

RESOLUTION R-2018-88

**A RESOLUTION AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH  
CONSTRUCTION & GEOTECHNICAL MATERIAL TESTING, INC. FOR MATERIAL TESTING  
SERVICES**

**WHEREAS**, the City of Wheaton, DuPage County, Illinois finds it reasonable and appropriate to enter into an agreement for material testing services; and

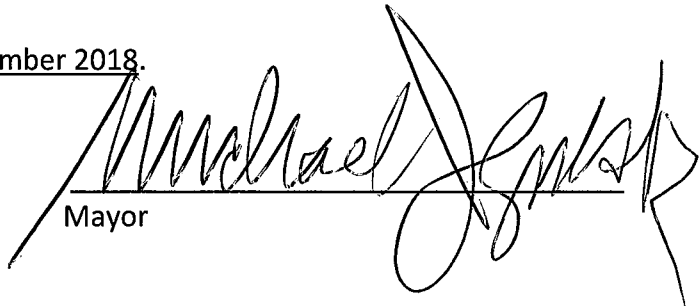
**WHEREAS**, the City conducted a Request for Proposal process and received and reviewed four submittals for material testing services; and

**WHEREAS**, it is determined by the City that the proposal received from Construction & Geotechnical Material Testing, Inc. meets the City's needs; and

**WHEREAS**, it is necessary for the City to enter into an agreement with Construction & Geotechnical Material Testing, Inc. for the purpose of providing material testing services.

**NOW, THEREFORE, BE IT RESOLVED** by the Mayor and City Council of the City of Wheaton, Illinois that the Mayor is hereby authorized to execute, and the City Clerk is hereby directed to attest to an agreement between the City of Wheaton and Construction & Geotechnical Material Testing, Inc., Wheaton, Illinois, for material testing services.

ADOPTED this 17<sup>TH</sup> day of September 2018.

  
\_\_\_\_\_  
Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

Roll Call Vote:

Ayes: Councilman Rutledge  
Councilman Scalzo  
Councilman Suess  
Councilwoman Fitch  
Councilman Prendiville  
Mayor Gresk

Nays: None

Absent: Councilman Barbier

Motion Carried Unanimously



This number must appear on the  
face of all invoices and documents  
related to this Agreement  
**No. C37083**

**CITY OF WHEATON, ILLINOIS  
MATERIAL TESTING  
SERVICE AGREEMENT**

**THIS AGREEMENT** is made and entered into this 18th day of September 2018, by and between the **CITY OF WHEATON**, an Illinois municipal corporation ("**City**"), located at 303 W. Wesley Street, Wheaton, Illinois, 60187 and **Construction & Geotechnical Material Testing, Inc.** ("**Consultant**"), located at 60 Martin Lane, Elk Grove Village, IL 60007.

WHEREAS, the City has determined that it is reasonable and appropriate to engage a Consultant to provide material testing, consistent with the Request for Proposal which is attached hereto and incorporated fully herein as if fully set forth as **Group Exhibit A**; and

WHEREAS, the Consultant has submitted a proposal for such services, which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit B** and represents that it has the necessary expertise and experience to furnish such services upon the terms and conditions set forth herein below.

NOW, THEREFORE, in consideration of the recitals and the mutual covenants, agreements, and conditions set forth in the Agreement, the parties agree as follows:

**SECTION 1. SCOPE OF SERVICES.**

**A. Recitals.** The recitals set forth above, including **Group Exhibit A**, are incorporated herein as substantive terms and conditions of this Agreement and represent the intent of the parties. Where this Agreement is inconsistent with any provision of **Group Exhibit A**, this Agreement shall control.

**B. Retention and Services.** The City retains the Consultant to perform, and the Consultant agrees to perform, all necessary services and work in connection with the services identified below ("**Services**"), which Services the Consultant shall provide pursuant to the terms and conditions of this Agreement:

Services for **Material Testing**, as more fully described in the attached proposal in **Group Exhibit B**, which shall be considered contractual requirements that must be met by Consultant. Consultant shall furnish all labor, materials, and equipment to provide and perform the Services.

**C. Access to Facilities and Property.** The City shall make its system facilities and properties available and accessible for inspection by Consultant and arrange for access to make

all provisions for the Consultant to enter upon public property as required by the Consultant to perform his Services.

