

**PROFESSIONAL ENGINEERING/ARCHITECTURAL
MASTER SERVICES CONSULTING AGREEMENT**

THIS AGREEMENT, effective this 9th day of September 2009, entered into by and between the Town of Cheraw, South Carolina, with office located at Cheraw, S.C. (hereinafter referred to as the "Client", and Davis & Floyd, Inc. a corporation organized and existing under the laws of the State of South Carolina, with office located at Florence, South Carolina (hereinafter referred to as the "Consultant").

WITNESS THAT:

WHEREAS, Client intends to undertake various projects requiring professional design services on an "as needed" bases; and

WHEREAS, the Client wishes to retain the Consultant to perform certain services required by the Client for various projects on a TASK ORDER basis and,

WHEREAS, Consultant is an enterprise duly licensed under the laws of South Carolina, that is qualified and willing to provide such services; and

WHEREAS, the Consultant is willing to undertake the performance of such services on a TASK ORDER basis in accordance with the terms and conditions hereinafter set forth; and

NOW, THEREFORE, in consideration of the mutual covenants herein contained, and for other good and valuable consideration, the parties hereby agree as follows:

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ARTICLE 1 - THE WORK

- 1.1 **Work to be Performed:** The Consultant shall perform the services ("Services") set forth in each Task Order ("TASK ORDER") agreed to and released under this Professional Engineering/Architectural Master Services Consulting Agreement ("Agreement"). The Services, including any additions and modifications, shall be performed in accordance with the terms and conditions of this Agreement including the attachments and amendments thereto.
- 1.2 **Ordering Agreements and Understandings:**
- 1.2.1 Negotiation of Task Orders Client and Consultant each reserve and retain the right to negotiate the Services and terms of any specific TASK ORDER.
- 1.2.2 Funding for the TASK ORDERS will be addressed and authorized under the individual TASK ORDER.
- 1.2.3 TASK ORDER Assignment Method
- (a) Upon agreement of the Client, the Consultant will develop a proposed TASK ORDER which will designate the purpose, scope of work, schedule, compensation and any other terms and conditions specific to the project. Upon agreement and execution by both parties, the TASK ORDER will be released and the Consultant will begin providing the Services as specified in the TASK ORDER.
 - (b) There is no limit to the number of TASK ORDERS that may be released under this Agreement. Multiple TASK ORDERS may be released providing for Services at a variety of locations. TASK ORDERS will be numbered consecutively. Modifications to TASK ORDERS will be designated alphabetically. (I.E. TASK ORDER No. 3A identifies the first change order to the third TASK ORDER)
 - (c) Any TASK ORDER released during the term of this Agreement and not completed within the term of this Agreement shall nevertheless be completed within the time specified in the TASK ORDER. The terms and conditions of this Agreement shall govern the rights and obligations of the parties with respect to that TASK ORDER to the same extent as if it were completed within the term of this Agreement.

ARTICLE 2 - CONTRACT DOCUMENTS

- 2.1 **Documents and Precedence:** The documents listed in 2.1.1 thru 2.1.3 constitute the "Contract Documents" of this Agreement. Any *preprinted* terms and conditions on forms used by either party in the administration of this Agreement are void and shall not act to supplement or replace the terms and conditions of this Agreement as set forth in the Contract Documents. For the purposes of establishing obligations and the resolution of ambiguities in the

Contract Documents, the following order of precedence shall prevail:

- 2.1.1 Approved Change Orders
- 2.1.2 TASK ORDER
- 2.1.3 This Master Services Consulting Agreement

ARTICLE 3 - CONTRACT TIME

- 3.1 **Term:** The term of this Agreement shall be for three (3) years from the effective date of this Agreement unless terminated or extended by the mutual agreement of the parties hereto.
- 3.2 **Schedule:** The Consultant shall provide the Services called for by the TASK ORDER beginning not earlier than the execution of the TASK ORDER by the Client. All Work shall be fully completed no later than the date specified in the TASK ORDER, unless sooner terminated or extended as provided herein.
- 3.3 **Delays:** Consultant shall not be liable for delays or failure to perform its Services caused directly or indirectly by circumstances beyond Consultant's control, including but not limited to, acts of God, fire, flood, war, sabotage, accident, labor dispute, shortage, government action including regulatory requirements, changed conditions, delays resulting from actions or inactions of Client or third parties, site inaccessibility or inability of others to obtain material, labor, equipment, or transportation. Should any of the above occur, the date for Completion or any other milestone date shall be adjusted for such delay in accordance with Article 12, provided the Consultant reports the delay to the Client within a reasonable time of its' discovery.

