

**RESOLUTION R-2023-02**

**A RESOLUTION AUTHORIZING THE EXECUTION OF AGREEMENT NO. 350 WITH SIKICH, LLP FOR AUDITING SERVICES FOR A FIVE (5) YEAR TERM AND A TOTAL AMOUNT NOT TO EXCEED \$280,510**

**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 solicited a Request for Proposal package (RFP Number 22-204) for Auditing Services; and

**WHEREAS**, staff received and reviewed two proposals for Auditing Services; and

**WHEREAS**, staff determined that each firm was fully qualified to perform the scope of services therefore cost was the deciding factor; and

**WHEREAS**, Sikich, LLP was determined to be the lowest responsive and responsible Proposer with an amount of \$280,510 for Auditing Services; and

**WHEREAS**, the City budgeted \$46,105 for auditing services in the Finance Department accounting services account in the General Fund. The first-year cost of \$50,750 is \$4,645 greater than budget. The General Fund has the reserves available to accommodate the additional cost; and

**WHEREAS**, the corporate authorities of the City of Wheaton, DuPage County, Illinois find it reasonable and appropriate to enter into an agreement with Sikich, LLP for Auditing Services for a five (5) year term and a total amount not to exceed \$280,510.

**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. 350 with Sikich, LLP for Auditing Services: a copy of that Agreement being on file with the City Clerk's office, and which is incorporated herein as if fully set forth as Exhibit A.

**ADOPTED** the 17<sup>th</sup> day of January 2023.

  
\_\_\_\_\_  
Mayor

ATTEST:

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

Roll Call Vote

Ayes: Councilwoman Bray-Parker  
Councilman Brown  
Mayor Suess  
Councilwoman Fitch  
Councilwoman Robbins  
Councilman Weller

Nays: None

Absent: Councilman Barbier

Motion Carried Unanimously

**CITY OF WHEATON, ILLINOIS  
PROFESSIONAL SERVICES AGREEMENT FOR  
AUDITING SERVICES**

**THIS AGREEMENT** is made and entered into this 18<sup>th</sup> day of January 2023, by and between the **CITY OF WHEATON**, an Illinois home rule municipal corporation ("**City**"), located at 303 W. Wesley Street, Wheaton, Illinois, 60187 and Sikich LLP, an Illinois limited liability partnership ("**Auditor**"), located at 1415 W. Diehl Road, Suite 400, Naperville, Illinois. City and Auditor are at times collectively referred to hereinafter as the "Parties."

**RECITALS**

**WHEREAS**, the City has determined that it is reasonable and necessary to engage a professional auditing services firm to provide auditing services for the City, consistent with the Request for Proposal ("**RFP**") which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit A**; and

**WHEREAS**, the Auditor has submitted a Statement of Work and a Schedule of Professional Fees and Expenses in its proposal for the provision of professional auditing services for the City; the Statement of Work and Schedule of Professional Fees and Expenses are hereinafter collectively referred to as the ("**Proposal**") and are attached hereto and incorporated herein as if fully set forth as **Group Exhibit B**; and

**WHEREAS**, Auditor represents that it has the necessary expertise and experience to furnish such professional auditing services upon the terms and conditions set forth herein below; and

**WHEREAS**, the City finds that the Proposal submitted by Auditor is the most appropriate for the provision of audit services to the City; and

**WHEREAS**, the Parties desire to enter into an agreement for the provision of audit services by the Auditor to the City, in accordance with the Proposal.

**NOW, THEREFORE**, in consideration of the Recitals and the mutual covenants, agreements, and conditions set forth in this Professional Services Agreement for Auditing Services, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Auditor 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 Professional Services Agreement for Auditing



Services (hereinafter the “**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 are attached as **Group Exhibit A**;
- b. The Auditor’s Proposal and all related documents are 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**.

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 Conflict Between Text of Agreement and an Exhibit.** In the event of a conflict between the text of this Agreement and any attachment or exhibit, the text of this Agreement shall control.

**1.3 Conflict Between Exhibits.** In the event of a conflict between the RFP and the Proposal, the RFP shall control.

## **SECTION 2. SCOPE OF SERVICES.**

**2.1 Selection Of and Acceptance By Auditor.** The City shall, and does hereby, confirm the selection of the Auditor as the party designated to provide professional audit services (“**Services**”) to the City in strict accordance with this Agreement, including the terms and conditions contained in the RFP (**Group Exhibit A**) and Statement of Work in the attached Proposal (**Group Exhibit B**). For and in consideration of the Agreement Amount indicated in **Section 4.1** herein, the Auditor shall, and does hereby, accept the selection and agrees to provide professional audit services to the City in strict accordance with this Agreement, including the terms and conditions contained in the **Group Exhibit A** and **Group Exhibit B**. 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 Commencement of Services.** The Auditor agrees to begin the examination of the City’s financial statements and financial operations as soon after January 1, 2023, to the mutual



