special, consequential, or punitive damages incurred due to the fault of the other party. Consequential damages include, without limitation, liability for loss of use of the Project or existing property, loss of profits, loss of use, loss of production, loss of goodwill, loss of business or other projects, or business interruption, however the same may be caused.

Section 15. Insurance

15.1. Insurance Requirements. Contractor shall maintain insurance coverage acceptable to the City in full force and effect throughout the term of this Agreement. Such insurance shall cover all risks arising directly or indirectly out of Contractor's activities or work hereunder. The amount of insurance carried is in no way a limitation on Contractor's liability hereunder. The policy or policies maintained by Contractor shall provide at least the following minimum limits and coverages at all times during performance under this Agreement:

15.1.1. Commercial General Liability Insurance. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of this Agreement, comprehensive Commercial General Liability Insurance covering Bodily Injury and Property Damage, written on an "occurrence" form policy. This coverage shall include broad form Contractual Liability insurance for the indemnities provided under this Agreement and shall be for the following minimum insurance coverage amounts: The coverage shall be in the amount of **\$2,000,000** for each occurrence and **\$3,000,000** general aggregate and shall include Products-Completed Operations Aggregate in the minimum amount of **\$2,000,000** per occurrence, Fire Damage (any one fire) in the minimum amount of **\$50,000**, and Medical Expense (any one person) in the minimum amount of **\$10,000**. All of the foregoing coverages must be carried and maintained at all times during this Agreement.

15.1.2. Professional Errors and Omissions Coverage. Contractor agrees to carry Professional Errors and Omissions Liability insurance on a policy form appropriate to the professionals providing the Services hereunder with a limit of no less than **\$2,000,000** per claim. Contractor shall maintain this insurance for damages alleged to be as a result of errors, omissions, or negligent acts of Contractor. Such policy shall have a retroactive date effective

before the commencement of any work by Contractor on the Services covered by this Agreement, and coverage will remain in force for a period of at least three (3) years after termination of this Agreement.

15.1.3. Business Automobile Liability Insurance. If Contractor will be using a motor vehicle in the performance of the Services herein, Contractor shall provide the City a certificate indicating that Contractor has business automobile liability coverage for all owned, hired, and non-owned vehicles. The Combined Single Limit per occurrence shall not be less than **\$2,000,000**.

15.1.4. Workers Compensation Insurance. Contractor and all employers providing work, labor, or materials under this Agreement that are subject employers under the Oregon Workers Compensation Law shall comply with ORS 656.017, which requires them to provide workers compensation coverage that satisfies Oregon law for all their subject workers under ORS 656.126. Out-of-state employers must provide Oregon workers compensation coverage for their workers who work at a single location within Oregon for more than thirty (30) days in a calendar year. Contractors who perform work without the assistance or labor of any employee need not obtain such coverage. This shall include Employer's Liability Insurance with coverage limits of not less than **\$500,000** each accident.

15.1.5. Insurance Carrier Rating. Coverages provided by Contractor must be underwritten by an insurance company deemed acceptable by the City, with an AM Best Rating of A or better. The City reserves the right to reject all or any insurance carrier(s) with a financial rating that is unacceptable to the City.

15.1.6. Additional Insured and Termination Endorsements. The City will be named as an additional insured with respect to Contractor's liabilities hereunder in insurance coverages. Additional Insured coverage under Contractor's Commercial General Liability, Automobile Liability, and Excess Liability Policies, as applicable, will be provided by endorsement. Additional insured coverage shall be for both ongoing operations via ISO Form CG 2010 or its equivalent, and products and completed operations via ISO Form CG 2037 or its equivalent. Coverage shall be Primary and Non-Contributory. Waiver of Subrogation endorsement via ISO Form CG 2404 or its equivalent shall be provided. The following is included as additional insured: "The City of Wilsonville, its elected and appointed officials, officers, agents, employees, and volunteers." An endorsement shall also be provided requiring the insurance carrier to give the City at least thirty (30) days' written notification of any termination or major modification of the insurance policies required hereunder.

