

**STANDARD AGREEMENT
BETWEEN
OWNER AND ENGINEER
FOR PROFESSIONAL SERVICES**

This AGREEMENT made and entered into this 13th day of November, 2003

by and between the OWNER,

The City of Gahanna, Ohio

200 South Hamilton Road

Gahanna, Ohio 43230

and the ENGINEER,

Fuller, Mossbarger, Scott and May Engineers, Inc.

6600 Busch Blvd., Suite 100

Columbus, Ohio 43229

PROJECT DESCRIPTION AND PURPOSE

The OWNER retains the ENGINEER to perform professional services in connection with The City of Gahanna's Street Lighting / Electric Utility GIS System (PROJECT).

Contemporaneous with the execution of this AGREEMENT, the ENGINEER and the OWNER each designates the following individuals as their representatives with respect to the services to be performed or furnished by the ENGINEER and responsibilities of the OWNER under this AGREEMENT. Such individuals shall have authority to transmit instructions, receive information, and render decisions relative to the PROJECT on behalf of their respective party.

Designated Representatives are:

For the OWNER

Name: Daniel Michalec

Title: GIS Manager

Phone Number: 614-342-4073

Facsimile Number: 614-342-4173

E-Mail Address: Dan.michalec@gahanna.gov

For the ENGINEER

Name: Don Armour

Title: Associate

Phone Number: 614-846-1400

Facsimile Number: 614-846-9566

E-Mail Address: darmour@fmsengineers.com

The OWNER and the ENGINEER, for the consideration of the terms, conditions and covenants herein set forth and other valuable considerations further agree:

SECTION 1 - ENGINEER'S SERVICES AND OWNER'S RESPONSIBILITIES

- 1.1. Scope of Services. The ENGINEER shall provide the services set forth in Appendix A. – "Scope of Services, Responsibilities, Time, Budget and Related Matters" (SERVICES).
- 1.2. Commencement of Services. Upon this AGREEMENT becoming effective, the ENGINEER is authorized to begin the SERVICES identified in Appendix A.
- 1.3. Changes in the Scope of Services. The OWNER may, by written order, make changes within the general scope of the AGREEMENT or SERVICES to be performed that are mutually acceptable to both parties. Equitable adjustments in the ENGINEER'S costs and or schedule shall be made accordingly, and this AGREEMENT shall be amended. The costs of such changes shall be negotiated in a manner consistent with the ENGINEER'S original agreement with the OWNER.
- 1.4. The OWNER shall have the responsibilities set forth herein and in Appendix A.

SECTION 2 - TIMES FOR RENDERING SERVICES

- 2.1. Time Period. The ENGINEER'S SERVICES will be performed within the time period or by the date stated in Appendix A.
- 2.2. Delay or Suspension of Services. If the ENGINEER'S SERVICES are delayed or suspended in whole or in part by the OWNER, then the ENGINEER shall be entitled to equitable adjustment of the time for performance and rates and amounts of compensation provided for elsewhere in this AGREEMENT to reflect reasonable costs incurred by the ENGINEER in connection with, among other things, such delay or suspension and reactivation and the fact that the time for performance under this AGREEMENT has been revised.

SECTION 3 - COMPENSATION AND PAYMENT TO THE ENGINEER

- 3.1. Basis of Payment. The OWNER shall pay the ENGINEER for SERVICES rendered under this AGREEMENT a Lump Sum amount of **\$45,500.00**. Appropriate amounts are incorporated in the Lump Sum to account for labor, overhead, profit, Reimbursable Expenses, and the ENGINEER'S Consultants' charges, if any.
- 3.2. Invoicing. The portion of the Lump Sum amount billed for the ENGINEER'S SERVICES will be based upon the ENGINEER'S estimate of the proportion of the total services actually completed during the billing period to the Lump Sum. Invoices will be prepared in accordance with the ENGINEER'S standard invoicing practices and will be submitted to the OWNER by the ENGINEER monthly, unless otherwise agreed.
- 3.3. Payments. Invoices are due and payable within thirty (30) calendar days of receipt. If the OWNER fails to make any payment due the ENGINEER for SERVICES and expenses within thirty (30) calendar days after receipt of the ENGINEER'S invoice therefore, the amounts due the ENGINEER will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day. In addition, the ENGINEER may, after giving seven (7) calendar days written notice to the OWNER, suspend SERVICES under this AGREEMENT until the ENGINEER has been paid in full all amounts due for SERVICES, expenses, and other related charges.

SECTION 4 - OTHER PROVISIONS CONCERNING PAYMENT

- 4.1. Adjusting Costs as a Result of Increased Time to Complete Services. The ENGINEER'S compensation is conditioned on time to complete the SERVICES not exceeding the time identified in Appendix A. Should the time to complete the SERVICES be extended beyond this period due to reasons not the fault of and beyond the control of the ENGINEER, the total compensation to the ENGINEER shall be appropriately adjusted.
- 4.2. Reimbursable Expenses. Reimbursable Expenses means the actual expenses incurred by the ENGINEER or the ENGINEER'S Consultants directly in connection with the SERVICES, including the categories and items listed in Appendix A, and if authorized in advance by the OWNER, overtime work requiring higher than regular rates.

4.3. Additional Compensation. The OWNER shall pay the ENGINEER for all SERVICES not included in the scope of this AGREEMENT on the basis agreed to in writing by the parties at the time such SERVICES are authorized by the OWNER.

SECTION 5 - STANDARD TERMS AND CONDITIONS

5.1. Standard of Care. The standard of care for all professional and related SERVICES performed or furnished by the ENGINEER under this AGREEMENT will be the care and skill ordinarily used by members of the ENGINEER'S profession practicing under similar circumstances at the same time and in the same locality. The ENGINEER makes no warranties, expressed or implied, under this AGREEMENT or otherwise, in connection with the ENGINEER'S SERVICES.

5.2. Independent Consultant. All duties and responsibilities undertaken pursuant to this AGREEMENT will be for the sole and exclusive benefit of the OWNER and the ENGINEER and not for the benefit of any other party. Nothing contained in this AGREEMENT shall create a contractual relationship with or a cause of action in favor of a third party against either the OWNER or the ENGINEER. The ENGINEER'S SERVICES under this AGREEMENT are being performed solely for the OWNER'S benefit, and no other entity shall have any claim against the ENGINEER because of this AGREEMENT or the performance or nonperformance of SERVICES hereunder. The OWNER agrees to include a provision in all contracts with contractors, and other entities involved in this project, to carry out the intent of this paragraph.

5.3. Insurance. The ENGINEER will maintain insurance coverage for Workers' Compensation, General Liability, and Automobile Liability and will provide certificates of insurance to the OWNER upon request.

5.4. Hazardous Environmental Conditions. It is acknowledged by both parties that the ENGINEER'S SERVICES do not include any services related to any "Hazardous Environmental Conditions," i.e. the presence at the site of asbestos, toxic mold, PCBs, petroleum, hazardous waste, or radioactive materials in such quantities or circumstances that may present a substantial danger to persons or property exposed thereto in connection with the PROJECT. In the event the ENGINEER or any other party encounters a Hazardous Environmental Condition, the ENGINEER may, at its option and without liability for consequential or any other damages, suspend performance of SERVICES on the portion of the PROJECT affected thereby until the OWNER: (i) retains appropriate specialist consultant(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the Hazardous Environmental Condition(s); and (ii) warrants that the site is in full compliance with applicable laws and regulations. The OWNER acknowledges that the ENGINEER is performing professional services for the OWNER and that the ENGINEER is not and shall not be required to become an "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or near the site in connection with the ENGINEER'S SERVICES under this AGREEMENT. If the ENGINEER'S SERVICES under this AGREEMENT cannot be performed because of a Hazardous Environmental Condition, the existence of the condition shall justify the ENGINEER'S terminating this AGREEMENT for cause under the provisions of Section 5.9. The OWNER will advise the ENGINEER, in writing and prior to the commencement of SERVICES, of all known Hazardous Environmental Conditions present at the site.

