

CONSULTING, PROFESSIONAL AND
TECHNICAL SERVICES AGREEMENT

THIS CONSULTING, PROFESSIONAL AND TECHNICAL SERVICES AGREEMENT ("Agreement") is effective as of **[DATE]** (the "Effective Date"), by and between **[Enter Your Company Name and Address]** ("**XXXX**") and **[Enter Consult Company Name and Address]** ("**Consultant**").

1. SERVICES

- A. Consultant shall perform the consulting, professional or technical services ("Services") set forth in the Statement of Work, which is attached hereto as Exhibit A and is incorporated herein by reference, in accordance with the terms and conditions of this Agreement. In the event of a conflict between the terms of any Statement of Work and this Agreement, the terms of this Agreement shall prevail.
- B. The parties may execute additional Statements of Work from time to time. Each Statement of Work will be completed in a consistent manner, sequentially numbered and executed by both parties.
- C. In the event **XXXX** is a party to a primary contract (the "Primary Contract") and Consultant is a subcontractor as designated on Exhibit B, the additional requirements set forth on Exhibit B shall apply.

2. PERSONNEL

- A. Each person retained by Consultant and actively engaged in the provision of Services under this Agreement shall be as described in the attached Exhibit A, including, as appropriate, name, title or position and responsibilities. Consultant may not provide the services of any other person as part of this Agreement without the prior written consent of **XXXX**.
- B. Each person providing Services to **XXXX** under this Agreement shall at all times be an employee of Consultant and not of **XXXX**. Consultant at all times shall be an independent contractor with full and complete responsibility for all of its employees, representatives, and subcontractors (hereafter "Personnel"), including, without limitation, payment of all payroll-related taxes.

3. PROFESSIONAL FEES

- A. In return for the full and satisfactory performance by Consultant of the Services pursuant to the terms of this Agreement, as determined by **XXXX** in its sole and reasonable discretion, **XXXX** shall pay to Consultant the amounts specified in the attached Exhibit A as full payment for the Services. Such amount shall be paid solely in accordance with the billing schedule and payment terms set forth on Exhibit A, including successful completion of the Services or milestones, if any, and satisfaction of any completion criteria set forth on Exhibit A. Any completion incentive set forth on Exhibit A shall be paid only after the satisfactory completion of, and acceptance by **XXXX** of, all Services.
- B. In the event that Consultant is compensated in whole or in part on an hourly basis, Consultant agrees to keep complete and accurate books and records of the actual

number of hours worked in performing the Services. Consultant shall prepare an invoice from such books and records in accordance with the billing schedule and payment terms set forth in Exhibit A, and **XXXX** shall pay such invoice within thirty (30) days of receipt by **XXXX**. During the term of this Agreement and for a period of one year following expiration or termination for any reason, **XXXX** or its representative may, upon reasonable prior notice, inspect the aforesaid books and records and make copies thereof. Any such audit shall be at the expense of **XXXX**.

4. TRAVEL AND LIVING EXPENSES

Unless otherwise specifically set forth in Exhibit A, travel, meals, living and related expenses are included in Consultant's fixed price. All travel by Consultant must have prior written **XXXX** approval.

5. TERM

This Agreement shall commence on the Effective Date and shall expire on **[Enter Date]**, or on the date of Consultant's satisfactory completion of all its obligations as set forth herein, whichever occurs first (the "Term"). This Agreement may not be renewed or extended except by written agreement executed by both parties.

6. TERMINATION

- A. If either party fails to observe or perform any of its material obligations under this Agreement ("Defaulting Party") and if its failure continues for a period of ten (10) days after written notice from the other party to the Defaulting Party thereof, then, without prejudice to any other rights or remedies the other party may have, the other party may terminate this Agreement without termination liability upon written notice to the Defaulting Party. Consultant acknowledges and agrees that Consultant shall be in material breach of this Agreement in the event that Consultant does not perform the Services to **XXXX's** reasonable satisfaction, as described in Exhibit A.
- B. Notwithstanding anything to the contrary contained herein, **XXXX** may terminate this Agreement without termination liability immediately upon written notice to Consultant in the event of any violation by Consultant or Personnel of the confidentiality provisions hereof or breach by Consultant of the proprietary rights provisions hereof.
- C. Except as otherwise set forth in Exhibit A, **XXXX** may terminate this Agreement or any Statement of Work or any portion of any Statement of Work by giving two (2) weeks prior written notice to Consultant.
- D. All obligations of each party that have accrued before termination or that are of a continuing nature shall survive termination.
- E. In the event of any termination of this Agreement prior to the expiration of the Term, Consultant shall be entitled to receive compensation in accordance with Exhibit A through the effective date of termination for all work that has been satisfactorily performed in **XXXX's** sole and reasonable discretion, but Contractor shall not be entitled to any compensation payable in accordance with Exhibit A after the effective date of termination, unless otherwise provided in Exhibit A, or mutually agreed upon by the parties in writing.

