

Master Professional Services Agreement

THIS AGREEMENT is entered into between **City of Appleton** (Client), 100 N. Appleton Street, Appleton, WI 54911 and **OMNNI Associates, Inc.** (Consultant), One Systems Drive, Appleton, WI 54914, for the following reasons:

- A. Client intends to plan or construct various projects (the Project); and,
- B. Client requires certain professional services in connection with the Project (the Services); and,
- C. Consultant is prepared to provide the Services.

In consideration of the promises contained in this Agreement, Client and Consultant agree as follows:

ARTICLE 1 - EFFECTIVE DATE

The effective date of this Agreement shall be the date of signature and shall be effective through December 31, 2022.

ARTICLE 2 - GOVERNING LAW

This Agreement shall be governed by the laws of the State of Wisconsin.

ARTICLE 3 - TASK ORDERS

Task Orders shall be used to describe the parties' mutual agreement on the scope of the Services, schedule, compensation and other particulars as stated therein. Task Orders are binding only after acceptance and execution by duly authorized representatives of both parties. Each Task Order shall govern the parties' rights and obligations with respect to each assignment, but all within the framework of this Agreement. In the event of an inconsistency between the terms of any Task Order and the terms of this Agreement, the terms of this Agreement shall prevail.

ARTICLE 4 - SCOPE OF SERVICES

Consultant shall provide the Services described in Section A (Scope of Services) of each Task Order.

ARTICLE 5 - SCHEDULE

Consultant shall exercise its reasonable efforts to perform those Services within the time frame set forth in Section B (Schedule) of each Task Order.

ARTICLE 6 - COMPENSATION

Client shall pay Consultant in accordance with Section C (Compensation) of each Task Order.

Payment on invoices shall be due within 30 days of receipt. Client shall give prompt written notice of any disputed amount and shall pay the remaining amount.

ARTICLE 7 - CLIENT'S RESPONSIBILITIES

Client shall be responsible for all matters described in Section D (Client's Responsibilities), of each Task Order.

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In addition, Client shall perform and provide the following in a timely manner so as not to delay the Services of the Consultant. Unless otherwise provided in this Agreement, Client shall bear all costs incidental to compliance with the following:

- A. Place at Consultant's disposal all available information pertinent to the Project, including previous reports, drawings, specifications or any other data as may be reasonably required by Consultant to perform its Services.
- B. Give prompt written notice to Consultant whenever Client becomes aware of any development that affects the scope or timing of Consultant's Services, or any defect in the Services of Consultant.
- C. Advise Consultant of the identity and scope of services of any independent consultants retained by Client to provide services in regard to the Project.

ARTICLE 8 - STANDARD OF CARE

The same degree of care, skill, and diligence shall be exercised in the performance of the Services as is ordinarily possessed and exercised by a member of the same profession, currently practicing, under similar circumstances. No other warranty, express or implied, is included in this Agreement or in any Task Order, drawing, specification, report, opinion, or other instrument of service, in any form or media, produced in connection with the Services.

ARTICLE 9 - INDEMNIFICATION AND LIABILITY

- A. General. Having considered the potential liabilities that may exist during the performance of the Services, the relative benefits and risks of the Project, and the Consultant's fee for the Services, and in consideration of the promises contained in this Agreement, Client and Consultant agree to allocate and limit such liabilities in accordance with this Article.
- B. Indemnification. Consultant agrees to indemnify and hold the Client harmless from and against legal liability for all damages, liabilities or costs to the extent such damages, liabilities or costs are caused by the Consultant's negligent acts, errors, or omissions arising out of its performance of the Services. In the event damages, liabilities or costs are caused by the joint or concurrent negligence of Consultant and Client, they shall be borne by each party in proportion to its own negligence.
- C. Limitation of Liability. In recognition of the relative risks and benefits of the Project to both the Client and the Consultant, the risks have been allocated such that the Client agrees, to the fullest extent permitted by law, to limit the liability of the Consultant and Consultant's officers, directors, employees, shareholders and subconsultants for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, including attorneys' fees and costs and expert-witness fees and costs, so that the total aggregate liability of the Consultant and Consultant's officers, directors, employees,

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shareholders and subconsultants shall not exceed the total insurance required from Consultant for Services under this Agreement pursuant to Article 10. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.

- D. Survival. The terms and conditions of this Article shall survive completion of the Services, or any termination of this Agreement.

ARTICLE 10 - INSURANCE

During the term of this Agreement, Consultant shall maintain the following insurance:

- A. General Liability Insurance, with a combined single limit of \$1,000,000 per occurrence and \$2,000,000 annual aggregate.
- B. Automobile Liability Insurance, with a combined single limit of \$1,000,000 for each person and \$1,000,000 for each accident.
- C. Workers' Compensation Insurance in accordance with Client's Exhibit C as attached.
- D. Professional Liability Insurance, with a limit of \$1,000,000 annual aggregate.
- E. Client shall be named additional insured as indicated in Exhibit C.

