

PROFESSIONAL SERVICES MASTER AGREEMENT

This agreement, including the attached Project Work Order and Project Change Order, is made and entered into this 6th day of December 2022 (the “Agreement”), by and between the below Client and Consultant:

Client: **City of Appleton** (“Client”)
100 N. Appleton Street
Appleton, WI 54911
Ph: (920)832-6423 Fax: (920)832-5962

Consultant: **Westwood Professional Services, Inc.** (“Westwood”)
12701 Whitewater Drive Suite 300
Minnetonka, MN 55343
Ph: (952) 937-5150 Fax: (952) 937-5822

Project: **Professional Services Master Agreement**

Projects will be as determined from time to time by Client. Each new scope of work will be initiated by a "Project Work Order" as defined by Attachment A. Any necessary scope of work and fee changes will be documented by a “Project Change Order” as defined by Attachment B. Both documents will be agreed to and executed by both the Client and Westwood.

Services: Westwood will provide professional services. Such professional services may include, but are not limited to: engineering services, survey services, renewable energy design, LiDAR mapping and aerial photography, GIS (Graphic Information Systems), wetland services, EIS (Environmental Impact Statements), EAW (Environmental Assessment Worksheet), sustainable and conservation development, soil mapping, cultural resources, feasibility studies, regulatory research and permitting, threatened and endangered species, erosion control services, SWPPP development (Storm Water Pollution Prevention Program) and review, land liaison services, title services, and land acquisition (described generally herein as “Services”). These Services, as defined in the Project Work and Change Orders, will be provided on an as-needed basis as requested by Client and agreed to by Westwood. Westwood Services may result in drawings, specifications, plans, reports, work product, and any other deliverable (“Deliverables”) that may be requested by the Client and agreed to by Westwood.

Fee: Charges for the above-described Services will be on an hourly basis in accordance with the Fee Schedule in effect at the time when the work is performed; or on a lump sum basis as agreed, based on the individual project. Fee estimates will be included in the Work Order, with the final cost to be determined based on actual requirements of the project and services rendered.

Effective date: The effective date of this Agreement shall be the date first indicated above and shall be effective through December 31, 2027.

1. GENERAL CONDITIONS OF AGREEMENT

A. The standard of care for all professional consulting and related services performed or furnished by Westwood under this Agreement will be the care and skill ordinarily used by members of Westwood’s profession practicing under similar circumstances at the same time and in the same locality. Except as expressly set forth in Paragraph 1.B, Westwood makes no warranties, express or implied, under this Agreement or otherwise, in connection with Westwood’s Services and Deliverables. Westwood and its

consultants may use or rely upon the design services of Client and others, including, but not limited to, contractors, manufacturers, and suppliers.

- B. If Client notifies Westwood of a deficiency, or if Westwood determines there is a deficiency, within sixty (60) days after delivery of a Deliverable to Client, as Client's sole and exclusive remedy, Westwood shall correct such deficiencies without additional compensation except to the extent such action is directly attributable to deficiencies in Client-furnished information.
- C. Client shall be responsible for, and Westwood may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by Client to Westwood pursuant to this Agreement. Westwood may use such requirements, reports, data, and information in performing or furnishing services under this Agreement.
- D. Westwood neither guarantees the performance of any third party, including contractors, using the Deliverables and Services, nor assumes responsibility for any third party's failure to furnish and perform any work that uses the Deliverables and Services.
- E. Westwood shall not be responsible for the acts or omissions of any contractor(s), subcontractor(s) or supplier(s), or of any of the contractor's agents or employees or any other persons (except Westwood's own employees) furnishing or performing any of the contractor's work; or for any decision made on interpretations or clarifications of Deliverables without consultation and advice of Westwood.
- F. It is understood and agreed that if Westwood's services under this Agreement do not include construction phase services, and that such services will be provided by Client, then Client assumes all responsibility for interpretation of Deliverables and for construction observation or review and waives any claims against Westwood related thereto.
- G. This Agreement is to be governed by the laws of the State of Wisconsin.
- H. All express indemnifications, or limitations of liability included in this Agreement will survive its completion or termination for any reason.
- I. Any provision or part of the Agreement held to be void or unenforceable under any laws or regulations shall be deemed stricken and all remaining provisions shall continue to be valid and binding upon Client and Westwood.
- J. Nothing contained herein shall be construed to mean that Westwood and Client are engaging in a joint venture or partnership.
- K. If either party hereto shall commence any action or proceeding against the other in connection with the terms, conditions, or obligations under this Agreement, the prevailing party shall be entitled to recovery of its reasonable attorney's fees and costs incurred herein. Interest on any outstanding balance shall accrue at the rate of 1.25% per month.