5.5. Indemnification and Allocation of Risk.

- a. The ENGINEER shall indemnify and hold harmless the OWNER, the OWNER'S officers, directors, partners, and employees from and against costs, losses, and damages (including reasonable attorney's fees) caused solely by the negligent acts or omissions of the ENGINEER or the ENGINEER'S officers, directors, partners, employees, and consultants in the performance of the ENGINEER'S SERVICES under this AGREEMENT.
- b. The OWNER shall indemnify and hold harmless the ENGINEER, the ENGINEER'S officers, directors, partners, employees, and consultants from and against costs, losses, and damages (including reasonable attorney's fees) caused solely by the negligent acts or omissions of the OWNER or the OWNER'S officers, directors, partners, employees, and consultants with respect to this AGREEMENT.
- c. Each Party's total liability to the other Party and anyone claiming by, through, or under said Party for any injuries, losses, damages and expenses caused in part by the negligence of a Party and in part by the negligence of the other Party or any other negligent entity or individual, shall not exceed the percentage share that said Party's negligence bears to the total negligence of the OWNER, the ENGINEER, and all other negligent entities and individuals.
- d. In addition to the indemnity provided under paragraph 5.5.b. of this AGREEMENT, the OWNER shall indemnify and hold harmless the ENGINEER and the ENGINEER'S officers, directors, partners, employees, and consultants from and against injuries, losses, damages and expenses (including but not limited to all fees and charges of engineers, architects,

attorneys, and other professionals, and all court or arbitration or other disputes resolution costs) caused by, arising out of, or resulting from a Hazardous Environmental Condition, provided that (i) any such injuries, losses, damages and expenses are attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of property, including the loss of use resulting there from, and (ii) nothing in this paragraph, 5.5.d., shall obligate the OWNER to indemnify any individual or entity to the extent of that individual or entity's own negligence or willful misconduct.

- e. The indemnification provision of paragraph 5.5.a. is subject to and limited by the provisions agreed to by the OWNER and the ENGINEER in paragraph 5.6, "Limit of Liability," of this AGREEMENT.

5.6. Limit of Liability. The total liability, in the aggregate, of the ENGINEER and the ENGINEER'S officers, directors, partners, employees, agents, and consultants, or any of them to the OWNER and anyone claiming by, through, or under the OWNER, for any and all injuries, losses, damages and expenses, whatsoever arising out of, resulting from, or in any way related to this AGREEMENT, or services to be performed pursuant thereto, from any cause or causes including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract or warranty, expressed or implied, of the ENGINEER or the ENGINEER'S officers, directors, partners, employees, agents, and consultants, or any of them, shall not exceed the total amount of \$10,000. Recoverable damages shall be limited to those that are direct damages and shall not be those that are indirect, consequential, lost profits, punitive, etc.

5.7. Construction/Field Observation. The OWNER and Engineer agree that construction observation services are specifically excluded from this contract. Should construction observation services be required at a later date, a modification to the scope of this contract will be negotiated in accordance with Paragraph 1.3. If construction/field services are performed all terms of this contract shall remain in place.