7. PROJECT MANAGERS

Consultant and **XXXX** shall each designate, prior to the commencement of work under each applicable Statement of Work, a project manager (which in the case of Consultant may be Consultant), who shall have responsibility for conveying decisions on behalf of the respective parties. The initial project managers are specified on Exhibit A. Either party may change the individual designated project manager by prior written notice to the other party. All correspondence and reports pertaining to this Agreement shall be initiated by and addressed to the respective project managers, except that notices under this Agreement shall be addressed as specified herein.

8. REPORTS AND DOCUMENTATION

Consultant shall provide to **XXXX** written reports as specified on Exhibit A or as otherwise agreed by **XXXX** and Consultant in writing.

9. REPRESENTATION OF WARRANTIES

- A. Consultant represents and warrants that the Services shall be performed in a good and workmanlike manner, and that the Services shall be of the highest professional standards and quality. Consultant agrees to re-perform any Services that **XXXX** determines, in its sole and reasonable discretion, do not meet this warranty at no cost to **XXXX**. In addition, the extended warranty, if any, specified on the Statement of Work shall also apply to the Services.
- B. Consultant represents and warrants that any and all ideas, materials, inventions, designs, computer programs, modules, products and related documentation and other works of authorship, including, without limitation, the reports listed in Exhibit A, that are created, supplied, performed, modified, incorporated or otherwise provided by Consultant hereunder (collectively, the "Developments") do not infringe on the proprietary rights of any third party. Consultant shall not be liable for any damages or claims of infringement based solely on material changes, alterations or modifications made to the Developments by **XXXX**.
- C. Consultant represents and warrants that neither Consultant nor any Personnel have any obligations to prior employers or others relating to proprietary or confidential information or any inventions or discoveries relating to the business of **XXXX**, including but not limited to any of the Developments, and neither Consultant nor any Personnel is bound by any restriction, agreement, judgment or other limitation limiting Consultant's ability to enter into this Agreement or to carry out its terms or shall engage in any activity or take any action that would be in conflict with or that would result in a breach or violation of any such restriction, agreement, judgment or other limitation.

10. PROPRIETARY RIGHTS

Consultant acknowledges and agrees that any and all Developments made or conceived solely or jointly by Consultant, or created wholly or in part by Consultant, in connection with the Services are "works made for hire" within the meaning of the Copyright Act, 17 U.S.C. Section 101 et. seq., and are the sole and exclusive property of **XXXX**. Consultant hereby assigns to **XXXX** all proprietary rights, if any, including, without limitation, all copyright and patent rights, that Consultant may now or hereafter have to any such Developments. Consultant agrees, at the request of **XXXX** and at no additional cost to **XXXX**, to execute such documents and perform such other acts as **XXXX** deems necessary in connection with such assignment. Notwithstanding the foregoing, Consultant shall retain a perpetual, royalty-free, worldwide, non-exclusive, transferable license to possess, copy, use modify, disclose, distribute and sublicense

without restriction those portions of the Developments not specifically developed or modified as a part of the Services.

11. TAXES

- A. **XXXX** shall pay any applicable sales or use taxes (except for any tax levied upon or measured by Consultant's gross receipts) imposed by any taxing authority and required to be paid by Consultant or **XXXX** as a result of the Services provided to **XXXX** under this Agreement. **XXXX** shall not be liable for any tax levied upon or measured by the income of Consultant. **XXXX** shall not be liable for any interest or penalties assessed as a result of any delay by Consultant in connection with any such taxes.
- B. If a claim is made against Consultant for any applicable taxes that are to be paid by **XXXX**, Consultant shall promptly notify **XXXX**. If **XXXX** so requests in writing, Consultant shall, at **XXXX's** expense, take such action as **XXXX** may reasonably direct with respect to such taxes, including payment of such taxes under protest. If the tax has been paid, and if requested by **XXXX**, Consultant shall, at **XXXX's** expense, take such action as **XXXX** may reasonably direct, including allowing **XXXX** to file a claim or commence legal action in Consultant's name, to recover such tax payment. In the event of refund or recovery of any tax, or part thereof, Consultant shall pay to **XXXX** promptly that portion of the tax paid by **XXXX**, including any interest received thereon.