15.1.7. Certificates of Insurance. As evidence of the insurance coverage required by this Agreement, Contractor shall furnish a Certificate of Insurance to the City. This Agreement shall not be effective until the required certificates and the Additional Insured Endorsements have been received and approved by the City. Contractor agrees that it will not terminate or change its coverage during the term of this Agreement without giving the City at least thirty (30) days' prior advance notice and Contractor will obtain an endorsement from its insurance carrier, in favor of the City, requiring the carrier to notify the City of any termination or change in insurance coverage, as provided above.

15.2. Primary Coverage. The coverage provided by these policies shall be primary, and any other insurance carried by the City is excess. Contractor shall be responsible for any deductible amounts payable under all policies of insurance. If insurance policies are “Claims Made” policies, Contractor will be required to maintain such policies in full force and effect throughout any warranty period. Coverage limits for commercial general liability and business automobile liability insurance may be satisfied by a combination of primary and excess insurance.

Section 16. Early Termination; Default

16.1. This Agreement may be terminated prior to the expiration of the agreed upon terms:

16.1.1. By mutual written consent of the parties;

16.1.2. By the City, for any reason, and within its sole discretion, effective upon delivery of written notice to Contractor by mail or in person; or

16.1.3. By Contractor, effective upon seven (7) days’ prior written notice, but only in the event of substantial failure by the City to perform in accordance with the terms through no fault of Contractor, where such default is not cured within the seven (7) day period by the City. Withholding of disputed payment is not a default by the City.

16.2. If the City terminates this Agreement, in whole or in part, due to default or failure of Contractor to perform Services in accordance with the Agreement or to continuously maintain a Project Manager approved by the City, the City may procure, upon reasonable terms and in a reasonable manner, services similar to those so terminated. In addition to any other remedies the City may have, both at law and in equity, for breach of contract, Contractor shall be liable for all costs and damages incurred by the City as a result of the default by Contractor, including, but not limited to all costs incurred by the City in procuring services from others as needed to complete this Agreement. This Agreement shall be in full force to the extent not terminated by written notice from the City to Contractor. In the event of a default, the City will provide Contractor with written notice of the default and a period of ten (10) days to cure the default. If Contractor notifies the City that it wishes to cure the default but cannot, in good faith, do so within the ten (10) day cure period provided, then the City may elect, in its sole discretion, to extend the cure period to an agreed upon time period, or the City may elect to terminate this Agreement and seek remedies for the default, as provided above.

16.3. If the City terminates this Agreement for its own convenience not due to any default by Contractor, payment of Contractor shall be prorated to, and include the day of, termination and shall be in full satisfaction of all claims by Contractor against the City under this Agreement.

16.4. Termination under any provision of this Section shall not affect any right, obligation, or liability of Contractor or the City that accrued prior to such termination. Contractor shall surrender to the City items of work or portions thereof, referred to in **Section 20**, for which Contractor has received payment or the City has made payment.

Section 17. Suspension of Services

The City may suspend, delay, or interrupt all or any part of the Services for such time as the City deems appropriate for its own convenience by giving written notice thereof to Contractor. An

adjustment in the time of performance or method of compensation shall be allowed as a result of such delay or suspension unless the reason for the delay is within Contractor's control. Should the City suspend, delay, or interrupt the Services and the suspension is not within Contractor's control, then the City and Contractor may agree to extend the time of completion by the length of the delay.

