

## **AGREEMENT FOR PROFESSIONAL SERVICES**

THIS AGREEMENT is entered into between The Norman Tax Increment Finance Authority (NTIFA) (OWNER) and SMC Consulting Engineers, P.C. (CONSULTANT) for the following reasons:

1. OWNER intends to construct **Interstate 35 East Frontage Road from Rock Creek Road to 24<sup>th</sup> Avenue NW** (the Project); and,
2. OWNER requires certain professional survey, design, analysis and engineering services in connection with the Project (the Services); and,
3. CONSULTANT is prepared to provide the Services.

In consideration of the promises contained in this Agreement, OWNER and CONSULTANT agree as follows:

### **ARTICLE 1 - EFFECTIVE DATE**

The effective date of this Agreement shall be \_\_ day of \_\_\_\_\_, 20\_\_.

### **ARTICLE 2 - GOVERNING LAW**

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

### **ARTICLE 3 - SCOPE OF SERVICES**

CONSULTANT shall provide the Services described in Attachment A, Scope of Services.

### **ARTICLE 4 - SCHEDULE**

CONSULTANT shall exercise its reasonable efforts to perform the Services described in Attachment A according to the Schedule set forth in Attachment B.

### **ARTICLE 5 - COMPENSATION**

OWNER shall pay CONSULTANT in accordance with Attachment C, Compensation. Invoices shall be due and payable upon receipt. OWNER shall give prompt written notice of any disputed amount and shall pay the remaining amount.

### **ARTICLE 6 - OWNER'S RESPONSIBILITIES**

OWNER shall be responsible for all matters described in Attachment D, OWNER'S Responsibilities. OWNER hereby represents that it owns the intellectual property rights in any plans, documents or other materials provided by OWNER to CONSULTANT. If OWNER does not own the intellectual property rights in such plans, documents or other materials, prior to providing same to CONSULTANT, OWNER shall obtain a license or right to use, including the right to sublicense to CONSULTANT. OWNER hereby grants CONSULTANT the right to use the intellectual property associated with plans, documents or other materials it owns or has the right to use for the limited purpose of performing the Services. OWNER represents that CONSULTANT'S use of such documents will not infringe upon any third parties' rights.

#### **ARTICLE 7 - 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 drawing, specification, report, opinion, or other instrument of service, in any form or media, produced in connection with the Services.

#### **ARTICLE 8 - INDEMNIFICATION AND LIABILITY**

Indemnification. The CONSULTANT and the OWNER each hereby agree to defend, indemnify, and hold harmless the other party, its officers, servants, and employees, from and against any and all liability, loss, damage, cost, and expense (including attorneys' fees and accountants' fees) caused by an error, omission, or negligent act of the indemnifying party in the performance of services under this Agreement. The CONSULTANT and the OWNER each agree to promptly serve notice on the other party of any claims arising hereunder, and shall cooperate in the defense of any such claims. In any and all claims asserted by any employee of the CONSULTANT against any indemnified party, the indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the CONSULTANT or any of the CONSULTANT'S employees under workers' compensation acts, disability benefit acts, or other employee benefit acts. The acceptance by OWNER or its representatives of any certification of insurance providing for coverage other than as required in this Agreement to be furnished by the CONSULTANT shall in no event be deemed a waiver of any of the provisions of this indemnity provision. None of the foregoing provisions shall deprive the OWNER of any action, right, or remedy otherwise available to the OWNER at common law.

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

#### **ARTICLE 9 - INSURANCE**

During the performance of the Services under this Agreement, CONSULTANT shall maintain the following insurance:

- (a) General Liability Insurance, with a 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 statutory requirements and Employers' Liability Insurance, with a limit of \$500,000 for each occurrence.
- (d) Professional Liability Insurance, with a limit of \$1,000,000 per claim and annual aggregate.

CONSULTANT shall, upon written request, furnish OWNER certificates of insurance which shall include a provision that such insurance shall not be canceled without at least thirty days' written notice to OWNER. OWNER shall require all Project contractors to include OWNER, CONSULTANT, and its parent company, affiliated and subsidiary entities, directors, officers and employees, as additional insured on their General and Automobile Liability insurance policies, and to indemnify both OWNER and CONSULTANT, each to the same extent



**ARTICLE 10 - 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 OWNER 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 Attachment A, Scope of Services. In the event the OWNER requests CONSULTANT to execute any certificates or other documents, the proposed language of such certificates or documents shall be submitted to CONSULTANT for review at least 15 days prior to the requested date of execution. CONSULTANT shall not be required to execute any certificates or documents that in any way would, in CONSULTANT's sole judgment, (a) increase CONSULTANT'S legal or contractual obligations or risks; (b) require knowledge, services or responsibilities beyond the scope of this Agreement; or (c) result in CONSULTANT having to certify, guarantee or warrant the existence of conditions whose existence CONSULTANT cannot ascertain.