**D. Reporting.** The Consultant shall regularly report to the City's Project Manager, or his designee, regarding the progress of the Services during the term of this Agreement.

**E. Time of Performance.** The Consultant shall perform the Services as indicated in the attached proposals, **Group Exhibit A**, and in accordance with Section 7(B) of this Agreement.

**F. Additional Services.** The Consultant shall provide only the Services specified in this Agreement and the attached **Group Exhibit A**. The Consultant acknowledges and agrees that the City shall not be liable for any costs incurred by the Consultant in connection with any services provided by the Consultant that are outside the scope of this Agreement ("**Additional Services**"), regardless of whether such Additional Services are requested or directed by the City, except upon the prior written consent of the City. Additional Services that have been authorized in writing by the City shall be subject to the terms and conditions of this Agreement and shall be compensated at the hourly rates included in the Consultant's cost proposal included in **Exhibit A**.

## **SECTION 2. PERSONNEL; SUBCONTRACTORS.**

**A. Key Project Personnel.** The Key Project Personnel identified in the attached **Group Exhibit B** shall be primarily responsible for carrying out the Services on behalf of the Consultant. The Key Project Personnel shall not be changed without the City's prior written approval.

**B. Availability of Personnel.** The Consultant shall provide all personnel necessary to complete the Services including, without limitation, any Key Project Personnel identified in this Agreement. The Consultant shall notify the City as soon as practicable prior to terminating the employment of, reassigning, or receiving notice of the resignation of, any Key Project Personnel. The Consultant shall have no claim for damages and shall not bill the City for additional time and materials charges as the result of any portion of the Services which must be duplicated or redone due to such termination or for any delay or extension of the Time of Performance as a result of any such termination, reassignment, or resignation.

**C. Use of Subcontractors.** The Consultant shall perform the Services with its own personnel and under the management, supervision, and control of its own organization unless otherwise approved in advance by the City in writing. All subcontractors and subcontracts used by the Consultant shall be acceptable to, and approved in advance by, the City. The City's approval of any subcontractor or subcontract shall not relieve the Consultant of full responsibility and liability for the provision, performance, and completion of Services as required by this Agreement. All Services performed under any subcontract shall be subject to all of the provisions of this Agreement in the same manner as if performed by employees of the Consultant. For purposes of this Agreement, the term "Consultant" shall be deemed also to refer to all subcontractors of the Consultant, and every subcontract shall include a provision binding the subcontractor to all provisions of this Agreement.

**D. Removal of Personnel and Subcontractors.** If any personnel or subcontractor fails to perform the Services in a manner satisfactory to the City and consistent with commonly accepted professional practices, the Consultant shall immediately upon notice from the City remove and replace such personnel or subcontractor. The Consultant shall have no claim for damages, for compensation in excess of the amount contained in this Agreement, or for a delay or extension of the Time of Performance as a result of any such removal or replacement.

**E. No Additional Obligation.** The Parties acknowledge and agree that the City is under no obligation under this Agreement or otherwise to negotiate or enter into any other or additional contracts or agreements with the Consultant or with any vendor solicited or recommended by the Consultant.

**F. Corporate Authorities of the City.** Notwithstanding any provision of this Agreement, any negotiations or agreements with, or representations by the Consultant to, vendors shall be subject to the approval of the City Manager or Corporate Authorities of the City. For the purposes of this Section, "vendors" shall mean entities engaged in subcontracts for the provision of additional services directly to the City. The City shall not be liable to any vendor or third party for any agreements made by the Consultant without the knowledge and approval of the City Manager or of the City's Corporate Authorities.

### **SECTION 3. COMPENSATION AND METHOD OF PAYMENT.**

**A. Agreement Amount.** The total amount billed by the Consultant for the Services performed under this Agreement shall not exceed **\$250,000** including reimbursable expenses, without the prior express written authorization of the City.

**B. Invoices and Payments.** The Consultant shall be paid as provided in **Group Exhibit B**. The Consultant shall submit invoices to the City containing sufficient detail of the Services performed to enable the City to properly evaluate the payout request. The City shall pay Consultant in accordance with the Illinois Local Government Prompt Payment Act. Payment will be made to the Consultant either through the City's Purchasing Card Program, MasterCard, in which payment will occur at the time of Service delivery, or through a Consultant generated invoice. Invoices shall be submitted to the City within six (6) months of completion of the Services. Any invoices submitted in excess of six (6) months from the date that Services were completed, will not be paid. Under no circumstances will a third party be reimbursed for Services performed under this Agreement.

**C. Unappropriated Funds.** The obligation of the City for payment to the Consultant is limited to the availability of funds appropriated in a current fiscal period, and continuation of this Agreement into a subsequent fiscal period is subject to the appropriation of funds, unless otherwise authorized by law.

**D. Taxes, Benefits, and Royalties.** The Agreement Amount includes all applicable federal, state and City taxes of every kind and nature applicable to the Services as well as all taxes, contributions, and premiums for unemployment insurance, old age or retirement benefits,

pensions, annuities, or similar benefits and all costs, royalties, and fees arising from the use of, or the incorporation into, the Services, of patented or copyrighted equipment, materials, supplies, tools, appliances, devices, processes, or inventions. All claims or right to claim additional compensation by reason of the payment of any such tax, contribution, premium, costs, royalties, or fees is hereby waived and released by Consultant.

**E. Interest Waiver.** Consultant hereby waives any and all claims or rights to interest on money claimed to be due pursuant to this Agreement, and all such rights to interest to which it may otherwise be entitled pursuant to law, including, but not limited to, pursuant to the Local Government Prompt Payment Act (50 ILCS 505/1 *et seq.*) as amended or the Illinois Interest Act (815 ILCS 205/1, *et seq.*) as amended.

**F. Records.** The Consultant shall maintain records showing actual time devoted and costs incurred in connection with the Services performed under this Agreement and shall permit the authorized representative of the City to inspect, audit and make copies of all data and records of the Consultant for the Services done under this Agreement. All such records shall be clearly identifiable. The records shall be made available to the City during normal business hours during the Agreement period, and for three years after the termination of the Agreement.

#### **SECTION 4. REPRESENTATIONS OF CONSULTANT.**

**A. Warranty of Services.** The Consultant represents, certifies and warrants that it shall perform and complete the Services in a manner consistent with the level of care, skill, and diligence exercised by other recognized professional engineering Consultants under similar circumstances at the time the services are performed. Consultant warrants that the design preparation of drawings, models, and surveys, the designation or selection of materials and equipment, the selection and supervision of personnel, and the performance of other services under this Agreement, is pursuant to a high standard of performance in the engineering profession. The representations, certifications, and warranties expressed shall be in addition to any other representations, certifications, and warranties expressed in this Agreement, or expressed or implied by law, which are hereby reserved unto the City. The City's approval shall not constitute, or be deemed, a release of the responsibility and liability of the Engineer, its employees, agents or associates for the exercise of skill and diligence to promote the accuracy and competency of their designs, information, plans, specifications or any other document, nor shall the City's approval be deemed to be the assumption of responsibility by the City for any defect or error in the aforesaid documents prepared by the Consultant, its employees, associates, agents, or subconsultants. Consultant shall promptly correct any defective designs, drawings, models, surveys, or specifications furnished by the Consultant at no cost to the City. The City's approval, acceptance, use of, or payment for, all or any part of the Consultant's services hereunder shall in no way alter the Consultant's obligations or the City's rights hereunder.

**B. Professional License.** The Consultant represents that it is properly licensed by the State of Illinois Department of Professional Regulation as a Licensed Professional Engineer.

C. **Solvency.** The Consultant represents that it is financially solvent and has the necessary financial resources to perform the Services with the standard of care required under this Agreement.

#### **SECTION 5. INDEMNIFICATION; INSURANCE; LIABILITY**

A. **Indemnification.** To the extent permitted by Illinois law, the Consultant shall, without regard to the availability or unavailability of any insurance, either of the City or of the Consultant, indemnify, save harmless, and defend the City, and its officials, directors, officers, employees, agents, and attorneys, in whole or in part from and against any and all lawsuits, claims, demands, damages, liabilities, losses, fines, judgments, settlements, penalties, costs, and expenses, including, but not limited to reasonable expert witness and attorneys' fees, as well as costs of litigation, that arise, or may be alleged to have arisen, out of or in connection with: (i) Consultant's negligent failure to meet the representations and certifications set forth in Section 4 of this Agreement, and (ii) Consultant's negligent act or omission or willful misconduct in the performance of or failure to perform the Services or any part thereof of the Agreement, including any claims or amounts recovered for any infringements of patent, trademark or copyright; or from any claims or amounts arising or recovered under the Workers' Compensation Act, or any other State or Federal law, order or decree, except to the extent caused by the negligence of the City. The obligation on the part of the Consultant to defend, hold harmless, and indemnify the City shall survive the expiration or termination of this Agreement. Nothing in this Agreement shall be construed as prohibiting the City, its officials, directors, officers, employees, agents or attorneys from defending, through the selection and use of their own agents, attorneys and experts, any claims, actions or suits brought against them arising out of the performance of this Agreement.

In the event that any claim for indemnification hereunder arises from the negligence or willful misconduct of both the Consultant and the City, the parties agree that any and all lawsuits, claims, demands, damages, liabilities, losses, fines, judgments, settlements, penalties, costs, and expenses shall be apportioned between the parties on the basis of their comparative degrees of fault, except as otherwise herein provided.

B. **Insurance.** Contemporaneous with the Consultant's execution of this Agreement, the Consultant shall provide certificates and policies of insurance, all with coverages and limits acceptable to the City, and evidencing at least the minimum insurance coverages and limits as set forth by the City in the Special Provisions for: Insurance Coverage for Professional Service Providers, which is attached hereto and incorporated as if fully set forth, as **Exhibit D** to this Agreement.

C. **No Personal Liability.** No elected or appointed official, director, officer, agent or employee of the City shall be personally liable, in law or in contract, to the Consultant as the result of the execution, approval or attempted execution of this Agreement.

D. **No Liability to Any Third Party.** The City shall have no liability to any third party in contract, tort or otherwise for incidental or consequential damages of any kind, including,

without limitation, punitive or economic damages or lost profits, regardless of whether the City shall be advised, shall have reason to know or in fact shall know of the possibility.

E. **Third Party Beneficiaries.** There are no third-party beneficiaries of this Agreement.

#### **SECTION 6. CONFIDENTIAL INFORMATION.**

A. **Confidential Information.** The term "**Confidential Information**" shall mean information in the possession or under the control of the City relating to the technical, business, or corporate affairs of the City; City property; user information, including, without limitation, any information pertaining to usage of the City's computer system, including and without limitation, any information obtained from server logs or other records of electronic or machine readable form; and the existence of, and terms and conditions of, this Agreement. City Confidential Information shall not include information that can be demonstrated: (i) to have been rightfully in the possession of the Consultant from a source other than the City prior to the time of disclosure of said information to the Consultant under this Agreement ("**Time of Disclosure**"); (ii) to have been in the public domain prior to the Time of Disclosure; (iii) to have become part of the public domain after the Time of Disclosure by a publication or by any other means except an unauthorized act or omission or breach of this Agreement on the part of the Consultant or the City; or (iv) to have been supplied to the Consultant after the Time of Disclosure without restriction by a third party who is under no obligation to the City to maintain such information in confidence.

B. **No Disclosure of Confidential Information by the Consultant.** The Consultant acknowledges that it shall, in performing the Services for the City under this Agreement, have access to or be directly or indirectly exposed to Confidential Information. The Consultant shall hold confidential all Confidential Information and shall not disclose or use such Confidential Information without express prior written consent of the City. The Consultant shall use reasonable measures at least as strict as those the Consultant uses to protect its own confidential information. Such measures shall include, without limitation, requiring employees and sub-Consultants of the Consultant to execute a non-disclosure agreement before obtaining access to Confidential Information.

C. **Breach of Confidentiality.** In the event of breach of the confidentiality provisions of Section 6 of this Agreement, it shall be conclusively presumed that irreparable injury would result to the City and there would be no adequate remedy at law. The City shall be entitled to obtain temporary and permanent injunctions, without bond and without proving damages, to enforce this Agreement. The City shall be entitled to damages for any breach of the injunction, including but not limited to, compensatory, incidental, consequential, exemplary and punitive damages. The confidentiality provisions of this Agreement survive the termination or performance of this Agreement.



**SECTION 7. INDEPENDENT CONSULTANT; TERM; TERMINATION; DEFAULT.**

**A. Independent Consultant Status.** The Consultant shall act as an independent Consultant in providing and performing the Services. Nothing in, nor done pursuant to, this Agreement shall be construed (i) to create the relationship of principal and agent, employer and employee, partners, or joint-venturers between the City and Consultant; or (ii) to create any relationship between the City and any sub-Consultant of the Consultant. Consultant is not in any way authorized to make any contract, agreement, or promise on behalf of the City, or to create any implied obligation on behalf of the City, and Consultant specifically agrees that it shall not do so. The City shall not have the authority to control the method or manner by which Consultant complies with the terms of this Agreement.

**B. Term.** This Agreement shall become effective upon the latter of the date accepted and signed by the City and the date accepted and signed by the Consultant, and shall continue in full force and effect until the earlier of the following occurs: (i) the termination of this Agreement; or (ii) final completion of all Services specified in the Agreement by **September 30, 2019** or to a new date mutually agreed upon by the parties in writing, or (iii) the completion by Consultant and City of their respective obligations under this Agreement, in the event such completion occurs before the date(s) in item (ii) above. A determination of completion shall not constitute a waiver of any rights or claims which the City may have or thereafter acquire with respect to any term or provision of this Agreement. The parties agree that time is of the essence.

**C. Termination.** Notwithstanding any other provision hereof, the City may terminate this Agreement, with or without cause, at any time upon fifteen (15) days prior written notice to the Consultant. In the event that this Agreement is so terminated, the City shall pay Consultant for the Services performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly or indirectly, to Consultant's breach of this Agreement. The written notice required under this subsection shall be either (i) served personally during regular business hours; (ii) served by facsimile during regular business hours (iii) served by certified or registered mail, return receipt requested, addressed to the address listed at the end of this Agreement with postage prepaid and deposited in the United States mail or (iv) by e-mail sent to the Consultant's Key Project Personnel. Notice served personally, by facsimile transmission or e-mail shall be effective upon receipt, and notice served by mail shall be effective upon receipt as verified by the United States Postal Service. Consultant shall provide the City with its Key Project Personnel's e-mail address upon its execution of this Agreement. On receiving such notice, Consultant shall, unless the notice directs otherwise, immediately discontinue all Services under this Agreement. As soon as practicable after receiving the termination notice, Consultant shall submit an invoice to the City showing in detail the Services performed under this Agreement up to the termination date. Consultant's receipt of payment for Services rendered upon City's termination of this Agreement, is Consultant's sole and exclusive remedy for termination for convenience by the City. City's termination for convenience does not constitute a default or breach of this Agreement. CONSULTANT WAIVES ANY CLAIM (OTHER THAN ITS CLAIM FOR PAYMENT FOR SERVICES PERFORMED), IT MAY HAVE NOW OR IN THE FUTURE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM CITY'S TERMINATION FOR CONVENIENCE.

D. **Default.** If it should appear at any time that the Consultant has failed or refused to prosecute, or has delayed in the prosecution of, the Services with diligence at a rate that assures completion of the Services in full compliance with the requirements of this Agreement, or has otherwise failed, refused, or delayed to perform or satisfy the Services or any other requirement of this Agreement ("**Event of Default**"), then the City shall have the right, without prejudice to any other remedies provided by law or equity, to pursue any one or more of the following remedies:

1. **Cure by Consultant.** The City may require the Consultant, within a reasonable time, to complete or correct all or any part of the Services that are the subject of the Event of Default; and to take any or all action necessary to bring the Consultant and the Services into compliance with this Agreement.

2. **Termination of Agreement by City.** The City may terminate this Agreement as to any or all Services yet to be performed, effective at a time specified by the City, and shall pay Consultant for the Services performed or reimbursable expenses actually incurred as of the effective date of termination.

3. **Withholding of Payment by City.** The City may withhold from any payment, whether or not previously approved, or may recover from the Consultant, any and all costs, including attorneys' fees and administrative expenses, incurred by the City as the result of any Event of Default by the Consultant or as a result of actions taken by the City in response to any Event of Default by the Consultant.

#### **SECTION 8. COMPLIANCE WITH LAWS AND GRANTS.**

A. **Generally: Permits/Codes/Business Laws/Safety Standards/Grants.** Consultant shall give all notices, pay all fees, and take all other action that may be necessary to ensure that the Services are provided, performed, and completed in accordance with all required governmental permits, licenses, or other approvals and authorizations that may be required in connection with providing, performing, and completing the Services, and will comply with all applicable municipal, county, state and federal statutes, ordinances, rules, and regulations, including without limitation all applicable building and fire codes, now in force or which may hereafter be in force, any statutes regarding qualification to do business, and all local, state and federal safety standards. Consultant shall comply with all conditions of any federal, state, or local grant received by Owner or Consultant with respect to this Agreement or the Services. Consultant shall be solely liable for any fines or civil penalties that are imposed by any governmental or quasi-governmental agency or body that may arise, or be alleged to have arisen, out of or regarding Consultant's, or its sub-Consultants', performance of, or failure to perform, the Services or any part thereof. Every provision of law required by law to be inserted into this Agreement shall be deemed to be inserted herein.

B. **Freedom of Information Act.** The Consultant shall, within four (4) business days of the City's request, provide any documents in the Consultant's possession related to this Agreement which the City is required to disclose to a requester under the Illinois Freedom of

Information Act ("FOIA"). This provision is a material covenant of this Agreement. Consultant agrees to not apply any costs or charge any fees to the City regarding the procurement of records required pursuant to an FOIA request. Should Consultant request that the City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Consultant agrees to pay all costs connected therewith (such as reasonable attorneys' fees and witness fees, filing fees, and any other expenses) to defend the denial of the request. The defense shall include, but not be limited to, challenged or appealed denials of FOIA requests to either the Illinois Attorney General or a court of competent jurisdiction. Consultant agrees to defend, indemnify, and hold harmless the City, and agrees to pay all costs in connection therewith (such as reasonable attorneys' and witness fees, filing fees, and any other expenses) to defend any denial of a FOIA request by Consultant's request to utilize a lawful exemption to the City.

C. **No Delinquent Taxes.** The Consultant represents and certifies that the Consultant is not barred from contracting with a unit of state or local government as a result of a delinquency in the payment of any tax administered by the Illinois Department of Revenue unless the Consultant is contesting, in accordance with the procedures established by the appropriate revenue act, its liability for the tax, or has entered into an agreement with Department of Revenue for payment of all taxes due and is currently in compliance with that agreement, as set forth in 11-42.1-1 et seq. of the Illinois Municipal Code, 65 ILCS 5/11-42.1-1 et seq.

D. **No Collusion.** The Consultant represents and certifies that the Consultant is not barred from contracting with a unit of state or local government as a result of a violation of either Section 33E-3 or Section 33E-4 of Article 33E of the Criminal Code of 2012, 720 ILCS 5/33E-1 et seq. The Consultant represents that the only persons, firms, or corporations interested in this Agreement as principals are those disclosed to the City prior to the execution of this Agreement, and that this Agreement is made without collusion with any other person, firm, or corporation. If at any time it shall be found that the Consultant has, in procuring this Agreement, colluded with any other person, firm, or corporation, then the Consultant shall be liable to the City for all loss or damage that the City may suffer, and this Agreement shall, at the City's option, be null and void.

E. **Sexual Harassment Policy.** The Consultant shall certify that it has a written sexual harassment policy in full compliance with Section 2-105(A)(4) of the Illinois Human Rights Act, 755 ILCS 5/2-105(A)(4).

F. **Patriot Act (USA Freedom Act) Compliance.** The Consultant represents and warrants to the City that neither it nor any of its principals, shareholders, members, partners, or affiliates, as applicable, is a person or entity named as a Specially Designated National and Blocked Person (as defined in Presidential Executive Order 13224) and that it is not acting, directly or indirectly for or on behalf of a Specially Designated National and Blocked Person. The Consultant further represents and warrants to the City that the Consultant and its principals, shareholders, members, partners, or affiliates, as applicable, are not directly or indirectly, engaged in, and are not facilitating, the transactions contemplated by this Agreement on behalf of any person or entity named as a Specially Designated National and Blocked Person. The Consultant hereby agrees to defend, indemnify and hold harmless the City, its corporate

authorities, and all City elected or appointed officials, officers, employees, agents, representatives, engineers, and attorneys, from and against any and all claims, damages, losses, risks, liabilities, and expenses (including reasonable attorneys' fees and costs) arising from or related to any breach of the representations and warranties in this subsection.

G. **Anti-Discrimination Laws.** Consultant shall comply with all federal and state laws prohibiting discrimination because of, or requiring affirmative action based on race, color, religion, sex, sexual orientation, marital status, order of protection status, national origin or ancestry, citizenship status, age, physical or mental disability unrelated to ability, military status or an unfavorable discharge from military service, and shall execute the Equal Employment Opportunity Clause compliance certification attached to this Agreement in **Group Exhibit C.**

H. **Americans with Disabilities Act.** Consultant shall utilize standards and/or methods that do not discriminate against the disabled in compliance with the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq.

I. **Drug Free Workplace Act.** Consultant shall comply with all conditions of the Illinois Drug Free Workplace Act, 30 ILCS 580/3 et seq.

J. **Public Works Employment Discrimination Act.** Consultant shall comply with all conditions and requirements of the Illinois Public Works Employment Discrimination Act, 775 ILCS 10/0.01 et seq.

K. **Execution of Certifications.** Consultant shall execute the legal certifications and compliance with laws documentation which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit C.**

#### **SECTION 9. GENERAL PROVISIONS.**

A. **Integration.** The provisions set forth in this Agreement represent the entire agreement between the parties and supersede all prior agreements, promises, and representations, as it is the intent of the parties to provide for a complete integration within the terms of this Agreement.

B. **Amendment.** No amendment or modification to this Agreement shall be effective unless and until such amendment or modification is in writing, properly approved in accordance with applicable procedures, and executed.

C. **Assignment.** This Agreement, or any part, rights or interests hereof, may not be assigned by the City or by the Consultant to any other person, firm or corporation without the prior written consent of the other party.

D. **Binding Effect.** The terms of this Agreement shall bind and inure to the benefit of the parties hereto and their agents, successors, and assigns.

E. **News Releases.** The Consultant shall not issue any news releases or other public statements regarding the Services without prior approval from the City Manager.

F. **Work Products.** Designs, drawings, plans, specifications, photos, reports, information, observations, calculations, notes, studies, logbooks, instructions, manuals, models, recommendations, printed and electronic files, and any other data or information, in any form, prepared, collected, or received by the Consultant in connection with any or all of the Services to be performed under this Agreement ("**Documents**") shall be and remain the exclusive property of the City. At the City's request, or upon termination of this Agreement, the Consultant shall cause the Documents to be promptly delivered to the City.

G. **Waiver.** Any failure of either the City or the Consultant to strictly enforce any term, right or condition of this Agreement, whether implied or express, shall not be construed as a waiver of such term, right or condition, nor shall it be deemed to or constitute a continuing waiver unless otherwise expressly provided in this Agreement.

H. **Severability.** If any term, covenant, condition, or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

I. **Time.** Time is of the essence as to those provisions in which time is an element of performance.

J. **Governing Laws/Jurisdiction.** This Agreement shall be interpreted according to the laws of the State of Illinois. Exclusive jurisdiction for any litigation involving any aspect of this Agreement shall be in the Eighteenth Judicial Circuit Court, DuPage County, Illinois.

K. **Force Majeure.** No party hereto shall be deemed to be in default or to have breached any provision of this Agreement as the result of any delay, failure in performance or interruption of services resulting directly or indirectly from acts of God, acts of civil or military disturbance, or war, which are beyond the control of such non-performing party.

L. **Headings.** The headings of the several paragraphs of this Agreement are inserted only as a matter of convenience and for reference and are in no manner intended to define, limit or describe the scope of intent of any provision of this Agreement, nor shall they be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

M. **Rights Cumulative.** Unless expressly provided to the contrary in this Agreement, each and every one of the rights, remedies, and benefits provided by this Agreement shall be cumulative and shall not be exclusive of any other such rights, remedies and benefits allowed by law.

N. **Limitation of Liability.** CITY SHALL NOT BE LIABLE TO CONSULTANTS FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, PUNITIVE, OR EXEMPLARY DAMAGES,

INCLUDING WITHOUT LIMITATION, LOST PROFITS (DIRECT OR INDIRECT) AND LOST REVENUES HOWSOEVER ARISING, WHETHER OR NOT CHARACTERIZED IN NEGLIGENCE, TORT, CONTRACT OR OTHER THEORY OF LIABILITY, EVEN IF CITY HAS BEEN ADVISED OF THE POSSIBILITY OF OR COULD HAVE FORESEEN ANY SUCH DAMAGES.

**O. Counterpart Execution.** This Agreement may be executed in several counterparts, each of which, when executed, shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

**P. Notice.** Unless otherwise expressly provided in this Agreement, any notice or communication required or permitted to be given under this Agreement shall be in writing and shall be delivered (i) personally, (ii) by a reputable overnight courier, (iii) by certified mail, return receipt requested, and deposited in the U.S. Mail, postage prepaid, (iv) by facsimile, or (v) by electronic internet mail ("e-mail"). Facsimile notices shall be deemed valid only to the extent that they are (a) actually received by the individual to whom addressed and (b) followed by delivery of actual notice in the manner described in either (i), (ii), or (iii) above within three (3) business days thereafter at the appropriate address set forth below. E-mail notices shall be deemed valid and received by the addressee thereof when delivered by e-mail and (a) opened by the recipient on a business day at the address set forth below, and (b) followed by delivery of actual notice in the manner described in either (i), (ii), or (iii) above within three (3) business days thereafter at the appropriate address set forth below. Unless otherwise expressly provided in this Agreement, notices shall be deemed received upon the earlier of (a) actual receipt; or (b) one business day after deposit with an overnight courier as evidenced by a receipt of deposit; or (c) three business days following deposit in the U.S. mail, as evidence by a return receipt. By notice complying with the requirements of this Subsection, each party shall have the right to change the address or the addressee, or both, for all future notices and communications to such party, but no notice of a change of addressee or address shall be effective until actually received.

Notices and communications shall be addressed to, and delivered to as follows:

**If to the Consultant:**

Construction & Geotechnical Material Testing, Inc.  
Attn: Pratik Patel  
60 Martin Lane  
Elk Grove Village, IL 60007  
E-Mail: [pkpatel@cgmtinc.com](mailto:pkpatel@cgmtinc.com)

**If to the City:**

City of Wheaton  
Attn: City Clerk  
303 W. Wesley Street, Box 727  
Wheaton, IL 60187-727  
E-Mail: [cityclerk@wheaton.il.us](mailto:cityclerk@wheaton.il.us)

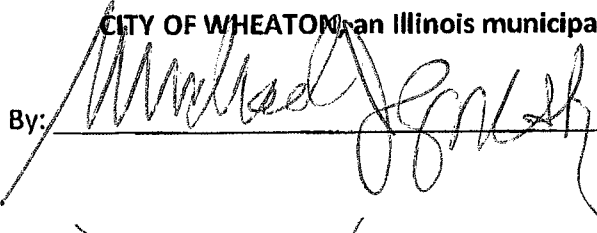
**Q. Contract Numbering.** The faces of all invoices and documents shall contain the following contract number **C37083** for reference purposes.

**R. Electronic Signatures.** The parties may execute this Agreement in writing or by facsimile transmission or by e-mail delivery of a ".pdf" format data file, and any such signature shall have the same legal effect as a handwritten signature for the purposes of validity, enforceability and admissibility. In addition, a true and correct facsimile copy or computer image

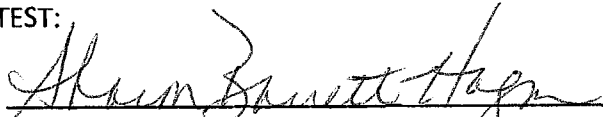
of this Agreement shall be treated as and shall have the same effect as an original signed copy of this document.

IN WITNESS WHEREOF, the parties have entered into this Agreement this 18th day of September, 2018.


**CITY OF WHEATON, an Illinois municipal corp.**

By:  Date: 9/18/18

ATTEST:

By:   
Sharon Barrett-Hagen, City Clerk

**Construction & Geotechnical Material Testing, Inc.**

By:  Date: 9/11/18  
Signature

Its: VICE PRESIDENT

ATTEST:

By: 

Title: PRESIDENT