Section 18. Modification/Addendum

Any modification of the provisions of this Agreement shall not be enforceable unless reduced to writing and signed by both the City and Contractor. A modification is a written document, contemporaneously executed by the City and Contractor, which increases or decreases the cost to the City over the agreed Compensation Amount in **Section 4** of this Agreement, or changes or modifies this Agreement, including the Scope of Work or the time for performance. No modification shall be binding or effective until executed, in writing, by both Contractor and the City. In the event Contractor receives any communication of whatsoever nature from the City, which communication Contractor contends gives rise to any modification of this Agreement, Contractor shall, within five (5) days after receipt, make a written request for modification to the City's Project Manager in the form of an Addendum. Contractor's failure to submit such written request for modification in the form of an Addendum shall be the basis for refusal by the City to treat said communication as a basis for modification or to allow such modification. In connection with any modification to this Agreement affecting any change in price, Contractor shall submit a complete breakdown of labor, material, equipment, and other costs. If Contractor incurs additional costs or devotes additional time on Project tasks, the City shall be responsible for payment of only those additional costs for which it has agreed to pay under a signed Addendum. To be enforceable, the Addendum must describe with particularity the nature of the change, any delay in time the Addendum will cause, or any increase or decrease in the Compensation Amount. The Addendum must be signed and dated by both Contractor and the City before the Addendum may be implemented.

Section 19. Access to Records

The City shall have access, upon request, to such books, documents, receipts, papers, and records of Contractor as are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, and transcripts during the term of this Agreement and for a period of four (4) years after termination of the Agreement, unless the City specifically requests an extension. This clause shall survive the expiration, completion, or termination of this Agreement.

Section 20. Property of the City

All documents, reports, and research gathered or prepared by Contractor under this Agreement, including but not limited to daily logs, monthly reports, any report required by the Scope of Work, spreadsheets, charts, graphs, modeling, maps, data generation, papers, diaries, and inspection reports, shall be the exclusive property of the City and shall be delivered to the City prior to final payment. Any statutory or common law rights to such property held by Contractor as creator of such work shall be conveyed to the City upon request without additional compensation.

Section 21. Notices

Any notice required or permitted under this Agreement shall be in writing and shall be given when actually delivered in person or forty-eight (48) hours after having been deposited in the United States

mail as certified or registered mail, addressed to the addresses set forth below, or to such other address as one party may indicate by written notice to the other party.

To City: City of Wilsonville
Attn: Martin Montalvo, Public Works Operations Manager
29799 SW Town Center Loop East
Wilsonville, OR 97070

To Contractor: Cumming Management Group, Inc.
Attn: Gerry Mulrooney
696 McVey Avenue, Suite 202
Lake Oswego, OR 97034

Section 22. Miscellaneous Provisions

22.1. Integration. This Agreement, including all exhibits attached hereto, contains the entire and integrated agreement between the parties and supersedes all prior written or oral discussions, representations, or agreements. In case of conflict among these or any other documents, the provisions of this Agreement shall control, and the terms most favorable to the City, within the City's sole discretion, will apply.

22.2. Legal Effect and Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors, and assigns. This Agreement may be enforced by an action at law or in equity.

22.3. No Assignment. Contractor may not assign this Agreement, nor delegate the performance of any obligations hereunder, unless agreed to in advance and in writing by the City.

22.4. Adherence to Law. In the performance of this Agreement, Contractor shall adhere to all applicable federal, state, and local laws (including the Wilsonville Code and Public Works Standards), including but not limited to laws, rules, regulations, and policies concerning employer and employee relationships, workers compensation, and minimum and prevailing wage requirements. Any certificates, licenses, or permits that Contractor is required by law to obtain or maintain in order to perform the Services described on **Exhibit A**, shall be obtained and maintained throughout the term of this Agreement.

22.5. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Oregon, regardless of any conflicts of laws. All contractual provisions required by ORS Chapters 279A, 279B, 279C, and related Oregon Administrative Rules to be included in public agreements are hereby incorporated by reference and shall become a part of this Agreement as if fully set forth herein.