12. INDEMNIFICATION

- A. Consultant shall defend, indemnify and hold harmless **XXXX**, its owners, directors, officers, employees, and agents (collectively "**XXXX**"), from and against any and all claims, suits, liabilities, judgments, losses, damages, fines, costs and expenses (including reasonable attorneys' fees and expenses) resulting from any claim, suit or demand by any third party arising from (i) injuries to or deaths of persons or loss of or damage to tangible property caused by Consultant or Personnel, (ii) the negligence or willful misconduct of Consultant or Personnel, or (iii) breach by Consultant or Personnel of this Agreement (including any representation or warranty made hereunder), all except to the extent proximately caused by the negligence or intentional misconduct of **XXXX**. Consultant's obligations under this Article shall survive the expiration or other termination of this Agreement. **XXXX** agrees to provide Consultant with written notice of any such third party claim or suit and reasonable cooperation in the defense of any such claim or suit. **XXXX** further agrees to assign to Consultant, at its option, the right to defend and/or settle such claim or suit.
- B. **XXXX** will notify Consultant, in writing, of any claim against **XXXX** that any Developments or other work product produced by Consultant for **XXXX**, or the use thereof, infringes a United States or international copyright, patent, trademark, or other intellectual property or other right of any person or entity.
 - 1. Upon being notified of any action brought against **XXXX** based on such a claim, Consultant, at its sole cost, shall indemnify and defend **XXXX** in said action, perform any negotiations for settlement or compromise of the action, and pay any and all settlements reached and/or costs and damages awarded in any such action, together with reasonable attorney's fees; provided, however, that to the extent that any action is based upon a claim that material furnished to Consultant by **XXXX**, or the use thereof, infringes a United States copyright, patent, or trademark, **XXXX**, at its sole cost, shall indemnify and defend Consultant in such action, perform any negotiations for settlement or compromise of the action, and

pay any and all settlements reached and/or costs and damages awarded in the action, together with reasonable attorney's fees.

2. In the event of an action for infringement Consultant will, with the prior, written consent of **XXXX**: (a) obtain for **XXXX** or Consultant the right to use the infringing material; (b) modify the Developments so as to render them non-infringing and functionally equivalent; or (c) provide **XXXX** with functionally equivalent substitute Developments; provided, however, that if none of the other options set forth in this paragraph can reasonably be achieved in **XXXX's** sole and reasonable determination, then **XXXX** may terminate this Agreement and Consultant shall refund to **XXXX** all fees paid to Consultant under the applicable Statement of Work in full satisfaction of Consultant's obligations under such Statement of Work. Any remedy under this paragraph shall be undertaken at the expense of the party that furnished the infringing material.

13. CONSEQUENTIAL DAMAGES

EXCEPT AS OTHERWISE PROVIDED HEREIN, NEITHER PARTY SHALL BE LIABLE FOR, AND EACH PARTY WAIVES AND RELEASES ANY CLAIMS AGAINST THE OTHER PARTY FOR, ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOST REVENUES, LOST PROFIT, OR LOSS OF PROSPECTIVE ECONOMIC ADVANTAGE, RESULTING FROM PERFORMANCE OR FAILURE TO PERFORM UNDER THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

14. UNAUTHORIZED PAYMENTS

- A. In connection with any performance under this Agreement, Consultant shall at all times comply, and require all Personnel to comply, fully with all of the terms and provisions of the Foreign Corrupt Practices Act and any related or successor statute, regulation or governmental directive regarding payments to foreign nationals or other persons or entities.
- B. In connection with any performance under this Agreement, Consultant shall not make, and shall prohibit all Personnel from making, any payment or offer, promise or authorization of any payment, of any money or other article of value, to any official, employee or representative of any foreign government, or foreign business person or entity doing or seeking to do business with **XXXX**, in order either to obtain or to retain **XXXX** business, or to direct **XXXX** business to a third party, or to influence any act or decision of any government employee or representative, or of any employee or representative of **XXXX**, to perform or to fail to perform his or her duties, or to enlist the aid of any third party to do any of the foregoing.
- C. In connection with any performance under this Agreement, Consultant shall neither solicit nor receive any amount of cash or negotiable paper, or any item, service or favor of value from any present or prospective supplier, vendor or **XXXX** of **XXXX**, or from anyone else with whom **XXXX** does business, including any governmental official or representative, for or in connection with the obtaining or retaining any business of or with **XXXX**. Consultant shall refuse to accept all such gifts and, if received, shall return such gifts to the donor. In all such cases Consultant shall notify **XXXX** promptly of such gift or offer thereof. If **XXXX** deems it necessary, Consultant shall turn over such gifts to **XXXX** for further handling. Consultant shall require all Personnel to comply with the provisions of this Article.

