RESOLUTION R-2022-92

A RESOLUTION AUTHORIZING THE EXECUTION OF AGREEMENT NO. 338 WITH KENIG, LINDGREN, O'HARA, ABOONA, INC. (KLOA) FOR PROFESSIONAL ENGINEERING SERVICES TO PERFORM A TRAFFIC STUDY AT EAST LOOP ROAD BETWEEN JAHNS DRIVE AND ROUTE 56 FOR A TOTAL AMOUNT NOT TO EXCEED $14,960

WHEREAS, the City of Wheaton, Illinois, ("City") is an Illinois Home Rule Municipality pursuant to the provisions of Article VII, Section 6, of the Illinois Constitution of 1970; and as such the City may exercise any power and perform any function pertaining to its government and affairs; and

WHEREAS, the City prepared a Request for Proposal package (RFP Number 22-187) for professional engineering services to perform a traffic study at East Loop Road between Jahns Drive and Route 56; and

WHEREAS, the City solicited proposals in a public bidding process and one response was received from Kenig, Lindgren, O'Hara, Aboona, Inc. (KLOA) to provide professional engineering services to perform a traffic study at East Loop Road between Jahns Drive and Route 56 in the amount of $14,960; and

WHEREAS, the City reviewed and determined that the specifications were clear and not unduly restrictive. Adequate competition was solicited, and it was reasonably assumed that more than one proposal would have been submitted; and

WHEREAS, it was determined by the City that the proposal submitted by KLOA meets the City's needs and that staff's estimated cost to perform a traffic study indicates that the proposed price from KLOA is fair and reasonable; and

WHEREAS, KLOA has provided the City with a conflicts letter which the Corporate Authorities finds acceptable ; and

WHEREAS, the traffic study is not currently budgeted and will impact the Capital Projects fund for $14,960 and the Capital Projects Fund has the reserves available to accommodate this additional cost. As per Ordinance O-2022-44, the developer will pay half of the cost of this proposal; and

WHEREAS, both parties agree to the terms and conditions set forth in the RFP and the agreement contained in the City's RFP package for professional engineering services to perform a traffic study at East Loop Road between Jahns Drive and Route 56; and

WHEREAS, the Corporate Authorities of the City of Wheaton, DuPage County, Illinois find it reasonable and appropriate to enter into an agreement with KLOA located 9575 W. Higgins Road, Suite 400, Rosemont, Illinois 60018.

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 City of Wheaton Agreement No. 338 with KLOA for professional engineering services to perform a traffic study at East Loop Road between Jahns Drive and Route 56; a copy of that Agreement is on file with the City Clerk's office, and is incorporated herein as if fully set forth as Exhibit A.

ADOPTED this 21st day of November 2022.

Mayor

ATTEST:

City Clerk

Roll Call Vote:

Ayes: Councilwoman Bray-Parker
Mayor Suess
Councilwoman Robbins
Councilman Weller
Councilman Barbier

Nays: None

Absent: Councilwoman Fitch
Councilman Brown

Agreement No. **338**

CITY OF WHEATON, ILLINOIS
PROFESSIONAL ENGINEERING SERVICES AGREEMENT FOR A
TRAFFIC STUDY AT EAST LOOP ROAD BETWEEN JAHNS DRIVE AND ROUTE 56

THIS AGREEMENT is made and entered into this 22nd day of November 2022, by and between the **CITY OF WHEATON**, an Illinois municipal corporation ("**City**"), located at 303 W. Wesley Street, Wheaton, Illinois, 60187 and **Kenig, Lindgren, O'Hara, Aboona, Inc.** ("**Engineer**"), located at 9575 West Higgins Road, Rosemont, Illinois, 60018. City and Engineer are at times collectively referred to hereinafter as the "Parties."

WHEREAS, the City has determined that it is reasonable and necessary to engage a professional engineering firm to provide professional engineering services for a **Traffic Study at East Loop Road between Jahns Drive and Route 56** (**"Project"**) consistent with the City's Traffic Study at East Loop Road between Jahns Drive and Route 56 Request for Proposal (RFP) package which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit A**; and

WHEREAS, the Engineer has submitted a cost proposal to provide professional engineering services for the Project **("Proposal")**, which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit B** and represents that is has the necessary expertise and experience to furnish such professional engineering services upon the terms and conditions set forth herein below; and

WHEREAS, the City finds that the Engineer's Proposal meets the City's requirements for the professional engineering services.

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. CONTRACT DOCUMENTS.

1.1 Incorporated Documents. The recitals set forth above are incorporated herein as substantive terms and conditions of this Agreement and represent the intent of the Parties. The Contract Documents consist of this Agreement and the following attached exhibits which are incorporated into this Agreement:

a. The City's RFP and all related documents is attached as **Group Exhibit A;**
b. The Engineer's Proposal and all related documents is attached as **Group Exhibit B**
c. Insurance Coverage for Professional Service Providers is attached as **Exhibit C;**
d. Legal certifications and compliance with laws documentation is attached as **Group Exhibit D;** and
e. Change Order Form, is attached as **Exhibit E; and**
f. KLOA letter is attached as **Exhibit F.**

These attachments along with this Agreement represent the entire integrated Contract between the Parties and supersede any and all prior negotiations, representations, or agreements, written or oral.

The Contract Documents also shall include any subsequent Change Orders or Written Amendments to any documents listed above or included within the incorporated exhibits, and other documents amending, modifying, or supplementing the Contract Documents, which may be delivered or issued after the effective date of the Agreement and are not attached hereto.

It shall be understood that words "Agreement" and "Contract" are synonymous in this document and its incorporated exhibits.

1.2 KLOA Letter. This Agreement shall further be subject to the KLOA letter dated November 10, 2022, a copy of which is attached hereto and incorporated by reference as if fully set forth herein as **Exhibit F**.

1.3 Controlling Document. In the event of a conflict between this Agreement and any attachment or exhibit, the provisions of this Agreement shall control.

SECTION 2. SCOPE OF SERVICES.

2.1 Retention and Services. The City retains the Engineer to perform professional engineering services to perform a Traffic Study at East Loop Road between Jahns Drive and Route 56 for the completion of this Project. For and in consideration of the Agreement Amount indicated in **Section 4.1** herein, the Engineer promises and agrees that it shall, at its own cost and expense, perform all the work and furnish all the labor, materials, and equipment necessary to provide the professional engineering services necessary for the Project **("Services")**, in accordance with the Project Scope of Services set forth in the City's RFP **(Group Exhibit A)** and the KLOA letter dated November 10, 2022, **(Exhibit F).** All Services shall be subject to and performed in accordance with this Agreement and its attached and incorporated exhibits, unless specifically stated otherwise in writing.

2.2 Access to Facilities and Property. The City shall make its system facilities and properties available and accessible for inspection by Engineer and arrange for access to make all provisions for the Engineer to enter upon public property as required by the Engineer to perform his or her Services.

2.3 Agreement Administration. A "Notice to Proceed" order will be issued by the City upon confirmation of a properly executed Agreement. Once the "Notice to Proceed" order is issued, the Engineer's primary contact with the City will become the Project Manager. The Project Manager's primary responsibility is to assure that the City receives the professional services in accordance with the terms and conditions of this Agreement. The Project Manager or his or her designee shall oversee the entire Project from kick-off activities through close out and payment of final invoice, monitor Project progress; address any quality issues and change orders, and review and approve service deliverables.

2.4 Reporting. The Engineer shall regularly report to the City's Project Manager, or his designee, regarding the progress of the Services, assumptions, and problems encountered during the term of this Agreement. Such reports may be provided in person or over the telephone at the discretion of the City.

2.5 Project Manager. The City's Project Manager for the Project is Sarang Lagvankar The Project Manager's contact information is as follows: (630) 260-2067 or via email at slagvankar@wheaton.il.us.

2.6 Time of Performance. The Engineer shall perform the Services within the Term of this Agreement as set forth in **Section 9.1** of this Agreement, in accordance with the schedule of services as indicated in the attached Proposal (**Group Exhibit B**), and in accordance with any other completion schedule or milestones which may be separately agreed upon in writing by the Parties. Engineer represents that it has the professional and technical personnel required to perform the Services in conformance with such conditions. Upon request of City, Engineer shall provide a more detailed schedule of anticipated performance to meet the schedule of services.

2.7 Additional Services. The Engineer shall provide only the Services specified in this Agreement, and the attached **Group Exhibit B**. The Engineer acknowledges and agrees that the City shall not be liable for any costs incurred by the Engineer in connection with any services provided by the Engineer 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 through an approved Change Order. Upon recognizing the need to perform Additional Services, the Engineer shall notify the City with reasonable promptness and explain the facts and circumstances giving rise to the need and submit to the City a Change Order Form for amendment to this Agreement for the City's review and approval setting forth the details of the requested Additional Services. 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 Engineer's cost proposal included in **Group Exhibit B** and in the absence of such hourly rates, then payment for Additional Services shall be mutually agreed upon by both the City and Engineer before the commencement of any Additional Services.

2.8 Changes and Alterations. Any changes or alterations to this Project affecting, inclusive of, but not limited to, scope, cost, milestones, deadlines, or other significant factors shall be integrated in writing on a City of Wheaton Change Order Form **[Exhibit E]**; verbal approval is not considered a Change Order and is not authorization to proceed. All Change Orders shall clearly identify the impact of cost and the effect on time required to perform the Services. Any proposed change to the Project that increases the Agreement price or the costs to be expended by the Engineer in an amount of $20,000 or more shall require the approval of the City of Wheaton City Council before such changes may be made. Any services that are performed beyond the approved Agreement scope or Agreement price shall not be paid without the City's prior written consent through an approved Change Order.

2.9 Independent Contractor Status. The Engineer shall act as an independent contractor 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 Engineer; or (ii) to create any relationship between the City and any subcontractor of the Engineer. Engineer 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 Engineer specifically agrees that it shall not do so. The City shall not have the authority to control the method or manner by which Engineer complies with the terms of this Agreement.

SECTION 3. PERSONNEL/SUBCONTRACTORS

3.1 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 Engineer. The Key Project Personnel shall not be changed without the City's prior written approval.

3.2 Availability of Personnel. The Engineer shall provide all personnel necessary to complete the Services including, without limitation, any Key Project Personnel identified in this Agreement. The Engineer 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 Engineer 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.

3.3 Use of Subcontractors. The Engineer 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 Engineer shall be acceptable to, and approved in advance by, the City. The City's approval of any subcontractor or subcontract shall not relieve the Engineer 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 Engineer. For purposes of this Agreement, the term "Engineer" shall be deemed also to refer to all subcontractors of the Engineer, and every subcontract shall include a provision binding the subcontractor to all provisions of this Agreement. Upon the City's request Engineer shall furnish the City with a copy of its agreement with any subcontractor performing Services required

under this Agreement.

3.4 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 engineering practices, the Engineer shall immediately upon notice from the City remove and replace such personnel or subcontractor. The Engineer 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.

3.5 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 Engineer or with any vendor solicited or recommended by the Engineer.

3.6 Corporate Authorities of the City. Notwithstanding any provision of this Agreement, any negotiations, or agreements with, or representations by the Engineer 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 Engineer without the knowledge and approval of the City Manager or of the City's Corporate Authorities.

SECTION 4. COMPENSATION AND METHOD OF PAYMENT.

4.1 Agreement Amount. The total amount billed by the Engineer for the Services performed under this Agreement shall not exceed **$14,960,** including reimbursable expenses, without the prior express written authorization of the City.

4.2 Invoices and Payments. The Engineer shall be paid in accordance with the amounts set forth in the Proposal **(Group Exhibit B)**. The Engineer shall submit an itemized invoice(s) containing sufficient detail of the Services performed to enable the City to properly evaluate the payout request. The City shall pay Engineer in accordance with the Illinois Local Government Prompt Payment Act. The City shall make all payments on the basis of approved invoices and supporting documents. The City shall use its best efforts to make payments within thirty (30) days after review and approval of the invoice. Each payment requires the City Council's approval of the expenditure which occurs at publicly scheduled meetings. 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.

4.3 Unappropriated Funds. The obligation of the City for payment to the Engineer 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.

4.4 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 Engineer.

4.5 Interest Waiver. Engineer 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.

4.6 Account Records. The Engineer 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 Engineer 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 5. DELIVERABLES.

5.1 Deliverables. In carrying out its Services, Engineer must prepare or provide to the City various Deliverables. For purposes of this Agreement, "Deliverables" include work product, which includes, but is not limited to, designs, drawings, plans and specifications, written reviews, recommendations, reports and analyses, schedules, design documentation (including all media and calculations), computer files, software, books and records, as-built drawings, manuals, and other documents and other work product prepared by or on behalf of Engineer for the City, whether in tangible or intangible or electronic form. Deliverables are the property of the City, and such Deliverables shall be owned by the City irrespective of any copyright notices or confidentiality legends to the contrary which may have been placed in or on such Deliverables. Engineer shall deliver such Deliverables to the City upon its request, upon termination of this Agreement, or in any event upon completion of the Work.

The City may reject Deliverables that do not include relevant information or data, or do not

include all documents or other material specified in this Agreement or are reasonably necessary for the purpose for which the City made this Agreement or for which the City intends to use the Deliverables (the "Deficient Deliverables") and such Deficient Deliverables shall be corrected by Engineer within thirty (30) days after receipt of notice from the City specifying the deficiency. Engineer's failure to correct any Deficient Deliverables within the required time specified in this **Section 5.1** or as otherwise agreed to by the Parties in writing shall be treated as a default of this Agreement.

5.2 License to Use Deliverables. All patents, copyrights, trademarks, trade names, service marks, trade secrets, software, firmware, industrial design rights, rights of priority, know-how, design flows, methodologies and any and all other intellectual property rights protected under any applicable law, (hereinafter, the "Intellectual Property Rights") incorporated into any of the Deliverables shall remain the sole property of the Engineer or its respective subcontractors and suppliers, subject to the license granted herein. With respect to such Deliverables and other Intellectual Property Rights used or delivered in the performance of the Services, Engineer, upon execution of this Agreement, grants to the City (for use by the City and its employees, contractors, and agents) an irrevocable, perpetual, nonexclusive, royalty-free license to use the Intellectual Property Rights included or contained in or incorporated into the Deliverables for purposes of constructing, operating, maintaining, repairing, modifying, completing the construction project work in the event of termination, installing, erecting, adding, improving or altering the City's construction project for which the Deliverables were created (the "Construction Project") at any time. Hereinafter, the above stated purposes shall be collectively referred to as the "Permitted Purposes." The foregoing rights include the rights to retain, copy, execute, modify, create derivative works of, and otherwise use copies of the Deliverables and the Intellectual Property Rights and the information contained therein or related thereto for the Permitted Purposes with respect to the Construction Project and as otherwise provided in this Agreement. The Engineer shall obtain for the City substantially similar licenses from its consultants and subcontractors consistent with this Agreement. Engineer's obligation shall be to use commercially reasonable efforts to obtain such license rights, and, in the event, Engineer cannot obtain a substantially similar license from a consultant or subcontractor as required herein, Engineer shall promptly notify the City and the Parties shall work together in good faith and in an expedited manner to obtain a license adequate to support all of the Permitted Purposes. Notwithstanding the foregoing, the City acknowledges that the Deliverables are prepared and furnished by the Engineer pursuant to this Agreement and are not intended or represented to be suitable for use or reuse by the City or others on any project other than the Construction Project or on any future projects. Any use or reuse on any project other than the on-going or completed Construction Project or on any future project without prior written verification or adaption by Engineer for the specific purpose intended will be at the City's sole risk and without liability to the Engineer and Engineer's consultants.

5.3 Warranty. Engineer warrants that: (i) all Intellectual Property Rights that may exist in the Deliverables furnished under this Agreement in connection with the Services are now (or shall at their incorporation into the Work be) vested in the Engineer or (ii) Engineer will be able to grant the City the license rights referred to in **Section 5.2** so that the City may timely, and as it may reasonably require, exercise such rights in connection with the Construction Project.

5.4 Infringement Claims. If the City or any of the Construction Project work, or any component thereof becomes subject to a claim of infringement or if Engineer believes it may be subject to such a claim, Engineer shall remedy such claim at its expense and at its option by any reasonable means, including: (i) replacing or modifying the allegedly infringing elements, or (ii) securing for City the right to continue to use such element(s), in each case without loss of functionality and without adversely affecting the on-going or completed Construction Project or any license and rights granted hereunder. Engineer shall give prompt written notice to the City if Engineer believes that any information or technology furnished by City or that City directs the Engineer to incorporate into the Construction Project Deliverables infringes on any third-party Intellectual Property Rights.

5.5 Injunction. If the City, and/or any City Indemnitee is enjoined from completing, using, operating, or otherwise enjoying the completed Construction Project or any part thereof, or from any Permitted Purpose of any Deliverable or any Intellectual Property Rights as a result of any claim identified in **Section 5.4**, Engineer shall exercise its best efforts to have such injunction removed at no cost to City or any applicable City Indemnitee. Any failure to secure the removal of such injunction shall not constitute a Force Majeure event. If Engineer fails to secure the removal of such injunction, it shall continue to defend and remedy such claim in accordance with **Section 6.1.**

5.6 No Release. City's acceptance of Engineer's engineering designs, drawings, or specifications or any other Services provided pursuant to this Agreement shall not be construed to relieve Engineer of any obligation under this **Section 5**.

5.7 Survival. The terms and provisions of this **Section 5** shall survive the termination or expiration of this Agreement.

SECTION 6. REPRESENTATIONS OF ENGINEER.

6.1 Standard of Care. The Engineer shall perform and complete the Services in a manner consistent with the level of care, skill, and diligence exercised by other recognized professional Engineers performing Services of a scope, purpose, or magnitude comparable with the nature of the Services to be provided under this Agreement at the time the Services are performed. 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, shall be provided pursuant to the standard of performance for the engineering profession described herein, and shall be in addition to any other representations expressed in this Agreement, or expressed or implied by law, which are hereby reserved unto the City. Engineer shall be responsible for the professional and technical accuracy of all Services performed and/or Deliverables furnished to the City, whether by Engineer, its subcontractors, or others on its behalf. The City's review, approval, or acceptance 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 review, approval, or acceptance be deemed to be the assumption of responsibility by the City for any defect or error in any Deliverables prepared by the Engineer, its employees, associates, agents, or sub-Engineers. Engineer shall promptly correct any defective designs, drawings, models, surveys, specifications, or other Deliverables furnished by the Engineer at no cost to the City. The City's approval, acceptance, use of, or payment for, all or any part of the Engineer's Services hereunder shall in no way alter the Engineer's obligations or the City's rights under this Agreement at law or in equity.

6.2 Professional License. The Engineer represents that it is registered as a professional design firm with the Illinois Department of Financial and Professional Regulation and that all engineers performing Services under this Agreement are properly licensed by the State of Illinois Department of Financial and Professional Regulation.

6.3 Solvency. The Engineer 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 7. INDEMNIFICATION; INSURANCE; LIABILITY.

7.1 INDEMNIFICATION

7.1.1 Professional Services. With respect to the Engineer's provision of professional services under this Agreement, the Engineer, without regard to the availability or unavailability of any insurance, either of the City or of the Engineer, shall indemnify, and hold harmless (hereinafter collectively the **"Professional Services Indemnification Obligations"**), the City, its past, present, and future elected officials, directors, officers, employees, (hereinafter the **"City Indemnitees"**), from and against any and all lawsuits, claims, allegations, demands, losses, damages, injuries, liabilities, fines, settlements, judgments, penalties, costs and expenses, including but not limited to reasonable expert witness fees, attorneys' fees, and costs recoverable under applicable law (hereinafter collectively **"Professional Services Claims"** or **"Professional Services Claim"**), to the extent caused by any willful or negligent error, omission, or act of the Engineer, its agents, consultants, representatives, or of any person employed by Engineer, or of anyone for whose acts the Engineer is legally liable, in the performance or failure to perform professional services under this Agreement.

7.1.2 Liability other than Professional Services, Including Copyright Infringement. With respect to liability other than that arising out of Engineer's provision of professional services under this Agreement, the Engineer without regard to the availability or unavailability of any insurance, either of the City or of the Engineer, shall indemnify, hold harmless and, not excluding the City's right to participate, defend (hereinafter collectively the **"Other Liability Indemnification Obligations"**), the City, its past, present, and future elected officials, directors, officers, representatives, employees, agents, volunteers, and attorneys (hereinafter the **"City Indemnitees"**), from and against any and all lawsuits, claims, allegations, demands, losses, damages, injuries, liabilities, fines, settlements, judgments, penalties, costs and expenses, including but not limited to reasonable expert witness fees, attorneys' fees, and costs (hereinafter collectively the **"Other Liability Claims"** or **"Other Liability Claim"**), which the City

or any City Indemnitee may incur, sustain or be subject to on account of any actual or alleged personal injury, bodily injury, illness, death, or property damage which is proximately caused by or is alleged to be proximately caused by any of the following: (i) any willful or negligent error, omission, or act of the Engineer, its agents, consultants, representatives, or of any person employed by Engineer, or of anyone for whose acts the Engineer is legally liable, in the performance of this Agreement; (ii) the actual or alleged violation, misappropriation or infringement of any Intellectual Property Right (as defined in **Paragraph 5.2**) or unauthorized disclosure or use of trade secrets by Engineer or any person employed by Engineer or anyone for whose acts the Engineer is legally liable in connection with the materials, processes, products, goods, devices or Deliverables (as defined in **Section 5)** provided to the City or City Indemnitees by Engineer, or Engineer's employees, agents or subcontractors. With respect to Engineer's duty to defend the City and City Indemnitees, the Engineer shall engage legal counsel, subject to the approval of the City and Engineer's insurer (which approval may not be unreasonably withheld) and shall assume control of the defense of any Other Liability Claims and pay all expenses incurred in connection with such defense, and when such control of defense is assumed by Engineer's legal counsel. The City may, but does not have the obligation to, engage its own legal counsel, at its own expense, and monitor or associate in the defense of any such matter. Any settlement of any claim or suit against the City related to this Agreement by Engineer must be made only with the prior written consent of the City Attorney, if the settlement requires any action on the part of the City, such consent to not be unreasonably withheld.

7.1.3 Additional Indemnification Obligation requirements. Engineer is not obligated to indemnify the City or City Indemnitees for the City's or the City Indemnitees' own negligence, but the Professional Services Indemnification Obligations and Other Liability Indemnification Obligations shall apply despite any common liability on the part of the City or City Indemnitees and shall not be limited by the limits of any applicable insurance policies required by this Agreement. In the event that any Professional Service Claim and/or Other Liability Claims for indemnification hereunder arises from the negligence or willful misconduct of both the Engineer and the City or City Indemnitees, the Parties agree that any such claims shall be apportioned between the Parties on the basis of their comparative degrees of fault, except as otherwise provided herein.

In the event that any Professional Services Claim and/or Other Liability Claim is asserted, and money is due to the Engineer pursuant to this Agreement, the City may, to protect itself against said Claim, retain reasonable amounts relative to the size and merits of the claim, until such time that all such claims have been settled or have been fully judicially determined and satisfied, and evidence to that effect has been furnished to the satisfaction of the City.

In the event that Engineer is alleged to have infringed upon any Intellectual Property Rights (as defined in **Paragraph 5.2**), in addition to Engineer's Other Liability Indemnification Obligations, the Engineer shall, at the sole discretion of the City and at Engineer's sole expense: (i) procure for the City the right to continue using the infringing subject matter; or (ii) replace or modify the infringing subject matter so that it becomes non-infringing but still complies with the requirements of this Agreement; or (iii) reimburse the City for all payments made to Engineer

relating to or impacted by the infringing material and all costs incurred by the City resulting from such infringement.

To the extent permissible by law, Engineer waives any limits to the amount of its obligations to indemnify, defend, or contribute to any sums due under any Professional Services Claims and/or Other Liability Claims, including any claim by any employee of Engineer that may be subject to the Illinois Workers Compensation Act, 820 ILCS 305/1 *et seq.* or any other related law or judicial decision, including but not limited to *Kotecki v. Cyclops Welding Corporation*, 146 Ill.2d 155 (1991). The City, however, does not waive any limitations it may have under the Illinois Workers Compensation Act, the Illinois Pension Code, or any other statute.

Engineer shall be responsible for any losses and costs, with the exclusion of betterment, to repair or remedy work performed under this Agreement resulting from any negligent act or omission, in the performance of its Services or that of its employees' or anyone for whom Engineer is legally responsible. Acceptance of the Services by the City shall not relieve the Engineer of the responsibility for subsequent correction of any such negligent error or omissions resulting therefrom. All provisions of this Section shall survive completion, expiration, or termination of this Agreement.

The Professional Services Indemnification Obligations and Other Liability Indemnification Obligations set forth in each and every paragraph of **Section 6** shall apply to the fullest extent permitted by law, and in the event any provision hereof is determined to be unenforceable, the Indemnification Obligations shall be severable and the fullest extent of indemnification that may lawfully apply shall remain in full force and effect. The Professional Services Indemnification Obligations and Other Liability Insurance Obligations shall survive the expiration and termination of this Agreement.

7.2 Insurance. Contemporaneous with the Engineer's execution of this Agreement, the Engineer 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 C** to this Agreement. The City shall be included under Engineer's general liability and auto liability insurance as an additional primary insured with respect to claims and/or liability arising out of Services performed for the City by Engineer. All subcontractors shall comply with each and every insurance provision in **Exhibit C**. Engineer shall therefore not allow any subcontractor to commence work/services on any subcontract to perform any part of the Services until it has provided evidence satisfactory to the City that the subcontractor has secured all insurance required under this Agreement. The insurance described herein as set forth in **Exhibit C** shall be maintained for the duration of the Agreement, including any warranty period.

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

7.4 Governmental Immunity. Nothing in this Agreement shall be construed as a waiver of any and all privileges, immunities, or defenses provided to or enjoyed by the City under common law or pursuant to statute, including but not limited to the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-101 *et. seq.*

7.5 Third Party Beneficiaries. It is recognized that the Services performed by Engineer are for the benefit of the City and no other party.

7.6 Limitation of Liability. CITY AND ENGINEER SHALL NOT BE LIABLE TO EACH OTHER 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 EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF OR COULD HAVE FORESEEN ANY SUCH DAMAGES.

7.7 No Control. The Engineer will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences, or procedures, or for the safety precautions and programs in connection with the construction of the subject project(s).

SECTION 8. CONFIDENTIAL INFORMATION.

8.1 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 Engineer from a source other than the City prior to the time of disclosure of said information to the Engineer 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 Engineer or the City; or (iv) to have been supplied to the Engineer 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.

8.2 No Disclosure of Confidential Information by the Engineer. The Engineer 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 Engineer shall hold confidential all Confidential Information and shall not disclose or use such Confidential

Information without express prior written consent of the City. The Engineer shall use reasonable measures at least as strict as those the Engineer uses to protect its own confidential information. Such measures shall include, without limitation, requiring employees and sub-Engineers of the Engineer to execute a non-disclosure agreement before obtaining access to Confidential Information.

8.3 Breach of Confidentiality. In the event of breach of the confidentiality provisions of **Section 7** 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 9. TERM; TERMINATION; and DEFAULT.

9.1 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 Engineer, 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 the Services specified in the Agreement by **December 16, 2022** or to a new date mutually agreed upon by the parties in writing, or (iii) the completion by Engineer 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.

9.2 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 Engineer. In the event that this Agreement is so terminated, the City shall pay Engineer for the Services performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly, or indirectly, to Engineer'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 Engineer'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. Engineer shall provide the City with its Key Project Personnel's e-mail address upon its execution of this Agreement. On receiving such notice, Engineer shall, unless the notice directs otherwise, immediately discontinue all Services under this Agreement. As soon as practicable after receiving the termination notice, Engineer shall submit an invoice to the City showing in detail the Services performed under this Agreement up to the termination date. Engineer's receipt of

payment for Services rendered upon City's termination of this Agreement, is Engineer'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.

If this Agreement is terminated as provided herein, City may require Engineer to provide all finished or unfinished documents and data and other information of any kind prepared by Engineer in connection with the performance of the Services under this Agreement. Engineer shall be required to provide such documents, data, and other information within fifteen (15) days of the request.

9.3 Default. If it should appear at any time that the Engineer 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:

9.3.1. Cure by Engineer. The City may require the Engineer, 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 Engineer and the Services into compliance with this Agreement.

9.3.2. 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 Engineer for the Services performed or reimbursable expenses actually incurred as of the effective date of termination.

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

SECTION 10. COMPLIANCE WITH LAWS AND GRANTS.

10.1 Generally: Permits/Codes/Business Laws/Safety Standards/Grants. Engineer 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. Engineer shall comply with all conditions of any federal, state, or

local grant received by City or Engineer with respect to this Agreement or the Services. Engineer 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 Engineer's, or its sub-Engineers', 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.

10.2 Freedom of Information Act. The Engineer shall, within four (4) business days of the City's request, provide any documents in the Engineer'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. Engineer 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 Engineer request that the City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Engineer 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. Engineer 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 Engineer's request to utilize a lawful exemption to the City.

10.3 No Delinquent Taxes. The Engineer represents and certifies that the Engineer 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 Engineer 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.

10.4 No Collusion. The Engineer represents and certifies that the Engineer 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 Engineer 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 Engineer has, in procuring this Agreement, colluded with any other person, firm, or corporation, then the Engineer 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.

10.5 Patriot Act (USA Freedom Act) Compliance. The Engineer 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 Engineer further represents and warrants to the City that the Engineer 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 Engineer 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.

10.6 Anti-Discrimination Laws. Engineer is an equal opportunity employer and the requirements of 775 ILCS 5/2-105 and 44 III. ADM Code APPENDIX A are incorporated herein as though fully set forth. The Engineer shall comply with all federal and state laws prohibiting discrimination because of or requiring affirmative action based on race, color, religion, sex, sexual orientation, gender identity, marital status, order of protection status, national origin or ancestry, genetic information, 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 D.**

In the event of the Engineer's noncompliance with any provision of the Illinois Human Rights Act or any other applicable law, the Engineer may be declared non-responsible and therefore ineligible for future Agreements or subcontracts with the City, and the Agreement may be cancelled or voided in whole or in part, and such other sanctions or penalties may be imposed, or remedies invoked as provided by statute or regulation. In all solicitations or advertisements for employees placed by it on its behalf, the Engineer shall state that all applicants be afforded equal opportunity without discrimination because of race, color, religion, sex, sexual orientation, gender identity, marital status, order of protection status, national origin or ancestry, genetic information, citizenship status, age physical or mental disability unrelated to ability, military status, or an unfavorable discharge from military services.

10.7 Americans with Disabilities Act. Engineer 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.

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

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

10.10 Execution of Certifications. Engineer 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 D**.

SECTION 11. GENERAL PROVISIONS.

11.1 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.

11.2 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.

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

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

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

11.6 Waiver. Any failure of either the City or the Engineer 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.

11.7 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.

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

11.9 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.

11.10 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.

11.11 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.

11.12 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.

11.13 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.

11.14 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 Engineer:
Kenig, Lindgren, O'Hara, Aboona, Inc.
Attn: Michael A. Werthmann
9575 west Higgins Road, Suite 400
Rosemont, IL 60018
E-Mail: mwerthmann@kloainc.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

11.15 Contract Numbering. The faces of all invoices and documents shall contain the following contract number **338** for reference purposes.

11.16 Electronic Signature. 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.

11.17 Authority to Enter Agreement. Engineer has all requisite power and authority to conduct its business and to execute, deliver, and perform the Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and bind each respective Party. If the Engineer is a corporation, the legal name of the corporation shall be set forth below, together with the signature of the officer or officers authorized to sign contracts on behalf of the corporation; if Engineer is a co-partnership the true name of the firm shall be set forth below, together with the signatures of all partners; and if the Engineer is an individual, the Engineer shall sign his or her name below. If signature is by an agent other than an officer of a corporation or a member of a partnership, a power-of-attorney must be attached hereto.

IN WITNESS WHEREOF, the parties have entered into this Agreement this 22nd day of November, 2022.

CITY OF WHEATON, an Illinois municipal corp.

By: Philip J. Suess Date: 11/22/2022

ATTEST:

BY: Andrea Rosedale

Title: City Clerk

Kenig, Lindgren, O'Hara, Aboona, Inc.

BY: Date: 11-14-22

Its: Principal

ATTEST:

BY:

Title: President