22.6. Jurisdiction. Jurisdiction and venue for any dispute will be in Clackamas County Circuit Court.

22.7. Legal Action/Attorney Fees. If a suit, action, or other proceeding of any nature whatsoever (including any proceeding under the U.S. Bankruptcy Code) is instituted in connection with any controversy arising out of this Agreement or to interpret or enforce any rights or obligations

hereunder, the prevailing party shall be entitled to recover attorney, paralegal, accountant, and other expert fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as determined by the court or body at trial or on any appeal or review, in addition to all other amounts provided by law. If the City is required to seek legal assistance to enforce any term of this Agreement, such fees shall include all of the above fees, whether or not a proceeding is initiated. Payment of all such fees shall also apply to any administrative proceeding, trial, and/or any appeal or petition for review.

22.8. Nonwaiver. Failure by either party at any time to require performance by the other party of any of the provisions of this Agreement shall in no way affect the party's rights hereunder to enforce the same, nor shall any waiver by the party of the breach hereof be held to be a waiver of any succeeding breach or a waiver of this nonwaiver clause.

22.9. Severability. If any provision of this Agreement is found to be void or unenforceable to any extent, it is the intent of the parties that the rest of the Agreement shall remain in full force and effect, to the greatest extent allowed by law.

22.10. Modification. This Agreement may not be modified except by written instrument executed by Contractor and the City.

22.11. Time of the Essence. Time is expressly made of the essence in the performance of this Agreement.

22.12. Calculation of Time. Except where the reference is to business days, all periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or legal holiday observed by the City, the period shall be extended to include the next day which is not a Saturday, Sunday, or legal holiday. Where the reference is to business days, periods of time referred to herein shall exclude Saturdays, Sundays, and legal holidays observed by the City. Whenever a time period is set forth in days in this Agreement, the first day from which the designated period of time begins to run shall not be included.

22.13. Headings. Any titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

22.14. Number, Gender and Captions. In construing this Agreement, it is understood that, if the context so requires, the singular pronoun shall be taken to mean and include the plural, the masculine, the feminine and the neuter, and that, generally, all grammatical changes shall be made, assumed, and implied to individuals and/or corporations and partnerships. All captions and paragraph headings used herein are intended solely for convenience of reference and shall in no way limit any of the provisions of this Agreement.

22.15. Good Faith and Reasonableness. The parties intend that the obligations of good faith and fair dealing apply to this Agreement generally and that no negative inferences be drawn by the absence of an explicit obligation to be reasonable in any portion of this Agreement. The obligation to be reasonable shall only be negated if arbitrariness is clearly and explicitly permitted as to the specific item in question, such as in the case of where this Agreement gives the City "sole discretion" or the City is allowed to make a decision in its "sole judgment."

22.16. Other Necessary Acts. Each party shall execute and deliver to the other all such further instruments and documents as may be reasonably necessary to carry out this Agreement in order to provide and secure to the other parties the full and complete enjoyment of rights and privileges hereunder.

22.17. Interpretation. As a further condition of this Agreement, the City and Contractor acknowledge that this Agreement shall be deemed and construed to have been prepared mutually by each party and it shall be expressly agreed that any uncertainty or ambiguity existing therein shall not be construed against any party. In the event that any party shall take an action, whether judicial or otherwise, to enforce or interpret any of the terms of the Agreement, the prevailing party shall be entitled to recover from the other party all expenses which it may reasonably incur in taking such action, including attorney fees and costs, whether incurred in a court of law or otherwise.

22.18. Entire Agreement. This Agreement and all documents attached to this Agreement represent the entire agreement between the parties.

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

22.20. Authority. Each party signing on behalf of Contractor and the City hereby warrants actual authority to bind their respective party.

The Contractor and the City hereby agree to all provisions of this Agreement.