Consultant shall, upon written request, furnish Client certificates of insurance.

Consultant and Client waive all rights against each other and their directors, officers, partners, commissioners, officials, agents, and employees for damages covered by property insurance during and after the completion of the Services.

ARTICLE 11 - LIMITATIONS OF RESPONSIBILITY

Consultant shall not be responsible for (a) construction means, methods, techniques, sequences, procedures, or safety precautions and programs in connection with the Project; (b) the failure of any contractor, subcontractor, vendor, or other Project participant, not under contract to Consultant, to fulfill contractual responsibilities to Client or to comply with federal, state, or local laws, regulations, and codes; or (c) procuring permits, certificates, and licenses required for any construction unless such procurement responsibilities are specifically assigned to Consultant in a Task Order.

ARTICLE 12 - OPINIONS OF COST AND SCHEDULE

Because Consultant has no control over the cost of labor, materials, or equipment furnished by others, or over the resources provided by others to meet Project schedules, Consultant's opinion of probable costs and of Project schedules, if any, shall be made on the basis of experience and qualifications as a professional. Consultant does not guarantee that proposals, bids, or actual Project costs will not vary from Consultant's cost estimates or that actual schedules will not vary from Consultant's projected schedules.

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ARTICLE 13 - OWNERSHIP AND REUSE OF DOCUMENTS

Consultant's work product which is prepared solely for the purposes of this Agreement, including, but not limited to, drawings, test results, recommendations and technical specifications, whether in hard copy or electronic form, shall become the property of Client when Consultant has been fully compensated as set forth herein. Consultant may keep copies of all work product for its records.

Consultant and Client recognize that Consultant's work product submitted in performance of this Agreement is intended only for the project described in this Agreement. Client's alteration of Consultant's work product or its use by Client for any other purpose shall be at Client's sole risk, and Client shall hold harmless and indemnify Consultant against all losses, damages, costs and expense, including attorney's fees, arising out of or related to any such alteration or unauthorized use.

ARTICLE 14 - ELECTRONIC COPIES AND INTELLECTUAL PROPERTY

If requested, solely as an aid and accommodation to Client, Consultant may provide copies of its work product documents in computer-readable media ("electronic copies", "CADD"). These documents will duplicate the documents provided as work product, but will not bear the signature and professional seals of the registered professionals responsible for the work. Client is cautioned that the accuracy of electronic copies and CADD documents may be compromised by electronic media degradation, errors in format translation, file corruption, printing errors and incompatibilities, operator inexperience and file modification. Consultant will maintain the original copy, which shall serve as the official, archived record of the electronic and CADD documents. Client agrees to hold harmless, indemnify and defend Consultant from any claims arising out of or relating to any unauthorized change or alteration of electronic copies and CADD documents.

Client acknowledges that Consultant has developed proprietary systems, processes, apparatus, analytical tools and methods which Consultant uses in its business. Such systems, processes, apparatus, analytical tools and methods, including software, patents, copyrights and other intellectual property, and all derivations, enhancements or modifications thereof made by Consultant ("Intellectual Property") shall be and shall remain the property of Consultant. This Agreement does not confer any grant of a license to any such Consultant Intellectual Property, nor any right of use by the Client independently or by other Client contractors.

ARTICLE 15 - TERMINATION AND SUSPENSION

This Agreement may be terminated by either party upon written notice in the event of substantial failure by the other party to perform in accordance with the terms of this Agreement; provided, however, the nonperforming party shall have 14 calendar days from the receipt of the termination notice to cure or to submit a plan for cure acceptable to the other party.

Client may terminate or suspend performance of this Agreement for Client's convenience upon written notice to Consultant. Consultant shall terminate or suspend performance of the Services on a

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schedule acceptable to Client, and Client shall pay Consultant for all the Services performed plus termination or suspension expenses. Upon restart of suspended Services, an equitable adjustment shall be made to Consultant's compensation and the Project schedule.

The provisions of this Article shall also apply to each individual Task Order, separate and apart from any other Task Orders, and without terminating or otherwise affecting this Agreement as a whole.

ARTICLE 16 - DELAY IN PERFORMANCE

Neither Client nor Consultant shall be considered in default of this Agreement or any Task Order for delays in performance caused by circumstances beyond the reasonable control of the nonperforming party. For purposes of this Agreement, such circumstances include, but are not limited to, abnormal weather conditions; floods; earthquakes; fire; epidemics; war, riots, and other civil disturbances; strikes, lockouts, work slowdowns, and other labor disturbances; sabotage; judicial restraint; and delay in or inability to procure permits, licenses, or authorizations from any local, state, or federal agency for any of the supplies, materials, accesses, or services required to be provided by either Client or Consultant under this Agreement or any Task Order. Consultant shall be granted a reasonable extension of time for any delay in its performance caused by any such circumstances.