**ARTICLE 11 - 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 shall be made on the basis of experience and qualifications as a practitioner of its profession. 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.

**ARTICLE 12 - REUSE OF DOCUMENTS**

All documents, including, but not limited to, plans, drawings, and specifications prepared by CONSULTANT as deliverables pursuant to the Scope of Services are instruments of service in respect to the Project. They are not intended or represented to be suitable for reuse by OWNER or others on modifications or extensions of the Project or on any other project. Any reuse without prior written verification or adaptation by CONSULTANT for the specific purpose intended will be at OWNER'S sole risk and without liability or legal exposure to CONSULTANT. OWNER shall indemnify and hold harmless CONSULTANT and its subconsultants against all judgments, losses, damages, injuries, and expenses, including reasonable attorneys' fees, arising out of or resulting from such reuse. Any verification or adaptation of documents will entitle CONSULTANT to additional compensation at rates to be agreed upon by OWNER and CONSULTANT.

**ARTICLE 13 - OWNERSHIP OF DOCUMENTS AND INTELLECTUAL PROPERTY**

Except as otherwise provided herein, documents, drawings, and specifications prepared by CONSULTANT and furnished to OWNER as part of the Services shall become the property of OWNER; provided, however, that CONSULTANT shall have the unrestricted right to their use. CONSULTANT shall retain its copyright and Ownership rights in its design, drawing details, specifications, data bases, computer software, and other proprietary property. Intellectual property developed, utilized, or modified in the performance of the Services shall remain the property of CONSULTANT.

**ARTICLE 14 - 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. OWNER may terminate or suspend performance of this Agreement for OWNER'S convenience upon written notice to CONSULTANT. CONSULTANT shall terminate or suspend performance of the Services on a schedule acceptable to OWNER, and OWNER shall pay CONSULTANT for all the Services performed. Upon restart of suspended Services, an equitable adjustment shall be made to CONSULTANT'S compensation and the Project schedule.

**ARTICLE 15 - DELAY IN PERFORMANCE**

Neither OWNER nor CONSULTANT shall be considered in default of this Agreement 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 OWNER or CONSULTANT under this Agreement. 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 of this Agreement.

**ARTICLE 16 - NOTICES**

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

John R. Clink, P.E.  
Capital Projects Engineer  
City of Norman  
P.O. Box 370  
Norman, OK 73070

CONSULTING FIRM NAME:

SMC Consulting Engineers, P.C.  
Ole M. Marcussen, P.E.  
Project Engineer  
815 West Main Street  
Oklahoma City, OK 73106

Nothing contained in this Article shall be construed to restrict the transmission of routine communications between representatives of OWNER and CONSULTANT.



#### **ARTICLE 17 - DISPUTES**

In the event of a dispute between OWNER and CONSULTANT arising out of or related to this Agreement, the aggrieved party shall notify the other party of the dispute within a reasonable time after such dispute arises. 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 or mediation.

Should such negotiation or mediation fail to resolve the dispute, either party may pursue resolution of the dispute by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association; provided, however, in the event the parties are unable to reach agreement to arbitrate under terms reasonably acceptable to both parties, either party may pursue resolution in any court having jurisdiction. During the pendency of any dispute, the parties shall continue diligently to fulfill their respective obligations hereunder.

#### **ARTICLE 18 - EQUAL EMPLOYMENT OPPORTUNITY**

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-1 00 reports, and maintenance of a current Affirmative Action Plan as required by Federal regulations.

#### **ARTICLE 19 - WAIVER**

A waiver by either OWNER 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 20 - 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. 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 21 - INTEGRATION**

This Agreement, including Attachments A, B, C, and D incorporated by this reference, represents the entire and integrated agreement between OWNER and CONSULTANT. It supersedes all prior and contemporaneous communications, representations, and agreements, whether oral or written, relating to the subject matter of this Agreement.

**ARTICLE 22 - SUCCESSORS AND ASSIGNS**

OWNER 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 23 - ASSIGNMENT**

Neither OWNER 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 OWNER'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 24 - NO THIRD PARTY RIGHTS**

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

IN WITNESS WHEREOF, OWNER and SMC Consulting Engineers, P.C. have executed this Agreement.

DATED this \_\_\_ day of \_\_\_\_\_, 201\_\_.

The Norman Tax Increment Finance  
Authority (NTIFA) (OWNER)

Signature \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Attest:

\_\_\_\_\_  
Secretary

SMC Consulting Engineers, P.C.  
Corporation

Signature *Tom L. McCaleb*

Name Tom L. McCaleb, P.E.

Title President

Date April 17, 2013

Attest:

*Lori J. [Signature]*  
Secretary



Approved as to form and legality this \_\_\_ day of \_\_\_\_\_, 201\_\_.

\_\_\_\_\_  
City Attorney



## **ATTACHMENT "A"**

Extending Interstate 35 East Frontage Road from Rock Creek Road north to 24<sup>th</sup>  
Avenue N.W.  
Norman, Oklahoma

### **SCOPE OF SERVICES AND CONSULTANT'S PROJECT UNDERSTANDING**

1. **PROJECT ADMINISTRATION/CLERICAL**

- A. CONSULTANT shall be available for meetings as the OWNER may deem necessary in connection with the work.

2. **TOPOGRAPHIC SURVEY**

- A. Perform topographic survey to serve as the bases of the engineering design of the PROJECT facilities and appurtenances.
- B. CONSULTANT shall provide survey in the same Coordinate Plane System that has been used on other projects.

3. **GEOTECHNICAL INVESTIGATION REPORT**

- A. A geotechnical site investigation shall be prepared by a Geotechnical Engineering Company and provided to the CONSULTANT. The Geotechnical Engineering Company shall be qualified in geotechnical investigations and be engaged in geotechnical exploration and testing in an ongoing professional basis.
- B. The Geotechnical Engineering Company shall develop a site-specific scope of services in conjunction with the CONSULTANT. The scope of services shall include, as a minimum, the geotechnical tests and analysis for design of the public roadway.

4. **RIGHT-OF-WAY**

- A. Prepare legal descriptions, coordinate with Landowners

5. **PIPE LINE COORDINATION**

- A. Coordinate with pipe line company on existing gas line

6. **PREPARATION OF PRELIMINARY PLANS**

- A. Prepare Preliminary Paving, Drainage, and Signalization Plans as required for a Plan-In-Hand meeting at the PROJECT site.
- B. Prepare a Preliminary Opinion of Probable Cost (OPC) based on the Preliminary plan designs.

7. **PREPARATION OF FINAL PLANS**

- A. Prepare Final Paving, Drainage, and Signalization Plans based on comments and suggestions from the Plan-In-Hand meeting.
- B. Prepare a Final Opinion of Probable Cost (OPC) based on the Final plan designs.



8. ENVIRONMENTAL PERMITS

- A. Obtain appropriate letters and required documents in preparation of making the Stormwater Discharge Permit Application to the ODEQ. Said documents become a part of the Stormwater Pollution Prevention Plan (the "SWPPP"), which shall be included in the Project Specifications and Project Construction Plans.

9. PRE-CONSTRUCTION MEETING & BIDDING ASSISTANCE

- A. Attend meetings to finalize Construction Documents.

10. CONSTRUCTION PHASE ENGINEERING

- A. CONSULTANT shall be available to answer questions regarding all aspects of construction.

11. AS-BUILT Construction Documents

- A. Deliver As-built of construction documents to City.

**ATTACHMENT B  
PROJECT SCHEDULE**

Article 4 of the AGREEMENT is amended and supplemented to include the following agreement of the parties.

It is understood and agreed that the date of beginning, rate of progress, and the time of completion of SERVICES under this AGREEMENT are essential provisions of this AGREEMENT. It is further understood and agreed that the services under this AGREEMENT shall commence upon execution of the AGREEMENT between OWNER & CONSULTANT and after receipt of a written Notice to Proceed from CONSULTANT. The parties mutually agree that time is of the essence in the performance of this AGREEMENT in order for OWNER to have advantage of existing funding. SUBCONSULTANT agrees to provide SERVICES for each phase of PROJECT as stated in Attachment A – Scope of Services, in accordance with the time frame as stated below:

TASK/MILESTONE	ANTICIPATED COMPLETION DATE
Notice to Proceed	City Council Approval
Preliminary Design	45 days after NTP
60% Plan-in-Hand	90 days after NTP
Final Plans (95% - Not Bid Set)	120 days after NTP
Submit plan for bid	150 days after NTP

The parties further agree that CONSULTANT will meet this schedule using standards and procedures for their submissions consistent with those currently used by Engineers/Surveyors practicing in Oklahoma. This schedule excludes the governing agency review time (except as provided above) and any time lost while CONSULTANT is waiting for direction either by government agency or OWNER, and any excusable delays as described in Article 15 of the AGREEMENT.

Dates indicated are dependent upon timely review by OWNER, Environmental Clearance, Right-of-Way Acquisition, Utility Relocations, and other factors beyond direct control of CONSULTANT.



### **ATTACHMENT "C"**

Extending Interstate 35 East Frontage Road from Rock Creek Road north to 24<sup>th</sup>  
Avenue N.W.  
Norman, Oklahoma

#### **SUMMARY BREAKDOWN OF ENGINEERING FEES -**

Task 1	PROJECT ADMINISTRATION/CLERICAL	\$13,000.00
Task 2	TOPOGRAPHIC SURVEY	\$3,500.00
Task 3	GEOTECHNICAL INVESTIGATION REPORT	\$3,500.00
Task 4	RIGHT-OF-WAY	\$7,000.00
Task 5	PIPE LINE COORDINATION	\$15,000.00
Task 6	PREPARATION OF PRELIMINARY PLANS AND OPC	\$36,000.00
Task 7	PREPARATION OF FINAL PLANS AND OPC	\$65,000.00
Task 8	ENVIRONMENTAL PERMITS	\$1,500.00
Task 9	PRE-CONSTRUCTION MEETING & BIDDING ASSISTANCE	\$7,000.00
Task 10	CONSTRUCTION PHASE ENGINEERING	\$3,750.00
Task 11	AS BUILTS	\$3,750.00
<b>TOTAL</b>		<b>\$159,000.00</b>

#### **INCIDENTAL COSTS**

- A. If services are requested which are beyond the scope of the proposal, they will be performed at the hourly rates identified herein.
- B. Items herein specified are based on existing requirements adopted by the City of Norman. If during the engineering phase of this development, new ordinances are passed with change the scope of the proposal, the Consultant reserves the right to negotiate for additional fees to be commensurate with the new ordinance change.

**PRODUCTION RATES:** Fees for Project Administration and Labor are charged for all activity directly attributable to the project. No charge is made for general office overhead, accounting or maintenance. No separate charges will be allowed for computer/plotting time. Labor charges are billed by the following categories or by similar categories indicated by a supplemental attachment:

#### **HOURLY ENGINEERING/PRODUCTION RATES**

Sr. Principal	\$165.00	Landscaping Architect, A.S.L.A.	\$85.00
Principal	\$140.00	Sr. Engineering Technician	\$75.00
Engineering Manager, P.E.	\$140.00	Engineering Technician II	\$55.00
Wetlands Engineer, P.E.	\$85.00	Clerical/Word Processing	\$55.00
Structural Engineer, P.E.	\$85.00		
Traffic Engineer, P.E.	\$145.00		
Design Engineer, P.E.	\$125.00		
Design Engineer, E.I.T.	\$75.00		

**SUB-CONSULTANT SERVICES:** In cases where the Consultant retains a Sub-Consultant, including Assigned Sub-Consultants, to provide services, the cost of such services will be billed at actual invoice amount.

**CONSTRUCTION STAKEOUT IS NOT PART OF THIS CONTRACT**

**Payment Schedule:**

Survey	25%
Preliminary Design	40%
60% Plan-in-hand	15%
95% Final plans	10%
100% Final plans, submit for bid	5%
Record Drawings	5%



**ATTACHMENT D  
OWNER'S RESPONSIBILITIES**

Article 6 of the AGREEMENT is amended and supplemented to include the following agreement of the parties.

**I. OWNER RESPONSIBILITIES**

1. Owner shall furnish to CONSULTANT all available information pertinent to PROJECT including previous reports, and any other data relative to design and construction of PROJECT.
2. OWNER shall be responsible for all permit fees.
3. OWNER shall examine all studies, reports, sketches, estimate specifications, plan drawings, proposals and any other documents presented by the CONSULTANT and render in writing decisions pertaining thereto within a reasonable time so as not to delay SERVICES of CONSULTANT.
4. OWNER shall designate in writing a person to act as its representative in respect to the work to be performed under this AGREEMENT, and such person shall have complete authority to transmit instructions, receive information, interpret and define OWNER's policies and decisions with respect to materials, equipment, elements, and systems pertinent to the services covered by this AGREEMENT.
5. OWNER shall furnish legal assistance as required in the preparation, review, and approval of construction documents.
6. OWNER shall furnish assistance in locating existing OWNER-owned underground utilities and expediting their relocation in preparation for construction.
7. OWNER shall provide for meeting facilities (or arrange for meeting facilities) for all PROJECT meetings with OWNER or Public Meetings in connection with PROJECT.

**II. SPECIAL RESPONSIBILITIES**

1. OWNER shall furnish Certificates of Title, Appraisals, and Right-of-Way Acquisition necessary for utility relocations and/or proposed construction of PROJECT.