2. TERMINATION

- A. Either party may terminate the Agreement upon thirty (30) days written notice in the event of failure by the other party to perform in accordance with the Agreement's terms through no fault of the terminating party.
- B. Westwood may terminate the Agreement upon seven (7) days written notice if:
 - 1) Westwood believes that Westwood is being requested by Client to furnish or perform services contrary to Westwood's responsibilities as a licensed professional; or
 - 2) Westwood's Services for the Project are delayed or suspended for more than ninety (90) days for reasons beyond Westwood's control.

Westwood shall have no liability to Client as a result of such termination in this paragraph.

- C. Notwithstanding the foregoing, this Agreement will not terminate as a result of a failure under this Paragraph 2 if the party receiving such notice begins, within seven (7) days of receipt of such notice, to correct its failure and proceeds diligently to cure such failure within thirty (30) days of receipt of notice; provided, however, that if and to the extent such failure cannot be reasonably cured within such thirty (30) day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, sixty (60) days after the date of receipt of the notice.
- D. The terminating party may set the effective date of termination at a time up to thirty (30) days later than otherwise provided to allow Westwood to demobilize personnel and equipment from the Project site, to complete tasks providing value which would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Project materials in orderly files. Westwood shall be compensated for the time required to complete such tasks.
- E. Westwood shall be compensated for all services performed by it prior to the date of termination.

3. USE OF DOCUMENTS

Westwood shall be the exclusive owner of all right, title, and interest in and to any and all Deliverables, together with any and all related rights of copyright, patent, trade secret, trademark and service mark, and all other proprietary rights of any kind whatsoever.

Subject to the provisions herein and upon Westwood's receipt of full payment therefore, Westwood hereby grants to Client, and Client accepts: (i) a nonexclusive, nontransferable, without the right to sublicense, royalty-free license to use the Deliverables for the sole purpose of constructing the Project: and (ii) the right to reproduce applicable portions of the Deliverables for Client's contractors, consultants, and suppliers solely for use in construction of the Project, provided Client reproduces on such copies the copyright notice and other proprietary legends that were on the original Deliverable.

Deliverables are not intended or represented to be suitable and are not licensed to Client for reuse by Client or others on extensions of the Project or on any other project. Upon termination for cause of this Agreement by Westwood, the license granted herein shall terminate. Any unauthorized use of the Deliverables will be at Client's sole risk and without liability to Westwood or to Westwood's consultants. Client shall indemnify and hold harmless Westwood and Westwood's Consultants from all claims, damages, losses, and expenses, including attorneys' fees arising out of or resulting therefrom.

4. SUCCESSORS, ASSIGNS, AND BENEFICIARIES

- A. Client and Westwood each is hereby bound and the partners, successors, executors, administrators and legal representatives of Client and Westwood are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators and legal representatives (and permitted assigns) of such other party, in respect of all covenants, agreements and obligations of this Agreement.
- B. Neither Client nor Westwood may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in this Agreement without the written consent of the other, except to the extent that any assignment, subletting, or transfer is mandated or required by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.
- C. Unless expressly provided otherwise in this Agreement:
 - 1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Client or Westwood to any contractor, contractor's subcontractor, supplier, other individual or entity, or to any surety for or employee of any of them.

2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Client and Westwood and not for the benefit of any other party.

5. HAZARDOUS ENVIRONMENTAL CONDITIONS

- A. It is acknowledged by both parties that Westwood's scope of services does not include any services related to a hazardous environmental condition. In the event Westwood or any other party encounters a hazardous environmental condition, Westwood may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Project affected thereby until Client: (i) retains appropriate specialist consultant(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the hazardous environmental condition; and (ii) warrants that the site is in full compliance with applicable laws and regulations.
- B. Client acknowledges that Westwood is performing professional services for Client and that Westwood is not and shall not be required to become an "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or near the site in connection with Westwood's activities under this Agreement.

6. ALLOCATION OF RISKS

- A. To the fullest extent permitted by law, Westwood shall indemnify and hold harmless Client, Client's officers, directors, partners, and employees from and against any and all costs, losses, and damages (including but not limited to all fees and charges of consultants, architects, attorneys, and other professionals, and all court or dispute resolution costs) caused by the negligent acts or omissions of Westwood or Westwood's officers, directors, partners, employees, and Westwood's consultants in the performance and furnishing of Westwood's services under this Agreement.
- B. To the fullest extent permitted by law, Client shall indemnify and hold harmless Westwood, Westwood's officers, directors, partners, employees, and Westwood's consultants from and against any and all claims, demands, costs, losses, and damages (including but not limited to all fees and charges of consultants, architects, attorneys, and other professionals, and all court or other dispute resolution costs) and liabilities that Westwood may incur or suffer which arise out of or relate to: (i) the negligent acts or omissions of Client or Client's officers, directors, partners, employees, and Client's consultants with respect to this Agreement or the Project; and (ii) Client's breach of or failure to perform any of its obligations of this Agreement or a Proposal.
- C. To the fullest extent permitted by law, Westwood's total liability to Client and anyone claiming by, through, or under Client for any cost, loss, or damages caused in part by the negligence of Westwood and in part by the negligence of Client or any other negligent entity or individual, shall not exceed the percentage share that Westwood's negligence bears to the total negligence of Client, Westwood, and all other negligent entities and individuals. In no event shall Westwood's total liability exceed the policy coverage limits of Westwood's applicable liability insurance as set forth in Attachment C.
- D. Neither party shall be liable with respect to any subject matter of this Agreement for any indirect, incidental, special, exemplary or consequential damages, including without limitation, any loss of revenues or profits.

7. PAYMENTS FOR SERVICES AND REIMBURSABLE EXPENSES

- A. *Preparation of Invoices.* Invoices will be prepared in accordance with Westwood's standard invoicing practices and will be submitted to Client by Westwood monthly, unless otherwise agreed.
- B. *Payment of Invoices.* Invoices are due and payable within thirty (30) days of receipt. If Client fails to make any payment due Westwood for services and expenses within thirty (30) days after receipt of

Westwood's invoice there for, the amounts due Westwood will be increased at the rate of 1.25% or the highest rate permitted by law per month or past thereof from said thirtieth (30th) day. In addition, after payments are due, Westwood may, after giving seven (7) days written notice to Client, suspend services under this Agreement until Westwood has been paid in full all amounts due for services, expenses, and other related charges. Payments will be credited first to interest and then to principal.

- C. *Disputed Invoices*. In the event of a disputed or contested invoice, only that portion so contested in good faith may be withheld from payment, and the undisputed portion will be paid.

Client shall pay Westwood for Services as follows:

- A. An amount equal to the cumulative hours charged to the Project by Westwood's employees times standard hourly rates for each applicable billing class for all services performed on the Project, plus reimbursable expenses and Westwood's consultants' charges, if any.
- B. Westwood's standard hourly rates applicable to the respective project shall be defined in the Project Work Order as defined in Attachment A.
- C. Westwood may alter the distribution of compensation between individual phases of the work noted herein to be consistent with services actually rendered.
- D. The standard hourly rates and reimbursable expenses schedule will be adjusted annually to reflect equitable changes in the compensation payable to Westwood.
- E. Client shall pay Westwood for reimbursable expenses. The amounts payable to Westwood for reimbursable expenses will be the Project-related internal expenses actually incurred or allocated by Westwood, plus all invoiced external reimbursable expenses allocable to the Project, the latter of which is multiplied by a factor of 1.15.
- F. Whenever compensation to Westwood herein is stated to include charges of Westwood's consultants, those charges shall be the amounts billed by Westwood's consultants to Westwood multiplied by a factor of 1.15. The external reimbursable expenses and Westwood's factors include consultant's overhead and profit associated with Westwood's responsibility for the administration of such services.

8. FORCE MAJEURE

An event of "Force Majeure" occurs when an event beyond the control of the Party claiming Force Majeure prevents such Party from fulfilling its obligations. An event of Force Majeure includes, without limitation, acts of God (including floods, hurricanes and other adverse weather), war, riot, civil disorder, acts of terrorism, disease, epidemic, strikes and labor disputes, actions or inactions of government or other authorities, law enforcement actions, curfews, closure of transportation systems or other unusual travel difficulties, or inability to provide a safe working environment for employees.

In the event of Force Majeure, the obligations of Westwood to perform Services shall be suspended for the duration of the event of Force Majeure. In such event, the schedule shall be extended by a like number of days as the event of Force Majeure. If Services are suspended for thirty (30) days or more, Westwood may, in its sole discretion, upon five (5) days prior written notice, terminate this Agreement or the affected Project Work Order, or both. In the case of such termination, in addition to the compensation and time extension set forth above, Westwood shall be compensated for all reasonable termination expenses.

9. CORONAVIRUS PANDEMIC IMPACT

Client acknowledges and agrees that due to the dynamic and fluid nature of the coronavirus pandemic (COVID-19) (the "Coronavirus Pandemic"), Westwood may face uncertainty regarding its ability to perform the work contemplated by the Agreement in accordance with the schedule and contracted price. As a result of the Coronavirus Pandemic, the schedule, and related scope and fee, provided in the Agreement may be impacted due to issues outside of Westwood's control including, but not limited to, the following: (a) shortages in labor (including employees and consultants); (b) direction or guidance from

any applicable governmental authority or applicable law that renders Westwood’s or it’s subconsultants’ performance impossible, impracticable, or contrary to such direction or guidance; (c) delays in governmental approvals; and (d) other causes beyond Westwood’s reasonable control, regardless of whether such impacts are direct or indirect.

If due to the impacts of the Coronavirus Pandemic, Westwood determines in good faith and in Westwood’s sole discretion, that it is not feasible for Westwood or its subconsultants to perform the work in accordance with the schedule Westwood shall promptly notify Client and the parties shall cooperate in good faith to negotiate equitable adjustments to the schedule and/or contract price. Notwithstanding anything to the contrary set forth in this Agreement, including any related work or change order, Westwood shall not be liable to Client for any damages (actual, direct, consequential, incidental, punitive, liquidated, or nominal) as a result of delays or cost adjustments in connection with the Coronavirus Pandemic.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement including but not limited to the attachments, Project Work Order, and Project Change Order.

CLIENT:

CONSULTANT:

City of Appleton

Westwood Professional Services, Inc.

(Print/Type)

Barry Morgan
0DD15C63B04149A...

By: _____

By: _____

Barry Morgan

Title: _____

Title: _____

Sr. Director, North Land Division

Date Signed: _____

Dated Signed: _____

12/8/2022

Address/Contact for giving notices:

Address/Contact for giving notices:

City of Appleton

Westwood Professional Services, Inc.

C/O City Attorney

C/O General Counsel

100 N. Appleton Street

12701 Whitewater Drive Suite 300

Appleton, Wisconsin 54911-4799

Minnetonka, Minnesota 55343

For City Reference: File A17-1039

- Attachments: A PSMA Project Work Order Template
- B PSMA Project Change Order Template
- C Insurance

ATTACHMENT A

Project Work Order

Professional Services Master Agreement

PROJECT TITLE: _____

CLIENT NAME City of Appleton

DATE OF WORK ORDER _____

PROJECT WORK ORDER NUMBER PWO-000XX

PROJECT LOCATION: _____

PROJECT NUMBER: _____

This Project Work Order between Client and Westwood is set forth pursuant to our “Professional Services Master Agreement” executed on *December 6, 2022*.

I. Contract Documents

This project work order, any resulting change orders, and the Professional Services Master Agreement comprise the contract documents, and there are no other general or supplementary conditions further stipulated.

II. Project Description

Description of the project.

III. Client and Westwood Responsibilities

1. Client Responsibilities

2. Westwood Responsibilities

Define the associated proposal to include the date of the proposal and the fee schedule.

IV. Deliverables

Clearly define the deliverables.

V. Schedule

1. Services will commence on *date* and will proceed for *number* of working days.
2. Notice to Proceed is understood to be this work order signed, dated, and fully executed by both Client and Westwood.

VI. Staff

1. Pursuant to completion of this work order, Westwood/Client will utilize the following primary personnel under the designated roles listed:

a. Name, License, Title

Description of responsibilities.

Contact Information

b. Name, License, Title (If project scope requires more than one service)

Description of responsibilities.

Contact Information

VII. Project Work Order Attachments:

1. Westwood *Proposal Document if required.*
2. *Fee Table*
3. *Insurance documents if required*

VIII. Form of Contract

1. The estimated project cost is: \$ _____
a. Brief Scope of Services and Total Estimated Fee.
2. Westwood will issue invoices on an approximate 4-week cycle.

ACCEPTED AND AGREED TO:

City of Appleton (Client):

Westwood Professional Services, Inc. (Westwood):

(Signature)

(Signature)

(Name – Printed)

(Name – Printed)

(Title)

(Title)

ADDRESS FOR GIVING NOTICES:

(If Different than Professional Services Master Agreement)

ADDRESS FOR GIVING NOTICES:

(If Different than Professional Services Master Agreement)

ATTACHMENT B

**Project Change Order
Professional Services Master Agreement**

WPS-PSMA-11-10XX

PROJECT TITLE: _____

CLIENT NAME City of Appleton

DATE OF CHANGE ORDER _____

PROJECT CHANGE ORDER NUMBER PCO-000XX

PROJECT WORK ORDER NUMBER PWO-000XX

PROJECT NUMBER: _____

This Project Change Order between Client and Westwood is set forth pursuant to our “Professional Services Master Agreement” executed on *December 6, 2022*. The purpose of this Project Change Order is to modify the conditions and the scope of work as defined in Project Work Order PWO-~~XXX~~.