15. CONFIDENTIAL INFORMATION

- A. Consultant hereby agrees that all information, whether written or oral, relating to **XXXX**, or received by **XXXX** from a third party pursuant to confidentiality restrictions, which is provided to Consultant or of which Consultant becomes aware either advertently or inadvertently while performing Services for **XXXX**, which information may include, but shall not be limited to, **XXXX** products or services, or **XXXX**'s, plans, business, finances, and technological developments and programs, shall be considered proprietary and confidential information of **XXXX** ("Confidential Information"). For the purposes of this Agreement, any information based on or derived from any Confidential Information shall be deemed to be Confidential Information hereunder. Confidential Information shall not include any information which:
- (i) was known to Consultant before disclosure under this Agreement and outside the terms of this Agreement;
 - (ii) is or becomes publicly known through no wrongful act of Consultant;
 - (iii) is independently developed by Consultant;
 - (iv) is disclosed to Consultant by a third party without breach of any obligation of confidentiality; or
 - (v) is disclosed pursuant to court order, duly authorized subpoena or government authority.
- B. Consultant agrees that during the term of this Agreement and for a period of five (5) years following termination for any reason:
- (i) Consultant shall not disclose any Confidential Information to any third party;
 - (ii) Consultant shall use its best efforts, but in no event less than the same degree of care and discretion as Consultant employs with respect to its own confidential information, to prevent the disclosure of any Confidential Information; and
 - (iii) Consultant shall not use any Confidential Information other than strictly in connection with its performance of the Services under this Agreement.
- C. Consultant agrees that no Confidential Information shall be disclosed by Consultant, except to Consultant's Personnel who have a need-to-know such Confidential Information and who are parties to a written agreement with Consultant which prohibits the disclosure of the Confidential Information. Consultant shall ensure that each of its Personnel who shall have access to Confidential Information is aware of the non-disclosure and non-use provisions of this Agreement and agrees to be bound by them. Consultant shall be liable to **XXXX** for any violation by any said Personnel of such provisions.
- D. Consultant shall promptly return to **XXXX** all Confidential Information (including any and all copies thereof in whatever form) upon completion of Services for **XXXX** or the termination of this Agreement for any reason. **XXXX** and Consultant agree that the terms and conditions of this Agreement shall be deemed **XXXX** Confidential Information.

16. PUBLICITY

Subject to the restrictions set forth in Section 15 hereof, Consultant may refer to **XXXX** as a reference in non-public business dealings with potential customers. Neither party shall refer to this Agreement in any form of publicity or advertising or use any trade name, trademark or product name of the other party without first obtaining prior written approval of such use. Neither party shall use any trade name, trademark, service mark or product name, of the other party, without first obtaining that party's prior written approval of such use.

17. FORCE MAJEURE

Neither party shall be responsible for delays in or suspension of performance caused by acts of God or governmental authority, strikes or labor disputes, fires or other loss of manufacturing facilities, breach by suppliers of supply agreements, or other similar or dissimilar causes beyond the reasonable control of that party. If a force majeure event continues for a period of sixty (60) days, then **XXXX** may, in its sole and reasonable discretion, terminate this Agreement.

18. NON-WAIVER

No waiver by either party of any default or breach by the other party of any provision of this Agreement shall be effective unless made in writing, and no waiver shall operate as or be deemed a waiver of any subsequent default or breach.

19. THIRD PARTY RIGHTS

Nothing contained in this Agreement shall or is intended to create or shall be construed to create any right in or any duty or obligation to any third party.

20. AMENDMENTS

This Agreement may be changed, modified or amended from time to time only by written agreement of both parties executed by their authorized representatives.

21. NOTICES

Notices under the terms of this Agreement shall be in writing and delivered in person, sent by prepaid certified mail, return receipt requested or by major overnight carrier, or fax machine, to the addresses provided above for each party. Notices shall be effective upon successful delivery thereof.