5.8. Indemnity Claims by the OWNER

- a. Notice of Claim. If any matter shall arise which, in the reasonable opinion of the OWNER, constitutes or may give rise to a Loss subject to indemnification by the ENGINEER as provided herein (an "Indemnity Claim"), the OWNER shall give prompt written notice (a "Notice of Claim") of such Indemnity Claim to the ENGINEER, setting forth the relevant facts and circumstances of such Indemnity Claim in reasonable detail and the amount of indemnity sought from the ENGINEER with respect thereto, and shall give continuing notice promptly thereafter as to developments coming to the OWNER'S attention materially affecting any matter relating to such Indemnity Claim.
- b. Third Party Claims. If any Indemnity Claim is based upon any claim, demand, suit or action of any third party against the OWNER (a "Third Party Claim"), then the OWNER, at the time it gives the ENGINEER the Notice of Claim with respect to such Third Party Claim, shall either (at the OWNER'S option):
 - (i) Offer to the ENGINEER the option to have the ENGINEER assume the defense of such Third Party Claim, which option shall be exercised by the ENGINEER (if the ENGINEER elects to exercise) by written notice to the OWNER within fifteen (15) days after the OWNER gives written notice to the ENGINEER thereof. If the OWNER so offers such option and the ENGINEER so exercises such option, then the ENGINEER shall, at its own expense, assume the defense of such Third Party Claim, shall upon the final determination thereof fully discharge at its own expense all liability of the OWNER with respect to such Third Party Claim, and shall be entitled, in its sole discretion and its sole expense, but without any liability of the OWNER therefore, to compromise or settle such Third Party Claim upon terms acceptable to the ENGINEER. From the time the ENGINEER so assumes such defense and while such defense is pursued diligently and in good faith, the ENGINEER shall have no further liability for attorneys' fees or other costs of defense thereafter incurred by the OWNER in connection with such Third Party Claim; or
 - (ii) Undertake to defend such Third Party Claim itself. If the OWNER so undertakes the defense of the Third Party Claim, it shall conduct such defense as would a reasonable and prudent person to whom no indemnity were available, shall permit the ENGINEER (at the ENGINEER'S sole expense) to participate in (but not control) such defense, and shall not settle or compromise such Third Party Claim without the ENGINEER'S consent (but such consent shall not of itself establish the ENGINEER'S indemnity liability therefore).

If the OWNER fails to offer to the ENGINEER the option to assume the defense as provided in clause (i) above, the OWNER shall undertake such defense in accordance with this clause at the OWNER'S sole expense. If the OWNER offers the option to the ENGINEER to assume the defense as provided for in clause (i) above, and the ENGINEER

does not exercise such option within the time and in the manner therein provided, then the OWNER shall undertake such defense in accordance with this clause at the expense of the ENGINEER.

- (iii) Time Limit for Indemnity Claims. Notwithstanding the foregoing provisions of this Section 5.8, the ENGINEER shall not have any liability for any Loss arising solely out of the matters referred to herein in Section 5.8 with respect to which a Notice of Claim has not been given to the ENGINEER prior to the second anniversary date of substantial completion of the SERVICES.

5.9. Dispute Resolution.

5.9.1. In an effort to resolve any conflicts that arise during or following the performance of SERVICES under this AGREEMENT, the OWNER and the ENGINEER agree that all disputes between them arising out of or relating to this AGREEMENT or the PROJECT shall be submitted to non-binding mediation unless the parties mutually agree otherwise.

5.9.2. The OWNER and the ENGINEER further agree to include a similar mediation provision in all agreements with any and all additional independent subconsultants and contractors retained for the PROJECT and to require all such parties to include a similar mediation provision as the primary method for dispute resolution between those parties and their independent subconsultants and contractors.

5.9.3. The ENGINEER shall be entitled to interest at the rate of 12% per annum on any amount awarded to the ENGINEER in arbitration or litigation, irrespective of whether the sum is liquidated, the parties agreeing that the award of interest in such event is fair and reasonable.

5.10. Termination of Contract. Either party may terminate this AGREEMENT for convenience and without cause upon giving the other party not less than seven (7) calendar days' written notice.

Either party may terminate this AGREEMENT for cause giving the other party not less than seven (7) calendar days' written notice for any of the following reasons:

- a. Substantial failure by the other party to perform in accordance with the terms of this AGREEMENT and through no fault of the terminating party;
- b. Assignment of this AGREEMENT or transfer of SERVICES by either party to any other entity without the prior written consent of the other party;
- c. Suspension of the PROJECT or the ENGINEER'S SERVICES by the OWNER for more than ninety (90) calendar days, consecutive or in the aggregate;
- d. Material changes in the conditions under which this AGREEMENT was entered into, the Scope of Services or the nature of the PROJECT, and the failure of the parties to reach agreement on the compensation and schedule adjustments necessitated by such changes.

In the event of termination of this AGREEMENT by either party, the OWNER shall within fifteen (15) calendar days of termination pay the SUBCONSULTANT for all SERVICES rendered and all reimbursable costs incurred by the ENGINEER up to the date of termination, in accordance with the payment provisions of this AGREEMENT.