VII. Contract Documents

1. This project change order, the referenced project work order, and the Professional Services Master Agreement comprise the contract documents, and there are no other general or supplementary conditions further stipulated.

VIII. Project Description

Description of the changes to the project description and/or scope of work.

IX. Client and Westwood Responsibilities

1. Client Responsibilities
2. Westwood Responsibilities

Define changes to the associated Project Work Order.

X. Deliverables

Define deliverable changes to the associated Project Work Order.

XI. Schedule

- 1. *Define changes in the schedule as defined in the associated project work order.*

XII. Staff

- 2. Pursuant to completion of this project change order, Westwood/Client will utilize the following primary personnel under the designated roles listed: *Define any staff changes.*

- a. Name, License, Title**

- Description of responsibilities.*

- Contact Information*

- b. Name, License, Title (If project scope requires more than one service)**

- Description of responsibilities.*

- Contact Information*

VII. Project Change Order Attachments:

- 1. Westwood *Attachments related to the execution of the project change order.*
- 2. *Any related changes to the project work order Fee Table if required.*
- 3. *Insurance documents if required*

VIII. Form of Contract

- 1. The estimated project cost is: \$ _____

- a. Define changes to Scope of Services and Total Estimated Fee.*

ACCEPTED AND AGREED TO:

City of Appleton (Client):

Westwood Professional Services, Inc. (Westwood):

(Signature)

(Signature)

(Name – Printed)

(Name – Printed)

(Title)

(Title)

ADDRESS FOR GIVING NOTICES:

(If Different than Professional Services Master Agreement)

ADDRESS FOR GIVING NOTICES:

(If Different than Professional Services Master Agreement)

ATTACHMENT C

INSURANCE

A. *Insurance.* Westwood shall, during the life of this Agreement, maintain the following insurances:

1. Commercial General Liability (occurrence form not less than):
 - \$2,000,000 General Liability
 - \$2,000,000 Products and Completed Operations Aggregate
 - \$1,000,000 Personal and Advertising Injury
 - \$1,000,000 Each Occurrence
 - \$10,000 Medical Expense
2. Commercial Automobile Liability (all scheduled auto, hired and non-owned autos):
 - \$1,000,000 Combined Single Limit
3. Umbrella
 - \$5,000,000 Aggregate
 - \$5,000,000 Each Occurrence
4. Workers Compensation
 - \$1,000,000 Each Accident
 - \$1,000,000 Policy Limit
 - \$1,000,000 Each Employee
5. *Professional Liability Errors and Omissions Insurance.*

Westwood shall carry Professional Liability Errors and Omissions insurance with limited contractual liability in the amount of \$2,000,000 per claim and in the aggregate for the duration of this Agreement.

B. *Additional Provisions.*

- **Primary and Non-Contributory requirement:** Except for Workers Compensation and Professional Liability, all other insurance above must be primary and non-contributory to any insurance or self-insurance carried by Westwood.
- **Acceptability of Insurers:** Insurance is to be placed with insurers who have an *A.M. Best* rating of no less than A- and a Financial Size Category of no less than Class VI, and who are authorized as an admitted insurance company in the state of Wisconsin.
- **Additional Insured Requirements:** The following must be named as additional insureds on the general liability and business automobile liability policies for liability arising out of project work: City of Appleton, and its officers, council members, agents, employees and authorized volunteers. On the Commercial General Liability Policy, the additional insured coverage must be ISO form CG 20 10 07 04 or equivalent and also include Products/Completed Operations equivalent to ISO form CG 20 37 07 04 or their equivalents for a minimum of 2 years after acceptance of work. This does not apply to Workers Compensation Policies.
- **Certificates of Insurance:** Certificates of Insurance acceptable to the City of Appleton shall be submitted prior to commencement of the work to the applicable department. In addition form CG 20 10 07 04 or equivalent for ongoing work exposure and form CG 20 37 07 04 or equivalent for products-completed operations exposure must also be provided. These certificates shall

contain a provision that coverage afforded under the policies will not be canceled or non renewed until at least 30 days' prior written notice has been given to the City of Appleton.