Should such circumstances occur, the nonperforming party shall, within a reasonable time of being prevented from performing, give written notice to the other party describing the circumstances preventing continued performance and the efforts being made to resume performance.

ARTICLE 17 - NOTICES

Any notice required by this Agreement shall be made in writing to the address specified below:

Client:	James P. Walsh City Attorney City of Appleton 100 N. Appleton Street Appleton, WI 54911-4799 Tel: (920) 832-6423 Jim.Walsh@appleton.org	Consultant:	Tim Bolwerk Senior Geotechnical Engineer OMNNI Associates, Inc. One Systems Drive Appleton, WI 54914-1654 Tel: (920) 830-6150 Tim.Bolwerk@omnni.com
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Nothing contained in this Article shall be construed to restrict the transmission of routine communications between representatives of Client and Consultant.

ARTICLE 18 - DISPUTES

In the event of a dispute between Client and Consultant arising out of or related to this Agreement, or any Task Order, the aggrieved party shall promptly report to the other party. If the parties cannot thereafter resolve the dispute, each party shall nominate a senior officer of its management to meet to resolve the dispute by direct negotiation.

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Should such negotiation fail to resolve the dispute, the Client and Consultant agree that all disputes between them arising out of or relating to this Agreement shall be submitted to non-binding mediation unless the parties mutually agree otherwise.

During the pendency of any dispute, the parties shall continue diligently to fulfill their respective obligations hereunder.

ARTICLE 19 - EQUAL EMPLOYMENT OPPORTUNITY

The Consultant hereby affirms its support of affirmative action and that it abides by the provisions of the "Equal Opportunity Clause" of Section 202 of Executive Order 11246 and other applicable laws and regulations.

Consultant affirms its policy to recruit and hire employees without regard to race, age, color, religion, sex, sexual preference/orientation, marital status, citizen status, national origin or ancestry, presence of a disability or status as a Veteran of the Vietnam era or any other legally protected status. It is Consultant's policy to treat employees equally with respect to compensation, advancement, promotions, transfers and all other terms and conditions of employment.

Consultant further affirms completion of applicable governmental employer information reports including the EEO-1 and VETS-100 reports, and maintenance of a current Affirmative Action Plan as required by Federal regulations.

ARTICLE 20 - WAIVER

A waiver by either Client or Consultant of any breach of this Agreement shall be in writing. Such a waiver shall not affect the waiving party's rights with respect to any other or further breach.

ARTICLE 21 - SEVERABILITY

The invalidity, illegality, or unenforceability of any provision of this Agreement or the occurrence of any event rendering any portion or provision of this Agreement void shall in no way affect the validity or enforceability of any other portion or provision of this Agreement or any Task Order. Any void provision shall be deemed severed from this Agreement, and the balance of this Agreement shall be construed and enforced as if it did not contain the particular portion or provision held to be void. The parties further agree to amend this Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this Article shall not prevent this entire Agreement from being void should a provision which is of the essence of this Agreement be determined void.

ARTICLE 22 - INTEGRATION

This Agreement, including issued Task Orders (and their respective attachments, if any), represents the entire and integrated agreement between Client and Consultant. It supersedes all prior and contemporaneous communications, representations, and agreements, whether oral or written,

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relating to the subject matter of this Agreement.

ARTICLE 23 - SUCCESSORS AND ASSIGNS

Client and Consultant each binds itself and its successors, executors, administrators, permitted assigns, legal representatives and, in the case of a partnership, its partners, to the other party to this Agreement and to the successors, executors, administrators, permitted assigns, legal representatives, and partners of such other party in respect to all provisions of this Agreement.

ARTICLE 24 - ASSIGNMENT

Neither Client nor Consultant shall assign any rights or duties under this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld; provided, however, Consultant may assign its rights to payment without Client's consent. Unless otherwise stated in the written consent to an assignment, no assignment will release or discharge the assignor from any obligation under this Agreement. Nothing contained in this Article shall prevent Consultant from engaging independent consultants, associates, and subcontractors to assist in the performance of the Services.

ARTICLE 25 - NO THIRD PARTY RIGHTS

The Services provided for in this Agreement are for the sole use and benefit of Client and Consultant. Nothing in this Agreement shall be construed to give any rights or benefits to anyone other than Client and Consultant.

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IN WITNESS WHEREOF, Client and Consultant have executed this Agreement.

CITY OF APPLETON, WISCONSIN
a Wisconsin Municipal Corporation
(CLIENT)

OMNNI ASSOCIATES, INC.
(Consultant)

Date: _____

Date: _____

By: _____

Timothy M. Hanna
Mayor

Tim A. Bolwerk, P.E.
Senior Geotechnical Engineer

Attest: _____

Kami Lynch
City Clerk

Christine Schulz
Chief Financial Officer

Approved as to form:

James P. Walsh
City Attorney

Countersigned pursuant to §62.09(10), Wis. Stats.:

Anthony D. Saucerman
Director of Finance