22. ASSIGNMENT

XXXX may assign this Agreement to any **XXXX** affiliate, wholly-owned subsidiary, or to any successor or owner of all or substantially all of its business or assets. This Agreement may not be otherwise assigned in whole or in part, and any such assignment shall be void and of no effect. Consultant shall not assign this Agreement, or assign or subcontract any part of the Services to be performed under this Agreement, without the prior written consent of **XXXX**.

23. EQUAL OPPORTUNITY EMPLOYER

XXXX certifies that it complies with Executive Order 11246 as amended, Section 503 of the Rehabilitation Act of 1973 as amended, and the Vietnam Era Veterans Readjustment Assistance Act of 1974 as amended, (38 USC 4212), and implementing regulations including the Equal Employment Opportunity Clause and the Affirmative Action Clause which are hereby incorporated by reference to the extent that **XXXX** is covered by those laws.

24. COMPLIANCE WITH LAWS

Consultant shall comply with all applicable state, federal, and local laws including, but not limited to, all applicable requirements of the Federal Government, pertaining to non-discrimination in employment and facilities, including, without limitation, the provision contained in Paragraphs 1 through 7 of Part II, Nondiscrimination in Employment by Government

Contractors and Subcontractors, of Executive Order 11246 (as amended by Executive Order 11375), and Certification of Nonsegregate Facilities (41 CFR, Chapter 1, Sections 1-12, 803.10) all of which provisions are incorporated herein by reference and expressly made a part hereof. Consultant certifies that all articles delivered hereunder were or shall be produced in conformance with the Fair Labor Standards Act.

25. GOVERNING LAW

This Agreement and any dispute arising under or in connection with this Agreement, including any action in tort, shall be governed by the laws of the State of Illinois, without regard to its conflict of laws principles. Both parties stipulate and agree to submit to exclusive jurisdiction and venue in the **[Enter Jurisdiction]**.

26. OFFERS OF EMPLOYMENT

For the term of this Agreement and for an additional period of six (6) months thereafter, Consultant agrees not to hire or to make any offer of employment or associateship to any employee of **XXXX**, nor influence any employee of **XXXX** to leave **XXXX's** employ. **XXXX** may offer employment to any Consultant Personnel without incurring any fee, charge additional cost, or liability hereunder, provided that said Personnel's assignment has been completed and **XXXX** has given Consultant thirty (30) days written notice of its intent to make such an offer of employment. **XXXX** may make an offer of employment earlier than completion of said assignment, provided that **XXXX** and Consultant agree in advance in writing to such an arrangement.

27. NON COMPETITION

Consultant Personnel who provide services to **XXXX** under this Agreement may not perform similar services for any competitor or potential competitor of **XXXX** during the term of this Agreement and for a period of one (1) year thereafter.

28. ENTIRETY OF AGREEMENT

This Agreement supersedes all prior oral or written representations or communications between the parties and, together with Exhibits A and B, constitutes the entire understanding of the parties regarding the subject matter of this Agreement.

IN WITNESS WHEREOF, the parties by their authorized representatives have executed this Agreement on the dates provided below.

XXXX

CONSULTANT

By

By

Name

Name

Title

Title

Date

Date

EXHIBIT A

CONTRACTNO. _____

STATEMENT OF WORK NUMBER ____

Services, Scope of Work and Completion Criteria:

Term of Performance:

Extended Warranty: N/A

XXXX Project Manager:

Consultant Project Manager:

Compensation, Billing Schedule and Payment Terms:

1. Consultant will be compensated at the flat rate of **[Enter Amount]** per week commencing as of the Effective Date.
2. Consultant shall not charge a premium for overtime work.
3. Invoices will be submitted for payment on a bi-monthly basis.
4. Invoices will show all hours worked.
5. All invoices for this Statement must reference **XXXX** purchase order number _____.

Maximum Travel and Related Expenses:

Travel expenses are not allowed; provided, however, that **XXXX** agrees to reimburse Consultant for (i) the cost, not to exceed [_____ **Dollars (\$_____)**], of one (1) round trip coach airline ticket between **XXXX's** offices and _____, New Jersey, and (ii) Consultant's reasonable expenses for meals and lodging, not to exceed [_____ **Dollars (\$_____)**], during the term hereof.

Additional Termination Conditions:

This Statement of Work is executed in accordance with the Consulting, Professional and Technical Services Agreement and incorporated therein.

XXXX

CONSULTANT

By _____
Name _____
Title _____
Date _____

By _____
Name _____
Title _____
Date _____

CONFIDENTIAL

EXHIBIT B:

Place an "X" next to the appropriate space:

 X Consultant is not a subcontractor.

 Consultant is a subcontractor. Additional Conditions: