

**TO: MAYOR AND CITY COUNCIL**

**FROM: Neil Jensen, City Administrator**

**SUBJECT: Professional Service Agreement (PSA) John Burch Park Wall Project**

**MEETING DATE: September 19, 2023**

**BACKGROUND**

The City of Cannon Falls was successful in securing a grant in John Burch Park for the construction of the retaining wall, 1<sup>st</sup> base dugout and concrete seating above from the State of Minnesota via the bonding bill. The dollars were a matching 50/50 grant. The city received \$469,000 from the State and additional dollars from private donations.

This PSA is for the design, bid, build and construction observation of the wall project. The engineering costs for the project is \$140,000. The project is expected to be completed by late fall of 2024.

Bill Angerman will be in attendance to answer any questions you may have concerning the wall, dugout and concrete seating.

**STAFF RECOMMENDATION**

Please approve the PSA for the John Burch Park with WHKS.

**REQUESTED COUNCIL ACTION**

Please make a motion to approve the Professional Service Agreement for the John Burch Park Retaining Wall Project with WHKS in the amount of \$140,000.



**PROFESSIONAL SERVICES AGREEMENT**

THIS AGREEMENT, by and between **City of Cannon Falls** hereinafter referred to as the "Client" and WHKS & Co., hereinafter referred to as "WHKS", is made as follows:

WHEREAS, the Client has a need for certain professional services relating to the project described as **John Burch Park Retaining Wall and Dugout.**

WHEREAS, WHKS proposes to furnish the professional services required by the Client for said project, NOW THEREFORE, the Client hereby agrees to retain and compensate WHKS to perform the professional services in accordance with the terms and conditions of this Agreement and the attached Standard Terms and Conditions.

**Scope of Services**

WHKS shall perform the following described services for the Client:

**Design, bid, and construction phase engineering services as described on the attached Scope of Services included in Exhibit A.**

**Basis of Compensation**

For the services described above, the Client shall remunerate WHKS as follows:

**Items 1-4 - Lump Sum Fee of \$105,000 including Expenses.**

**Items 5-6 - Billed Hourly with an Estimated Fee of \$35,000.**

**Expenses billed at actual cost and mileage at the current published IRS rate per mile. External expenses include an administrative charge of 10 percent.**

Executed this \_\_\_\_\_ day of September, 2023

**City of Cannon Falls**

***WHKS & CO.***

By: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: Neil Jensen

Printed Name: William Angerman

Title: City Administrator

Title: COO, Exec V. P.



## Exhibit A to Professional Services Agreement

### A. Project Description

The existing stacked stone retaining wall at John Burch Park in Cannon Falls has extensive deterioration and requires replacement. This project is for the design of a replacement retaining wall to be constructed in the same location adjacent to the ball field. Additionally, a new first base dugout will be designed to replace the existing dugout. It is anticipated that the dugout will be of concrete construction, both cast in place and precast. Due to the dugout's close proximity to the proposed wall and existing adjacent concessions area, the dugout structure will likely be connected with or directly abutting both of these structures. The wall will include an aesthetic finish, top of wall railing, and stepped concrete seating area for spectators near the dugout.

### B. Scope of Services Provided Under This Agreement:

#### 1. **Project Management and Meetings**

- Perform general project administrative duties including supervision and coordination of the project team, review of project costs and billings, prepare invoices using Consultant's standard forms, preparation of status reports, and general administrative activities.
- Hold kick-off meeting with Client to discuss the project and review the scope.
- Advise the Client of the necessity of obtaining Special Engineering Services as described in Paragraph C., and act as the Client's representative in connection with any such services not actually performed by WHKS.
- Attend three (3) meetings for the project.

#### 2. **Topographic Survey and Research of Existing Conditions**

- Perform site topographical surveys to support new facilities, exclusive of boundary surveys for land and easement acquisition.
- Develop project control and base map for the project.
- Locate the existing underground utilities as located by the Gopher State One Call locate system.
- Collect, obtain and review relevant information from the Client.

#### 3. **Preliminary Design**

- Prepare preliminary plans for the project.
- Preliminary plans will be provided to the City and Stakeholders for review and comment. We will evaluate three different wall construction options.
- Relevant review comments and stake holder input will be addressed and incorporated into the design.
- Geotechnical Engineering services will be performed by a subcontractor to WHKS under this contract. Geotechnical services to include soil borings and geotechnical evaluations for design of the structures.

#### **4. Final Design**

- Prepare Final plans and specifications to show the character and scope of work to be performed by contractors on the Project.
- Prepare forms advertisement for bids, contractor's proposal, construction agreement, payment bond and performance bond for approval by the Client, subject to prior review and approval by Client's Attorney, Bond Counsel, and/or Fiscal Agent.
- Prepare opinion of probable construction cost on completed plans and specifications.
- Furnish one (1) signed copy of the plans, specifications, and other contract documents as required to the Client.
- Furnish plans and specifications to bidders through the use of a web based plan room.
- Answer contractor's questions during the bidding phase.
- Prepare addendums to the contract documents prior to bid letting, if necessary.
- Assist in the receiving and tabulation of Contractors' proposals and assist in awarding construction contract.
- A Storm Water Pollution Prevention Plan (SWPPP) will be prepared.

#### **5. Construction Administration**

- Provide construction administration assistance during construction. Contract administration assistance activities conducted during project construction include clarification of design details, periodic visits to the construction site to observe the progress of work, review of shop drawings, review periodic payment estimates for completed construction work and recommend payments for processing, prepare change orders when required, and prepare the final summary of construction costs.
- Conduct a preconstruction meeting with Client, Contractor and Utility Owners.
- Provide construction staking.
- Prepare record drawings from Contractor provided "mark-ups" at the completion of the construction.
- Provide construction updates to the Client.

#### **6. Construction Observation**

- Provide resident project observation services during the construction of the Project. Resident observation is a part time function during construction. Duties are to provide on-site evaluations of the Project progress in accordance with the plans and specifications and report said progress to the Engineer. Additionally, the observer maintains a log book recording conditions at the job site, weather, record of visitors, summary of daily activities, actions taken, observations in general and assists in recording data for eventual preparation of Record Drawings. The observer duties do not include construction means, methods, procedures, and job-site safety. Fee based on 300 hours of observation and travel time.
- The testing of materials will be included in the bid package as a bid allowance to be paid by the Contractor.

**C. Special Engineering Services:**

Special Engineering Services are those services not listed above, but which may be required or advisable to accomplish the Project. Special Engineering Services shall be performed when authorized by the Client for additional fees, to be determined at the time authorized.

Special Engineering Services include:

1. Easement research, plats or descriptions
2. Negotiation for easements or land acquisition
3. Special assessment assistance
4. Quality control testing and construction materials testing
5. Permits other than those identified above
6. Geotechnical design/recommendations (other than those listed above)
7. Cultural resource survey or other studies or documentation that may be required by regulatory agencies that are not specifically listed in the scope of services
8. National Environmental Policy Act (NEPA) compliance, including historical and archeological investigations
9. Attendance at additional meetings (other than those listed above)

## STANDARD TERMS AND CONDITIONS FOR PUBLIC SECTOR PROJECTS

### **1. Scope of Services**

Client and WHKS have agreed to a list of services WHKS will provide to Client as listed on the Professional Services Agreement Form.

### **2. Governing Law**

The laws of the State of Minnesota will govern this Agreement, its interpretation and performance. Any litigation arising in any way from this Agreement shall be brought in the courts of that State.

### **3. Standard of Care**

Services provided by WHKS under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances and locality.

### **4. Integration**

This Agreement comprises the final and complete agreement between Client and WHKS. It supersedes all prior communications, representations, or agreements, whether oral or written, relating to the subject matter of this Agreement. Execution of this Agreement signifies that each party has read the document thoroughly. Amendments to this Agreement shall not be binding unless made in writing and signed by both Client and WHKS.

### **5. Guarantees and Warranties**

WHKS shall not be required to sign any documents, no matter by whom requested, that would result in WHKS having to guarantee or warrant the existence of conditions whose existence WHKS cannot ascertain. Client also agrees not to

make resolution of any dispute with WHKS or payment of any amount due to WHKS in any way contingent upon WHKS signing any such guarantee or warranty.

### **6. Indemnification**

WHKS agrees, to the extent permitted by law, to indemnify and hold Client harmless from any damage, liability or cost (including reasonable attorney's fees and costs of defense) to the extent caused by WHKS' negligent acts, errors or omissions in the performance of professional services under this Agreement and those of its subconsultants or anyone for whom WHKS is legally liable.

Client agrees, to the extent permitted by law, to indemnify and hold WHKS harmless from any damage, liability or cost (including reasonable attorneys' fees and costs of defense) to the extent caused by Client's negligent acts, errors or omissions and those of Client's contractors, subcontractors or consultants or anyone for whom Client is legally liable.

Neither WHKS nor Client shall be obligated to indemnify the other party in any manner whatsoever for the other party's own negligence.

### **7. Billing and Payment Provisions**

Invoices shall be submitted by WHKS monthly and are due upon presentation and shall be considered PAST DUE if not paid within thirty (30) calendar days of the invoice date.

If payment is not received by WHKS within thirty (30) calendar days of the invoice date, Client shall pay as interest an additional charge of one

and one-quarter percent (1.25%) of the PAST DUE amount per month. Payment thereafter shall first be applied to accrued interest and then to the unpaid principal.

If Client fails to make payments within sixty (60) days from the date of an invoice or otherwise is in breach of this Agreement, WHKS may, at its option, suspend performance of services upon five (5) calendar days' notice to Client. WHKS shall have no liability whatsoever to Client for any costs or damages as a result of such suspension caused by any breach of this Agreement by Client. If Client fails to make payment to WHKS in accordance with the payment terms herein, this shall constitute a material breach of this Agreement and shall be cause for termination by WHKS.

In the event legal action is necessary to enforce the payment provisions of this Agreement, WHKS shall be entitled to collect from Client any judgment or settlement sums due, reasonable attorneys' fees, court costs and expenses incurred by WHKS in connection therewith and, in addition, the reasonable value of WHKS personnel time and expenses spent in connection with such collection action, computed at WHKS current fee schedule and expense policies.

Payment of invoices is in no case subject to unilateral discounting or set-offs by Client, and payment is due regardless of suspension or termination of this Agreement by either party.

### **8. Ownership of Records**

All reports, plans, specifications, field data and notes and other

documents, including all documents on electronic media, prepared by WHKS as instruments of service shall remain the property of WHKS.

Client shall be permitted to retain copies, including reproducible copies, of the plans and specifications for information and reference in connection with Client's use of the completed project. The plans and specifications shall not be used by Client or by others on other similar projects except by agreement in writing by WHKS.

#### **9. Delivery of Electronic Files**

In accepting and utilizing any drawings, reports and data on any form of electronic media generated and provided by WHKS, Client covenants and agrees that all such electronic files are instruments of service of WHKS, who shall be deemed the author, and who shall retain all rights under common and statutory laws, and other rights, including copyrights. Client is aware that differences may exist between the electronic files delivered and the respective construction documents due to addenda, change orders or other revisions. In the event of a conflict between the signed construction documents prepared by WHKS and electronic files, the signed construction documents shall govern.

Client and WHKS agree that the electronic files prepared by WHKS shall conform to the current CADD software in use by WHKS or to other mutually agreeable CADD specifications defined in the Agreement. Any changes to the CADD specifications by either Client or WHKS are subject to review and acceptance by the other party. Additional efforts by WHKS made necessary by a change to the CADD specifications or other software shall be compensated for as Additional Services.

The electronic files provided by WHKS to Client are submitted for an acceptance period of 60 days. Any defects Client discovers during this period will be reported to WHKS and will be corrected as part of the Scope

of Services. Correction of defects detected and reported after the acceptance period will be compensated for as Additional Services.

Client agrees not to reuse the electronic files, in whole or in part, for any purpose or project other than the project that is the subject of this Agreement. Client agrees not to transfer the electronic files to others without the prior written consent of WHKS, except as required by law. In addition, Client agrees, to the extent permitted by law, to indemnify and hold WHKS harmless from any damage, liability or cost, including reasonable attorney's fees and costs of defense, arising from any changes made by anyone other than WHKS or from any reuse of the electronic files without the prior written consent of WHKS.

Under no circumstance shall delivery of the electronic files for use by Client be deemed a sale by WHKS and WHKS makes no warranties, either express or implied, of merchantability and fitness for any particular purpose. In no event shall WHKS be liable for any loss of profit or any consequential damages.

#### **10. Changed Conditions**

Client shall rely on the judgment of WHKS as to the continued adequacy of this agreement in light of occurrences or discoveries that were not originally contemplated by or known to WHKS. Should WHKS call for contract renegotiation, WHKS shall identify the changed conditions necessitating renegotiation and WHKS and Client shall promptly and in good faith enter into renegotiation of this Agreement. If terms cannot be agreed to, the parties agree that either party has the absolute right to terminate this Agreement.

#### **11. Permits and Approvals**

WHKS shall assist Client in applying for those permits and approvals typically required by law for projects similar to the one for which WHKS services are being engaged. This assistance consists of completing

and submitting forms as to the results of certain work included in the Scope of Services.

#### **12. Suspension of Services**

If the project is suspended for more than thirty (30) calendar days in the aggregate, WHKS shall be compensated for services performed and charges incurred prior to receipt of notice to suspend and, upon resumption, an equitable adjustment in fees to accommodate the resulting demobilization and remobilization costs. In addition, there shall be an equitable adjustment in the project schedule based on the delay caused by the suspension. If the project is suspended for more than ninety (90) calendar days in the aggregate, WHKS may, at its option, terminate this Agreement upon giving notice in writing to Client.

#### **13. Termination**

Either Client or WHKS may terminate this Agreement at any time with or without cause upon giving the other party seven (7) calendar days prior written notice. Client shall within thirty (30) calendar days of termination pay WHKS for all services rendered and all costs incurred up to the date of termination, in accordance with the compensation provisions of the Agreement.

#### **14. Unauthorized Changes**

In the event Client, Client's contractors or subcontractors or anyone for whom Client is legally liable makes or permits to be made any changes to any reports, plans, specifications or other contract documents prepared by WHKS without obtaining WHKS' prior written consent, Client shall assume full responsibility for the results of such changes. Therefore, Client agrees to waive any claim against WHKS and to release WHKS from any liability arising directly or indirectly from such changes.

Client also agrees, to the extent permitted by laws, to indemnify and hold WHKS harmless from any

damage, liability or cost, including reasonable attorneys' fees and costs of defense, arising from such changes.

**15. Jobsite Safety**

Neither the professional activities of WHKS nor the presence of WHKS or its employees and subconsultants at a construction site, shall relieve the General Contractor and any other entity of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending or coordinating all portions of the construction work in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. WHKS and its personnel have no authority to exercise any control over any construction contractor or other entity or their employees in connection with their work or any health or safety precautions.

**16. Additional Services**

Services which are requested by Client or are required as part of the Project, but are not included in the Scope of Services, are considered Additional Services.

WHKS will notify Client in writing when Additional Services will be needed. WHKS and Client will agree on the extent of the Additional Service(s) required and will agree on the method and amount of the compensation for performance of said agreed upon Additional Services.

WHKS will not perform Additional Services which will result in additional cost to Client without documented verbal or written authority of Client.

In the event WHKS is requested or required to participate in any dispute resolution procedure which involves any aspect of the Project, Client agrees to compensate WHKS for the reasonable value of WHKS' personnel time and expenses spent

in connection with such procedures computed at WHKS' then current fee schedule and expense policies.

**17. Dispute Resolution**

In an effort to resolve any conflicts that arise, Client and WHKS agree that all disputes between them arising out of or relating to this Agreement shall be submitted to nonbinding mediation unless the parties mutually agree otherwise.

**18. Third Party Beneficiaries**

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either Client or WHKS. WHKS' services under this Agreement are being performed solely for Client's benefit, and no other entity shall have any claim against WHKS because of this Agreement or the performance or nonperformance of services hereunder.

**19. Extension of Protection**

Client agrees to extend any and all liability limitations and indemnifications provided by Client to WHKS to those individuals and entities WHKS retains for performance of the services under this Agreement, including but not limited to WHKS officers and employees and their heirs and assigns, as well as WHKS subconsultants and their officers, employees, heirs and assigns.

**20. Timeliness of Performance**

WHKS will perform the services described in the Scope of Services with due and reasonable diligence consistent with sound professional practices.

**21. Delays**

WHKS is not responsible for delays caused by factors beyond WHKS' reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, accidents, acts of God, failure of any governmental or other

regulatory authority to act in a timely manner, failure of Client to furnish timely information or approve or disapprove of WHKS' services or work product promptly, or delays caused by faulty performance by Client or by contractors of any level. When such delays beyond WHKS' reasonable control occur, Client agrees WHKS is not responsible for damages, nor shall WHKS be deemed to be in default of this Agreement.

**22. Right to Retain Subconsultants**

WHKS may use the services of subconsultants when, in the sole opinion of WHKS, it is appropriate and customary to do so. Such persons and entities include, but are not limited to, aerial mapping specialists, geotechnical consultants and testing laboratories. WHKS' use of other consultants for additional services shall not be unreasonably restricted by Client provided WHKS notifies Client in advance.

**23. Assignment**

Neither party to this Agreement shall transfer, sublet or assign any rights under or interest in this Agreement (including but not limited to monies that are due or monies that may be due) without the prior written consent of the other party.

**24. Severability and Survival**

Any provision of this Agreement later held to be unenforceable for any reason shall be deemed void, and all remaining provisions shall continue in full force and effect.

**25. Hazardous Materials**

It is acknowledged by both parties that WHKS' Scope of Services does not include any services related to asbestos or hazardous or toxic materials. In the event WHKS or any other party encounters asbestos or hazardous or toxic materials at the jobsite, or should it become known in any way that such materials may be present at the jobsite or any adjacent areas that may affect the performance of WHKS services,



WHKS may, at its option and without liability for consequential or any other damages, suspend performance of services on the project until Client retains appropriate specialist consultant(s) or contractor(s) to identify, abate and/or remove the asbestos or hazardous or toxic materials, and warrant that the jobsite is in full compliance with applicable laws and regulations.

## **26. Joint Participation**

The parties have participated jointly in the negotiation and preparation of all agreements between the parties. Each party has had an opportunity to obtain the advice of legal counsel and to review and comment upon this instrument. Accordingly, no rule of construction shall apply against any party or in favor of any party. This instrument shall be construed as if the parties jointly prepared it and any uncertainty or ambiguity shall not be interpreted against one party and in favor of another.

## **27. Record Documents**

If required in the Professional Services Agreement, WHKS shall, upon completion of the Work, compile for and deliver to the Client a reproducible set of Record Documents that are based upon the marked-up record drawings, addenda, change orders and other data furnished by the Contractor or other third parties. These Record Documents may show certain significant changes from the original design made during construction. Because these Record Documents are based on unverified information provided by other parties, which the Consultant is entitled to assume as reliable, the Consultant does not warrant their accuracy.

Revised 02/23/07

Revised: 04/29/09