CONTRACTOR:

CITY:

CUMMING MANAGEMENT GROUP, LLC

CITY OF WILSONVILLE

By: _____

By: _____

Print Name: _____

Print Name: _____

As Its: _____

As Its: _____

Employer I.D. No. _____

APPROVED AS TO FORM:

Barbara A. Jacobson, City Attorney
City of Wilsonville, Oregon

OWNER'S REPRESENTATIVE AND CONSTRUCTION MANAGEMENT SERVICES DRAFT SCOPE OF WORK

The following Scope of Work (SOW) is illustrative of anticipated duties and responsibilities. The Final SOW will be developed in collaboration with the successful Consultant team prior to contract issuance.

This position will provide administrative, management, day-to-day construction oversight, and related services as required to coordinate work of the contractors with each other and with the activities and responsibilities of the Owner's Representative, the Owner, and the Architect. While the City is prepared to commence with a traditional Design/Bid construction format, the City will look to the representative for insight and guidance on alternative delivery and contracting methods to assure the best product and control cost. Scott Edwards Associates will serve as the Project Architect and shall be considered the Architect and/or lead design professional on the delivery team. Contractor shall serve as the Owner's Representative and to whom this Scope of Work applies.

The Owner's Representative shall serve as the City's (Owner's) principal point of contact and liaison between the Architect, the General Contractor ("GC"), and other consultants, contractors, and vendors throughout the Project. The Owner's Representative shall advocate for the Owner's interests in quality, timeliness, and cost-effective construction, while maintaining professional relationships with contractors and other service providers. The Owner's Representative will be responsible for monitoring progress on all aspects of the Project in every phase and ensuring the Project is completed at the lowest possible cost and highest degree of functionality and quality.

CORE SERVICES

The Owner's Representative will be tasked with completing the Project in accordance with the Owner's objectives for cost, time, and quality, and shall provide services including:

General Services

- a. Schedule and conduct meetings to discuss such matters as procedures, progress, issues, problems, and scheduling.
- b. Attend a progress meeting to provide Project updates to Owner.
- c. Attend weekly progress meetings during construction and provide progress meeting minutes provided by GC.
- d. Coordinate with Architect, Owner, and GC.
- e. Enroll the buildings in an Energy Trust of Oregon incentive program.
- f. Evaluate aspects of the proposed buildings related to sustainability.

- g. Assist with value engineering analysis, if needed.

Project Delivery

- a. Evaluate the existing construction cost estimate and further refine and update as needed.
- b. Prepare "Milestone" schedule.
- c. Recommend Project delivery system: traditional design/bid/build, modified design/bid/build with prequalified construction firms, or Construction Manager/General Contractor (CM/GC).
- d. If an alternative delivery/building process is selected, successfully complete the necessary documents such as "Findings of Fact."
- e. Interface with the City of Wilsonville's Community Development Department regarding permits, and attend all associated meetings.
- f. Review "Constructability" and "Construction Phasing" issues.

Contract Management

- a. Review/advise on preparation of construction contract documents.
- b. Review/prepare bid packages.
- c. Develop scheduling and contract administration clauses for inclusion into the contract documents.

Bidding Phase

The Owner's Representative will assist the City in the review of budget, contractor bids, and qualifications. Such assistance will represent the Owner's Representative's best judgment at the time of review, as a project manager familiar with the construction industry. The City acknowledges that the Owner's Representative has no control over costs of labor, materials, or equipment, over each contractor's method of determining its bid, over competitive bidding, market, or negotiating conditions. Accordingly, the Owner's Representative will not warrant or represent that the accepted bid will not vary from the estimated Project budget approved by the City or from any cost estimate or evaluation made by the Owner's Representative. What the Owner's Representative will do, however, is review the bid line items, along with the construction drawing, to verify quantities appear correct and reasonable, and will point out any concerns to the City. The Owner's Representative will also review all submitted bids and look for any significant differences in costs or quantities that raise concern of a possible error or omission, and review those concerns with the City.

- a. Review pre-qualification of construction contractors.

- b. Compare and analyze bids and proposals.
- c. Assist in construction contractor selection and award.
- d. Assist in contract negotiations with construction firm.

Inspections

- a. Monitor construction progress and quality on-site through day-to-day observation/inspection of Work.
- b. Make reasonable efforts to guard against defects and deficiencies in the Work of the GC and ensure that provisions of the contract documents are being fulfilled.
- c. Prepare inspection reports documenting observed construction activities and provide written recommendations regarding defects and deficiencies in the Work.
- d. Provide digital photographs documenting construction activities.
- e. Determine, in general, that the work of each contractor is being performed in accordance with the requirements of the contract documents.
- f. Promptly inform the Architect and the Owner of Work which does not conform to the requirements of the contract documents and should be rejected by the Architect or the Owner.
- g. Monitor any hazardous substance or hazardous materials release or on-site discovery and notify the City if any such thing is discovered or suspected. The Owner's Representative is not, however, responsible to remediate any such discovered hazardous material nor to direct how such remediation should occur.

General Construction Oversight & Coordination

- a. Review and process vendor insurance certificates, invoices, payment applications, surety bonds, sworn statements, and waivers for contract compliance.
- b. Monitor and enforce GC's compliance with contract and specifications.
- c. Coordinate contractor and vendor activities with the Architect and GC.
- d. Review test reports submitted by others to substantiate contract compliance and identify non-conforming issues that require follow-up and resolution.
- e. Recommend courses of action to Owner when requirements of any contracts are not being fulfilled.
- f. Identify actual and potential problems associated with the construction Project and consult with the Architect and Owner.
- g. Maintain an awareness of safety and health requirements and notify GC of apparent violations of applicable regulations and contract provisions for the protection of the public and Project personnel.
- h. Assist GC in coordination of special requirements and inspections for public right of way work.

- i. Assist with obtaining building permits.
- j. Review/recommend service provider payment requests and contract modifications.

Requests for Information (RFIs)

- a. Assist Architect in preparation of responses to RFI-related construction issues.
- b. Transmit design-related RFIs to Architect.
- c. Conduct meetings with the GC and other parties as needed to discuss and resolve RFIs.

Change Orders

- a. Evaluate any Project changes as they arise and recommend necessary or desirable changes to the Architect and the Owner; and if they are accepted, collaborate with the Architect to prepare change orders for the Architect's and contractor's signatures and Owner authorization.
- b. Implement change order procedures.
- c. Review requests for changes.
- d. Assist in negotiating contractor's proposals for change orders.
- e. Facilitate change order tracking and facilitate issue resolution. Perform quantity and cost analysis as required for negotiation of change orders.
- f. Analyze additional compensation claims that are submitted during the construction period and prepare responses.
- g. Perform claims administration, including coordinating and monitoring claims responses, logging claims, and tracking claim status.

Applications for Payment

Owner's Representative will handle payment requests in accordance with the requirements of the contractor's or supplier's contract. Copies of all contracts for which the Owner's Representative is making payments will be provided to the Owner's Representative, with the payment protocol language highlighted. The Owner's Representative will not, however, be responsible to visit the site and inspect the work before making payment, as long as the following protocol is followed:

- a. Develop and implement procedures for review and process applications for payment by GC for progress and final payments. Make recommendations and provide advice for certification to the Owner for payment.
- b. Review certified payroll records for compliance with State BOLI requirements.
- c. Ensure that the approved protocol established by the City and contractor has been followed in the making of and submittal of the invoice.

- d. Require contractor to certify, in writing, that all work being billed has been fully performed or under which provision of the contract the invoice is authorized.

Submittals

- a. In collaboration with the Architect, establish and implement procedures for submittals and expedite the processing and approval of shop drawings and samples.
- b. Maintain logs, files, and other necessary documentation-related submittals.
- c. Provide advice on submittals, coordinate them with information contained in related documents, and transmit them to the Architect for review.
- d. Monitor Architect's responses to submittals for timeliness and help expedite responses.

Reporting

- a. Prepare and distribute Project status reports as requested by the Owner.
- b. Prepare and distribute change order reports on a monthly basis, or as required, to provide information pertaining to proposed and executed change orders and their effect on the budget and schedule.
- c. Prepare and regularly update a comprehensive issue list identifying all unresolved issues, responsible parties, resolution steps, and dates.
- d. Assist Owner in preparing documentation and reports for City Council at key milestones throughout the Project.

Schedule

- a. Ensure the GC procures long lead-time equipment at the proper time to avoid delays.
- b. Review updated construction schedules and maintain records.
- c. Compare Work progress with planned schedule, identify potential variances between scheduled and probable completion dates, and notify the Architect, Owner, and GC of any Project slippage.
- d. Review the contractor's plan to get back on schedule.
- e. Review schedule for Work not started or incomplete and recommend to Owner and GC adjustments in the schedule to meet their required completion date.
- f. Obtain monthly updates from the GC of construction schedule, incorporating actual progress, weather delays, and change order impacts.
- g. Negotiate time extensions due to change orders or other delays.

Budget

- a. Maintain, reconcile, and track the Project budget and schedule.

- b. Assist in monthly progress payment recommendations.
- c. Monitor Project budget, including costs outside of the GC contract, including security and access contract, low voltage contract, permits, testing, and other incidentals, and provide anticipated final cost report to Owner on monthly basis, showing actual costs for activities in progress and estimates for uncompleted tasks. Identify variances between actual and budgeted or estimated costs, and advise Owner whenever projected costs are anticipated to exceed budgets or estimates.

Project Closeout

- a. Develop an occupancy checklist (punch list) and schedule.
- b. Assist the Architect in conducting close-out inspections. Participate in Project inspection(s) for Substantial Completion(s) and warranty inspections.
- c. Make written recommendations to the Owner as to the status of punch list items and when Work is ready for final inspection. Assist the Architect in conducting final inspections.
- d. Coordinate building systems functional testing and performance verification with the GC, the Owner's maintenance personnel, and the Architect. Observe each contractor's check-out of utilities, operational systems, and equipment for readiness and assist in equipment initial start-up and testing.
- e. Participate in any building commissioning and provide documented confirmation that building systems function according to criteria set forth in the Project Documents.
- f. Assist the Owner in obtaining a Certificate of Occupancy, which may encompass accompanying government officials during inspections of the Project, assisting in preparing and submitting proper documentation to the appropriate agencies, and assisting in final testing and other such activities.
- g. Coordinate staff training on building systems.
- h. Assist the Owner with warranty problem resolution and other claims against any contractor(s) for defective work or performance after completion of the construction.
- i. Collaborate with the Architect to collect and submit the following close-out documentation to the Owner:
 - a. Operations and Maintenance data for equipment as required by the Contract Documents for the Project.
 - b. Record drawings for the Project showing, among other things, deviations from the original plans and drawings for the Project made during construction, details in the construction not previously shown on such plans or drawings, changes to existing conditions or existing conditions found to

differ from those shown on the original plans and drawings; the actual installed position of equipment, piping, conduits, light switches, electric fixtures, circuiting, ducts, dampers, access panels, control valves, drains, openings and stub outs; and such other information as the Owner, Architect, or Inspector may reasonably request from time to time.

- c. Warranties and bond for equipment put into service.
- d. Keys, tools, spare parts, and maintenance materials.
- e. A list of all construction contractors, vendors, and material persons of every tier providing services, equipment, and/or materials in connection with the Project, in formal adequately bound, catalogued form, which shall include the names, addresses, telephone numbers, and fax numbers of such persons, and shall further include notices as to where pertinent persons can and may be reached for emergency service, inclusive of nights, weekends, and holidays.
- f. All guaranties and warranties from all construction contractors as required by the Contract Documents for the Project.

This Scope of Work may be amended at the time of selection of the successful Consultant.