ARTICLE 4 - CONTRACT PRICE

- 4.1. **Consideration:** In consideration for undertaking the Services, the Client shall pay to the Consultant the sum specified in the TASK ORDER in payments in accordance with the terms of the TASK ORDER and the payment provisions of this Agreement.

ARTICLE 5 - PAYMENT PROVISIONS

- 5.1 **Payment:** Consultant will submit invoices to Client monthly for Services provided under each released TASK ORDER. Client recognizes that timely payment is a material part of this Agreement. Each invoice is due and payable within thirty (30) calendar days of the date of the invoice. Client must notify Consultant of any amounts in dispute within fifteen (15) calendar days of the date of the invoice. Client will pay when due that portion of invoice not in dispute. If Client fails to pay any undisputed invoiced amounts within thirty (30) calendar days of the date of the invoice, Consultant may suspend its performance of Services pending payment of all past due invoices or terminate this Agreement without incurring any liability to Client therefore and without

waiving any other claim against Client. Any undisputed invoice amount not received by Consultant within thirty calendar days of the invoice shall accrue interest due and payable at the rate of twelve percent (12%) compounded annually, if allowed by law, otherwise at the highest annual interest rate allowed by law.

- 5.2 **Travel:** Local travel will be at the Consultant's expense. Local travel is hereby defined as travel within a 20-mile radius of the Consultant's local office. Travel required during the performance of this Agreement will be subject to the terms and conditions and applicable rates as set forth in the Federal Travel Regulations and invoiced as an additional cost.
- 5.3 **Invoicing Instructions:** The Consultant will submit invoices, segregated by TASK ORDER, with at least the following information: the invoice date, title of the TASK ORDER, description of services performed and costs related thereto.

ARTICLE 6 - PRELIMINARY MATTERS

- 6.1 **Permits and Licenses:** The Consultant has or will have, prior to the commencement of any Services, all necessary business and professional licenses, permits, and other necessary Federal, State, County, Municipal, or other licenses as may be required to enable the Consultant to perform the services required hereunder.
- 6.2 **Agreement Administration:** Consultant contacts with the Client regarding prices, terms, financial actions, etc., shall be made with the Client's authorized Representative. All correspondence between the Consultant and the Client shall be addressed to the Client's designated Representative.

Client Representative:

DAVIS & FLOYD, Inc. Representative:

Mr. William J. Taylor

Mr. Guy E. Slagle, Jr.

Telephone 843.537.8400

Telephone 843.519.1050

- 6.3 **Communications:** All of Consultant's written or oral communication with or to Federal, State, or local agencies relative to work under this Agreement must be through or with the authorization of the Client's authorized Representative.
- 6.4 **Documents and Records:** Client acknowledges that Consultants' reports, boring logs, field data, field notes, laboratory test data, calculations, estimates and other similar documents ("Records") are instruments of professional service, not products. All data Consultant prepares for Client under this Agreement will remain the property of Consultant. Client has no rights to incomplete or partial data. Consultant will retain Records pertaining to a TASK ORDER for a minimum of three (3) years following completion of the TASK ORDER. During this time, Consultant will reasonably make available the Records to the Client. Consultant may charge a reasonable fee for retrieving or copying such Records.

6.5 **Reuse of Project Documents:** The project documents prepared or furnished to Client by Consultant under this Agreement may be based on information obtained from sources outside Consultant's control. Other than the application of prudent professional care in their evaluation, the Consultant does not warrant, expressed or implied the accuracy thereof. All documentation furnished to the Client is intended for the benefit of the Client for the purpose stated herein and is not intended or represented to be suited for reuse by the Client or others. Any reuse without the specific written consent of the Consultant for the specific purposes intended will be at user's sole risk and without liability and legal exposure to Consultant. Client agrees to indemnify and hold Consultant harmless from any and all liabilities, losses, costs, or expenses suffered by Consultant in connection with Client's unauthorized reuse of project documents.

6.6 **Use of Electronic Files:** Copies of documents that may be relied upon by Client are limited to the printed copies (also known as hard copies) that are signed or sealed by Consultant. Files in electronic media format of text, data, graphics, or of other types that are furnished by Consultant to Client are only for convenience of Client. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.

When transferring documents in electronic media format, Consultant makes no representations as to long-term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by Consultant at the beginning of the Task Order. If there is a discrepancy between the electronic files and the hard copies, the hard copies shall govern.

Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 30 days, after which the receiving party shall be deemed to have accepted the data thus transferred. The party delivering the electronic files will correct any errors detected within the 30-day acceptance period. The Consultant shall not be responsible to maintain documents stored in electronic media format after acceptance by the Client.

ARTICLE 7 - AVAILABILITY OF LANDS

7.1 **Client Furnished Lands:** The Client will furnish the lands upon which the Services are to be performed, rights-of-way for access thereto and lands designated for temporary use. Easements, if required, will be provided by the Client. The Client will allocate the land provided by the Client for temporary use during construction among project consultants and contractors.

ARTICLE 8 - RISK ALLOCATION

- 8.1 **Insurance:** During the period that Services are performed under this Agreement, Consultant will maintain, at least, the following insurance: (i) Workers' Compensation coverage in accordance with the laws of the states having jurisdiction over its employees engaged in the Services and Employer's Liability Insurance (limit of \$500,000 each occurrence.); (ii) Commercial General Liability with a limit of \$1,000,000 per occurrence and a \$2,000,000 aggregate; (iii) Commercial Automobile Liability with a limit of \$500,000 per occurrence and a \$1,000,000 aggregate; and (iv) Professional Liability coverage with a \$500,000 limit on each claim and a \$1,000,000 aggregate.
- 8.1.1. **Certificates:** Prior to beginning Services, Certificates of insurance shall be furnished to the Client evidencing that the coverage will be in effect throughout the performance of the Services and will not be canceled or materially changed until at least thirty (30) days prior written notice has been given to the Client.
- 8.2 **Consequential Damages:** Neither party will be responsible to the other for consequential damages including, but not limited to, loss of profit, loss of investment or business interruption.
- 8.3 **Limit of Liability:** Not Used.
- 8.4 **Underground Structures and/or Utilities:** In those instances where Consultant performs underground exploration or ground penetration under this Agreement, Client will furnish Consultant information identifying the type and location of utility lines or any other object(s) beneath the site's surface. Consultant will, prior to penetrating the site's surface, furnish to Client a plan indicating the locations intended for penetrations taking into consideration the information received from the Client and other sources. Consultant shall be entitled to rely on the accuracy and completeness of all information provided to Consultant from Client. Client will approve the location of any penetrations prior to their being made. Consultant shall take all reasonable care and precautions to avoid damage to underground structures and utilities.
- 8.5 **Jobsite Safety:** Unless the specified Services provide otherwise, Consultant is responsible for safety of its own employees within the work zone necessary to perform the Services. This shall not relieve Client of its' responsibility for maintaining a safe jobsite. Consultant shall comply with any and all currently prevailing safety regulations and standards including, but not limited to, the Occupational Safety and Health Act of 1970, as amended from time to time, and the rules, regulations and standards issued there under.

ARTICLE 9 – CONSULTANT'S RESPONSIBILITIES

- 9.1 **Independent Status / Subcontracting:** Consultant expressly agrees that it is an independent contractor and its employees engaged in the Services are not and shall not be treated or considered employees of the Client. It is understood

that Consultant may retain subcontractors to perform services usually performed by subcontractors. Consultant retains the responsibility for the conduct of all sub-consultants and subcontractors, and the services provided.

- 9.2 **Proprietary Information:** The Consultant shall not directly or indirectly or through its employees disclose to any third person or use for the benefit of anyone other than the Client, either during or after the term of this Agreement (or for the period of time stipulated in the applicable data), any secret or proprietary information provided to the Consultant by the Client whether relating to the Work performed hereunder or to the business and affairs of the Client, provided such information is clearly designated secret or proprietary when conveyed to Consultant. Such information shall include, without limitation, Client manuals, forms or procedures. Disclosure shall not be made without the prior written consent of the Client unless disclosure is required by law, in which case notification of the request for such information shall be provided to the Client prior to release. Information identified in writing by the Consultant as confidential and/or proprietary shall be similarly treated by the Client.
- 9.3 **Publications:** The Consultant shall not publish or publicly disseminate any information or data derived or obtained from or in connection with any services rendered hereunder, without the prior written consent of the Client.

ARTICLE 10 - WORK BY OTHERS

- 10.1 **Cooperation:** Consultant will cooperate with Client personnel, contractors and Subconsultants who may be working on the site. Particular attention will be paid to such matters as safety, use and disruption of utilities, the allocation of storage and work space, parking, security and general policing of the work site.