In the event of any termination that is not the fault of the ENGINEER, the OWNER shall within fifteen (15) calendar days of termination pay the SUBCONSULTANT for all SERVICES rendered and all reimbursable costs incurred by the ENGINEER up to the date of termination, in accordance with the payment provisions of this AGREEMENT.

In the event of any termination that is not the fault of the ENGINEER, the OWNER shall pay the ENGINEER, in addition to payment for SERVICES rendered and reimbursable costs incurred, for all expenses reasonably incurred by the ENGINEER in connection with the orderly termination of this AGREEMENT, including but not limited to demobilization, reassignment of personnel, associated overhead costs and all other expenses directly resulting from the termination.

5.11. Access. The OWNER shall arrange for safe access to and make all provisions for the ENGINEER and the ENGINEER'S Consultants to enter upon public and private property as required for the ENGINEER to perform SERVICES under this AGREEMENT.

5.12. Patents. The ENGINEER shall not conduct patent searches in connection with its SERVICES under this AGREEMENT and assumes no responsibility for any patent or copyright infringement arising there from. Nothing in this AGREEMENT shall be construed as a warranty or representation that anything made, used, or sold arising out of the SERVICES performed under this AGREEMENT will be free from infringement of patents or copyrights.

5.13. Ownership and Reuse of Documents. All documents prepared or furnished by the ENGINEER pursuant to this AGREEMENT are instruments of service, and the ENGINEER shall retain an ownership and property interest therein. Reuse of any such documents by the OWNER shall be at the OWNER'S sole risk; and the OWNER agrees to indemnify, and hold the ENGINEER harmless from all claims, damages, and expenses including attorney's fees arising out of such reuse of documents by the OWNER or by others acting through the OWNER.

5.14. Copyrighted Information. The OWNER agrees that all hard copy and/or digital data provided to the OWNER by the ENGINEER is copyrighted, and is furnished to the OWNER with all rights reserved. The OWNER is hereby expressly permitted to use the data for the purposes required to complete the scope of this AGREEMENT. The OWNER further agrees not to otherwise copy, reproduce or use the data for any other purposes whatsoever without the written consent of the ENGINEER.

5.15. Use of Electronic Media.

- a. Copies of documents that may be relied upon by the OWNER are limited to the printed, or hard copies that are signed or sealed by the ENGINEER. Files in electronic media format of text, data, graphics, or of other types that are furnished by the ENGINEER to the OWNER are only for convenience of the OWNER. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.
- b. When transferring documents in electronic media format, the ENGINEER makes no representations as to long-term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the ENGINEER at the beginning of this PROJECT.
- c. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.
- d. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within sixty (60) calendar days, after which the receiving party shall be deemed to have accepted the data thus transferred. The party delivering the electronic files will correct any errors detected within the sixty (60) calendar day acceptance period. The ENGINEER shall not be responsible to maintain documents stored in electronic media format after acceptance by the OWNER.

5.16. Force Majeure. The ENGINEER shall not be liable for any loss or damage due to failure or delay in rendering any SERVICES called for under this AGREEMENT resulting from any cause beyond the ENGINEER'S reasonable control.

5.20. Assignment. Neither party shall assign its rights, interests or obligations under this AGREEMENT without the express written consent of the other party.

5.21. Binding Effect. Except for the non-assignability of this AGREEMENT as provided herein, it shall bind, and the benefits thereof shall inure to the respective parties hereto, their legal representatives, executors, administrators, successors, and assigns.

5.22. Severability and Waiver of Provisions. Any provision or part of the AGREEMENT held to be void or unenforceable under any laws or regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon the OWNER and the ENGINEER, who agree that the AGREEMENT shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision. Non-enforcement of any provision by either party shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this AGREEMENT.

5.21. Survival. All express representations, indemnifications, or limitations of liability included in this AGREEMENT will survive its completion or termination for any reason.

5.22. Subject Headings. The subject headings of the Sections and Subsections of this AGREEMENT are included for convenience only and shall not affect the construction or interpretation of its provisions.

5.23. Prevailing Law. This AGREEMENT is to be governed by the laws of the state in which the ENGINEER'S office executing this AGREEMENT is located.

5.24. Notices. Any notice required under this AGREEMENT will be in writing, addressed to the appropriate party at its address on page one (1) and given personally, or by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.

SECTION 6 – ENTIRE AGREEMENT

6.1. The following Appendices are incorporated herein by reference:

- a. Appendix A, "Scope of Services, Responsibilities, Time, Budget and Related Matters." A consists of 2 pages. This Appendix may be amended by A.2, A.3, A.4 etc., with written approval by the ENGINEER and the OWNER.

6.2. This AGREEMENT (consisting of pages 1 to 7, inclusive, together with the Appendices identified in Section 6) constitutes the entire AGREEMENT between the OWNER and the ENGINEER and supersedes all prior written or oral understandings with respect to the ENGINEER'S SERVICES herein described. This AGREEMENT may not be altered, modified or amended, except in writing properly executed by authorized representatives of the OWNER and the ENGINEER.

IN WITNESS WHEREOF, the Parties have signed this AGREEMENT the date and year set forth above.

OWNER

ENGINEER

Signature

Signature

Printed Name and Title

D.W. Armour, Jr., P.E. / Associate
Printed Name and Title

Appendix A

Scope of Services, Responsibilities, Time, Budget and Related Matters

This is APPENDIX A, consisting of 2 pages,
referred to in and part of the AGREEMENT between the
OWNER and the ENGINEER for Professional Services
dated November 13, 2003

Initial:

OWNER _____

ENGINEER _____

SECTION A.1. ENGINEER'S SCOPE OF SERVICES

A.1.1. The ENGINEER shall:

- a. Consult with the OWNER to define and clarify the OWNER'S requirements for the PROJECT and available data.
- b. Advise the OWNER as to the necessity of the OWNER providing data or services, which are not part of the ENGINEER'S SERVICES, and assist the OWNER in obtaining such data and services.
- c. Complete Tasks 1, 2, 3A through and including 3D, Task 3F, and Task 4 identified and described in the ENGINEER'S written proposal to the City of Gahanna dated October 30, 2003 which is hereby added to this contract by reference.

A.1.2. The ENGINEER shall not:

- a. Complete Task 3E, unless authorized to do so under the terms of paragraph 1.3 of this contract and all other items not specifically included in the Scope of Services.

SECTION A.2. OWNER'S RESPONSIBILITIES

A.2.1. The OWNER shall do the following in a timely manner, so as not to delay the SERVICES of the ENGINEER:

- a. Provide all criteria and full information as to the OWNER'S requirements for the PROJECT.
- b. Furnish to the ENGINEER all existing studies, reports and other available data pertinent to the PROJECT, obtain or authorize the ENGINEER to obtain or provide additional reports and data as required, and furnish to the ENGINEER SERVICES of others as required for the performance of the ENGINEER'S services.

A.2.2. The ENGINEER shall be entitled to use and rely upon all such information and services provided by the OWNER or others in performing the ENGINEER'S SERVICES under this AGREEMENT.

A.2.3. The OWNER shall bear all costs incidental to compliance with its responsibilities pursuant to this Section A.2.

SECTION A.3. TIMES FOR RENDERING SERVICES

A.3.1. The time period for the performance of the ENGINEER'S SERVICES shall be 7 (seven) months with milestones established as follows:

- Source document review – 2 weeks after Notice to Proceed (NTP)
- Implementation Plan – 4 weeks after NTP
- Pilot Project – 6 weeks after approval of Implementation Plan
- Full Conversion – 4 months after approval of Pilot Project

A.3.2. The ENGINEER'S services under this AGREEMENT will be considered complete when all deliverables set forth in Appendix A are submitted to the OWNER.

SECTION A.4. OTHER

A.4.1. The OWNER has established the following budgets: completion of all tasks outlined in ENGINEERS October 30, 2003 proposal:

\$45,500