ARTICLE 11 - CLIENT RESPONSIBILITIES AND AUTHORITY

- 11.1 **Client's Representative:** Client shall assign a Representative authorized to act on Client's behalf with respect to each TASK ORDER. Client's authorized Representative shall render decisions in a timely manner pertaining to Consultant's Services to avoid unreasonable delay in the orderly and sequential progress of Consultant's Services.
- 11.2 **Inspection:** The Client, through any authorized representatives, shall have the right at all reasonable times to inspect, or otherwise evaluate the quality or any other aspect of the Services performed or the safety measures employed and the premises in which it is being performed. If any inspection or evaluation is made by the Client on the premises of the Consultant or a Subconsultant, the Consultant shall provide, and shall require his Subconsultants to provide, all reasonable facilities and assistance for the safety and convenience of the Client representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unnecessarily delay the Services.

11.3 **Audit:** Upon request of the Client, the accounting records, as well as other records maintained by the Consultant directly related to the performance of the Services specified herein, shall be subject, at all reasonable times, to audit by an independent public accounting firm selected by the Client. In addition, the Client may have such an audit performed at any time within two years following the completion or termination of work specified herein.

11.4 **Hazardous Substances/Hazardous Waste:** Client represents that if Client knows or has reason to suspect that hazardous substances or contamination may exist at a project site, Client will fully inform the Consultant prior to release of the TASK ORDER. In the event Consultant encounters hazardous substances or contamination significantly beyond that originally represented by Client, Consultant may suspend its Services and enter into good faith renegotiation of the TASK ORDER.

Client acknowledges that Consultant has no responsibility as a generator, treater, storer, or disposer of hazardous or toxic substances found or identified at a site. Therefore, Client agrees to defend, indemnify, and hold harmless Consultant, from any claim or liability, arising out of Consultant's performance of work under this Agreement and made or brought against Consultant for any actual or threatened environmental pollution or contamination except to the extent that Consultant has negligently caused or contributed to any such pollution or contamination. This indemnification includes reasonable attorney fees and expenses incurred by Consultant in defense of such claim.

Client shall execute any manifests or forms required by law or regulation in connection with the transportation, storage or disposal of hazardous materials resulting from the Services or work at the site, or shall authorize Consultant in writing to execute such documents as agent for the Client.

11.5. **Sample Ownership:** All samples and cuttings of materials containing hazardous materials or contaminants are the property and responsibility of Client. Removal of cuttings from the project site will remain the obligation of Client. Absent direction from Client, Consultant may return all contaminated samples and laboratory byproducts to the Client for proper disposal or treatment.

ARTICLE 12 - CHANGES

12.1 **Change Order Content:** Changes in the terms of this Agreement or the Services may be accomplished without invalidating this Agreement by Change Order subject only to the limitations of this Article and the requirement that the change be within the General scope of work of this Agreement. A Change Order is an amendment to this Agreement or a TASK ORDER modifying the Services and specifying any or all of the following: (i) a change in the terms and conditions or Services; (ii) an adjustment in the Contract Time; and (iii) the amount of the adjustment in the Contract Price.

- 12.2 **Changed Conditions:** The Consultant will rely on the Client's judgment in establishing the scope of work for TASK ORDERS. In the event of changed conditions, Client agrees to negotiate appropriate Change Orders to equitably adjust the price and/or schedule accordingly. Reduction of the Scope of Services by Change Order shall not be the basis of a claim by the Consultant based on loss of anticipated profits from Services not accomplished.
- 12.3 **Issuance of Change Orders:** Consultant will treat as a Change Order any written or oral order (including directions, instructions, interpretations, or determinations) from Client which request changes in the Services. Consultant will give Client written notice within a reasonable time of the receipt of any Change Order of any resulting change in the schedule and price. Unless Client objects in writing within 5 days, the proposed terms of the Change Order shall become a part of this Agreement.
- 12.4 **Failure to Agree:** If the Client and the Consultant cannot agree upon an equitable adjustment in the Contract Time and or Contract Price, and the Consultant will not sign the Change Order, the disagreement shall be considered a dispute subject to settlement in accordance with the disputes clause at Article 15.

ARTICLE 13 - WARRANTY

- 13.1 **Standard of Care:** It is understood that Consultant makes no warranty, either expressed or implied, as to the findings, designs, accommodations, specifications, or professional advice or opinion except that Consultant represents that it shall perform its Services in accordance with the standards of care and diligence normally practiced by professional consulting firms performing Services of a similar nature in the same locale.
- 13.2 **Extent of Study:** Client recognizes that actual environmental conditions may vary from conditions encountered at locations where Consultant makes visual observations, obtains samples, or performs other explorations. Consultant does not guarantee the extent or absence of pollution or hazardous materials at a site and failure to discover differing conditions or potential environmental contamination through appropriate and/or mutually agreed-upon investigation and/or sampling techniques shall not impose any liability on the Consultant.

ARTICLE 14 - SUSPENSION AND TERMINATION

- 14.1 **Suspension of Services:** Consultant will, upon written notice from Client, suspend, delay, or interrupt all or a part of the performance of Services to the extent directed. In such event, Consultant will resume work upon the suspended activities only upon written notice from Client. Where appropriate, an extension of the Contract Time and/or Contract Price will be established as specified in Article 12.

- 14.2 **Termination:** Either party may terminate the Services with or without cause upon 10 days advance written notice. Regardless of the party effecting the termination, the Client shall within 30 calendar days of termination pay the Consultant for services rendered and costs incurred prior to the time of termination, as well as those reasonable costs associated with the termination itself, including the costs incurred in the settlement of terminated contracts and subcontractors, suppliers and others, all in accordance with the Consultant's then-prevailing fee schedule and expense reimbursement policy.

ARTICLE 15 - MISCELLANEOUS PROVISIONS

- 15.1 **Subcontract:** The Consultant shall not further subcontract any Services to be performed under this Agreement, except as specified in the Consultant's proposal or prior written authorization from the Client. Neither this Agreement nor any Subtier Subcontract will create any contractual relationship between any Subtier Subcontractor and Client, nor any liability of Client to any Subtier Subcontractor.
- 15.2 **Assignment:** Neither Party to this Agreement shall transfer, assign or hypothecate its interest in this Agreement without the written consent of the other; which consent shall not be unreasonably withheld. Any attempted transfer, assignment, or hypothecation without such written consent shall be void and confer no rights upon any third person and shall constitute a default hereunder.
- 15.3 **Third Party Liability:** Except as specifically stated in this Agreement, this Agreement does not create any rights or benefits to parties other than Client and the Consultant.
- 15.4 **Dispute Resolution:** Client and Consultant agree that prior to litigation, they shall first submit any and all unsettled claims, counterclaims, disputes and other matters in question between them arising out of or relating to this Agreement to mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association, effective as of the date of this Agreement.
- 15.5 **Applicable Law:** In the performance of the Services provided by this Agreement, the Consultant and the Client shall comply with all applicable Federal, State and local laws, rules, and regulations. This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of South Carolina.
- 15.6 **Entire Agreement, Modifications, Headings, Severability:** The parties acknowledge that this Agreement constitutes the entire Agreement between them and supersedes all prior representations, warranties, agreements, and understandings oral or written between the parties with respect to its subject matter. Unless stated otherwise in this Agreement, this Agreement may not be modified except in writing signed by both parties. The headings to this Agreement are for convenience and reference purposes only and shall not constitute a part of the Agreement. If any element of this Agreement is later

held to violate the law or a regulation, it shall be deemed void, and all remaining provisions shall continue in force.

Client and Consultant confirm reading this document in full and confirm that they understand the terms of this Agreement. Client and Consultant freely enter into this Agreement. The Agreement becomes effective on the latest date of execution indicated below.

Client: Town of Cheraw, South Carolina

By: William Dylon

Title: Town Administrator

Date: 09/09/09

Consultant: Davis & Floyd, Inc.

By: [Signature]

Title: V.P.

Date: 9/9/09

(Intentionally left Blank)

APPENDIX A

PROFESSIONAL ENGINEERING/ARCHITECTURAL MASTER SERVICES CONSULTING AGREEMENT

CONSULTANT RATE SCHEDULE

Fees shall be based upon the following provisions:

- Direct cost (i.e., direct non-payroll expenses) and reimbursable expenses, including but not limited to, the cost of reproduction, travel, postage, and parking will be charged on the basis of direct or actual costs times a factor of 1.1.
- Sub-consultants will be charged on the basis of direct or actual costs times a factor of 1.1.
- The following will be considered additional services:
 - Soils investigations including test boring.
 - Assistance to the Client in litigation.
 - Preparation of special documents or reports as may be required by state and federal agencies that may have jurisdiction over the project to include but not be limited to environmental assessments, wetland surveys, wildlife surveys, archeological surveys, and pilot studies.
 - Revision or rebidding the project.
 - Assistance in property survey or right-of-way acquisition.
 - Furnish a resident construction observer.
 - Special studies, property surveys, or environmental evaluations that may be required will be considered additional services.
 - Permitting fees.
- As specified in the respective Task Order, compensation of the consultant for basic services shall be based upon the following:
 - Payroll cost times a multiplier of 3.2;
 - Lump sum amount; or,
 - Current effective labor rates.