convenience of the City and the Auditor ("**Commencement**") but such Commencement shall be in accordance with the Time Requirements in the RFP, unless both Parties agree in writing to different schedule. The Auditor further agrees that it will conduct said examination with diligence as to ensure its completion in accordance with the Time Requirements in the RFP or with such other schedule agreed to in writing by both Parties, with such efficiency and thoroughness as is expected under Generally Accepted Auditing Standards. The examination and Auditor's Reports shall be completed and delivered to the City in accordance with the Time Requirements in the RFP, and in accordance with any other completion and delivery schedule which may be separately agreed upon in writing by the Parties. The Auditor shall file a State Comptroller's report prior to six-months following the fiscal year-end each year.

**2.3      Working Papers.** The Auditor agrees to adopt reasonable procedures as to ensure the safe custody of its working papers. The Auditor agrees to make the working papers available for examination by the City as requested, and to provide copies of such working papers at the request of the City.

**2.4      Corrections.** The Auditor shall be responsible for the quality, technical accuracy, completeness and coordination of all reports, documents, data, information and other items and Services under this Agreement. The Auditor shall promptly provide, to the satisfaction of the City all corrective services necessary as a result of the Auditor's errors, omissions, or negligent acts.

**2.5      Reporting.** The Auditor shall regularly report to the City's Assistant Finance Director, or her designee, regarding the progress of the Services during the term of this Agreement. Such reports may be provided in person or over the telephone at the discretion of the City.

**2.6      Additional Services.** The Auditor shall provide only the Services specified in this Agreement, and the attached **Group Exhibits A and B**. The Auditor acknowledges and agrees that the City shall not be liable for any costs incurred by the Auditor in connection with any services provided by the Auditor 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 Auditor 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. A written document containing a detailed description of the Additional Services to be provided and the cost for such Additional Services, consistent with the terms of this Agreement, shall be included as an attachment ("**Change Order Attachment**") to any Change Order for Additional Services. Approved Change Orders shall be incorporated into this Agreement as an Amendment to this Agreement. 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 Auditor's Schedule of Fees and Expenses 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 Auditor and set forth in the Change Order Attachment before the commencement of any Additional Services.

**2.7 Changes and Alterations.** Any changes or alterations to the scope, cost, milestones, deadlines or other significant factors pertaining to this Agreement 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 that increases the Agreement price 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.

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

### **SECTION 3. PERSONNEL/SUBCONTRACTORS**

**3.1 Auditor's Representative.** The Auditor shall designate an individual who will serve as Auditor's authorized representative throughout the term of this Agreement and who shall be readily available to respond to communications from the City. This representative shall be subject to receive instructions and shall have full authority to execute the directions of the City without delay. Auditor shall also provide the City with the name, email address and phone number of the Auditor's representative who, in the case of an off-hours emergency, can be readily accessible and available for a quick response. The Auditor shall notify the City as soon as practicable prior to terminating the employment of, reassigning, or receiving notice of the resignation of, the Auditor's representative, and shall immediately notify the City in writing of any change in the identity and/or contact information of the Auditor's representative. The Auditor 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 Requirements as a result of any such termination, reassignment, or resignation.

**3.2 Availability of Personnel.** The Auditor shall provide all personnel necessary to complete the Services including, without limitation, the Auditor's representative identified in this Agreement.



**3.3      No Subcontractors.** The Auditor shall perform the Services with its own personnel and under the management, supervision, and control of its own organization. The use of subcontractors for the performance of Services required under this Agreement shall not be allowed.

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

#### **SECTION 4. COMPENSATION AND METHOD OF PAYMENT.**

**4.1      Agreement Amount.** The total amount to be paid by the City for all Services provided by the Auditor pursuant to this Agreement shall not exceed **\$50,750.00** for the audit of calendar year ending 2022; **\$53,300.00** for the audit of calendar year ending 2023; **\$55,970.00** for the audit of calendar year ending 2024; **\$58,770.00** for the audit of calendar year ending 2025; and **\$61,720.00** for the audit of calendar year ending 2026 ("**Agreement Amount**"), including reimbursable expenses, without the prior express written authorization of the City. The Auditor acknowledges and agrees that 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, which shall be the sole responsibility of Auditor. All claims or right to claim additional compensation by reason of the payment of any such tax, contribution, premium, or any costs, royalties, or 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 are hereby waived and released by Auditor.

**4.2      Invoices and Payments.** The Auditor shall be paid in accordance with the amounts set forth in the Proposal (**Group Exhibit B**). The Auditor 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 Auditor 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 Auditor 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 Interest Waiver.** Auditor 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.

**4.5 Account Records.** The Auditor shall maintain records showing actual time devoted and costs incurred in connection with the Services performed under this Agreement (hereinafter "**Account Records**") and shall permit the authorized representative of the City to inspect, audit and make copies of all such Account Records of the Auditor for the Services done under this Agreement. All such Account Records shall be clearly identifiable. The Account 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. AUDIT DOCUMENTATION AND AUDIT REPORTS**

**5.1 Audit Documentation.** The record of audit procedures performed, relevant audit evidence obtained, and conclusions reached by the auditor shall be considered audit documentation ("**Audit Documentation**") under this Agreement. The Audit Documentation for this Agreement is the property of Auditor and constitutes Confidential Information not to be disclosed to any other person or persons without City's written permission, unless otherwise required pursuant to professional standards, statutory or regulatory authority, or court order. The foregoing obligation of confidentiality shall not apply to any information that was in the public domain at the time of the communication thereof to Auditor. However, subject to applicable laws and regulations, audit documentation and appropriate individuals will be made available upon request and in a timely manner to oversight, regulatory, state agencies or their designees, or the U.S. Government Accountability Office for purposes of a quality review of the audit, to resolve audit findings, or to carry out oversight responsibilities. Auditor shall notify City of any such request. If requested, access to such Audit Documentation shall be provided under the supervision of Auditor's personnel. Upon request, Auditor may provide copies of selected Audit Documentation to the aforementioned parties. The City acknowledges and understands that such parties may intend, or decide, to distribute the copies or information contained therein to others, including other governmental agencies. Additionally, as a result of Auditor's prior or future Services to City, Auditor might be requested or required to provide information or documents to the City or a third party in a legal, administrative, regulatory inquiry or arbitration or similar proceeding in which Auditor is not a party. If this occurs, Auditor's efforts in complying with such requests will be deemed billable to City as a separate engagement. Auditor shall be entitled to compensation for its time and reasonable reimbursement for its expenses in complying with the request. The Audit Documentation shall be retained for a minimum of seven

years after the Audit Report release date. Auditor shall return original City records upon completion of the Services rendered under this Agreement. City acknowledges and understands that when records are returned to the City, it is the City's responsibility to retain and protect the records for possible future use, including potential examination by any government or regulatory agencies.

**5.2 Final Audit Reports.** Final audit reports ("**Audit Reports**") shall be issued to the City upon the City's approval of the preliminary drafts. Auditor's Services for each calendar year ends on delivery of Auditor's Audit Report for that year. Any follow-up Services that might be required will require a separate agreement or an amendment to this Agreement. Audit Reports rendered to the City by Auditor are the exclusive property of the City for use subject to applicable laws and regulations.

**5.3 Warranty.** Auditor warrants that (i) all Intellectual Property Rights that may exist in the Audit Report(s) furnished under this Agreement in connection with the Services are now (or shall at their incorporation into the Services be) vested in the Auditor or (ii) Auditor will be able to grant the City license rights to use to the intellectual property in the Audit Report(s).

**5.4 Infringement Claims.** If the City becomes subject to a claim of intellectual property infringement or if Auditor believes it may be subject to such a claim, Auditor shall remedy such claim at its expense and at its option by any reasonable means, including: (i) replacing or modifying the allegedly infringing elements so that it becomes non-infringing but still complies with the requirements of the Agreement, or (ii) securing for City the right to continue to use such element(s), without loss of functionality and without adversely affecting any license and rights granted hereunder; or (iii) reimbursing the City for all payments made to Auditor relating to or impacted by the infringing material and all costs incurred by the City resulting from such infringement. Auditor shall give prompt written notice to the City if Auditor believes that any information or technology furnished by City or that City directs the Auditor to incorporate into the 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 any Audit Report or any Intellectual Property Rights as a result of any claim identified in **Section 5.4**, Auditor 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 Auditor 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 Intellectual Property Indemnification.** Auditor agrees to indemnify, defend, and hold the City harmless from and against any loss, cost, damage, liability, or expense (including attorney's fees and other reasonable litigation expenses) suffered or incurred by the City in connection with any Intellectual Property Rights infringement claim by any third party. If a claim is made or an action brought that the Audit Report(s) provided (or any component thereof) to the City, infringes a third-party patent, copyright, or trademark, or misappropriates any trade



secret or other Intellectual Property Right, the Auditor shall defend City from, in the manner and form determined in the sole discretion of the City, and indemnify and hold harmless City against, such claim and any resulting costs, damages and attorneys' fees arising out of or incurred as a result of such claim, together with all amounts finally awarded or agreed to in a settlement. The City shall have the sole control of the defense and all related investigation, defense or settlement of such claim or action.

**5.7 No Release.** City's acceptance of any Audit Report(s) or any other Services provided pursuant to this Agreement shall not be construed to relieve Auditor of any obligation under this **Section 5**.

**5.8 Survival.** The terms and provisions of **Section 5** and all of its subsections shall survive the termination or expiration of this Agreement.

## **SECTION 6. REPRESENTATIONS OF AUDITOR.**

**6.1 Standard of Care.** The Auditor shall perform and complete the Services in a manner consistent with the level of care, skill, and diligence exercised by other recognized professional auditors 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. Auditor shall assign staff that, in Auditor's judgment, has sufficient education, training or experience to perform the tasks assigned to them. Auditor shall be responsible for the professional and technical accuracy of all Services performed and/or Audit Reports furnished to the City, whether by Auditor, 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 Auditor, its employees, agents or associates for the exercise of skill and diligence to promote the accuracy and competency of any document or Service provided, 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 Audit Report prepared by the Auditor, its employees, associates, agents, or subcontractors. The City's approval, acceptance, use of, or payment for, all or any part of the Auditor's Services hereunder shall in no way alter the Auditor's obligations or the City's rights under this Agreement at law or in equity.

**6.2 Solvency.** The Auditor 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 Indemnification and Liability.** To the fullest extent permitted by law, Auditor shall indemnify, defend and hold the City, its past, present, and future elected officials, directors, officers, employees, (hereinafter collectively referred to as the "**City**")



**Indemnitees**"), harmless from and against any 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, for or on account of any injury or damage which may arise solely as a result of the gross negligence or willful misconduct of the Auditor, its subcontractors, and their respective employees and agents, in performing attest Services. Except as to professional liability, such indemnification shall not be limited by reason of the enumeration of any insurance coverage herein provided. City will promptly notify Auditor of any such claim, demand, lawsuit or proceeding. The City shall have control over the defense and settlement of any such claim, demand, lawsuit or proceeding, in which case Auditor shall pay all damages, settlements, costs and expenses, including defense costs, fees and expenses, as required by the indemnification in this provision.

To the fullest extent permitted by law, Auditor agrees it will defend, indemnify, and hold harmless the City and City Indemnitees against any and all losses, damages, injuries, liabilities, fines, settlements, judgments, penalties, costs and expenses, including but not limited to reasonable expert witness fees, attorneys' fees, and costs which the City and City Indemnitees may hereafter sustain, incur, or be required to pay arising out of Auditor's performance or failure to adequately perform its non-attest Service obligations pursuant to this Agreement.

Auditor and its partners, directors, employees, and agents shall not be liable to the City for any amount in excess of the amount of professional liability insurance required under this Agreement as set forth in **Exhibit C** to this Agreement, except to the extent finally determined to have resulted from the willful misconduct or fraudulent behavior of Auditor relating to such Services.

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, PUNITIVE, OR EXEMPLARY DAMAGES RELATED TO AUDITOR'S SERVICES PROVIDED UNDER THIS AGREEMENT AND/OR EITHER PARTY'S USE OF E-MAIL TRANSMISSIONS, INCLUDING, BUT 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.

The terms of this section shall apply to any claims of any kind, including but not limited to, contract, tort, or negligence of the City or Auditor.

**7.1.2 City Negligence.** Auditor is not obligated to indemnify the City or City Indemnitees for third-party lawsuits, claims, demands, damages, liabilities, losses, and expenses (including reasonable attorneys' fees and administrative expenses) sustained or incurred by the City solely as a result of the acts or omissions of the City or the City

Indemnitees. In the event that any Claim for indemnification hereunder arises from (i) the negligence or willful misconduct of both the Auditor and the City or City Indemnitees related to Auditor's non-attest Services or (ii) the willful misconduct of both the Auditor and the City or City Indemnitees related to Auditor's attest Services, 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.

**7.1.3 Kotecki Waiver.** Auditor agrees to assume the entire liability for all personal injury claims suffered by its employees and waives any limitation of liability defense based upon the Illinois Workers Compensation Act, 820 ILCS 305/1 *et seq.* and cases decided thereunder. Auditor agrees to indemnify and defend the City from and against all such loss, expense, damage, or injury, including reasonable attorneys' fees, which the City may sustain as a result of personal injury claims by Auditor's employees, except to the extent those claims arise as a result of the City's own negligence.

**7.1.4 Severability and Survival.** In the event any provision of this **Section 7.1** 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 terms and provisions of this **Section 7.1** shall survive the expiration and termination of this Agreement.

**7.2 Insurance.** Contemporaneous with the Auditor's execution of this Agreement, the Auditor 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 Auditor'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 Auditor. 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 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 Auditor are for the benefit of the City and no other party.



## **SECTION 8. CONFIDENTIAL INFORMATION.**

**8.1 Confidential Information.** The term "**Confidential Information**" as used throughout this Agreement 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; investment and financial information; 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; the existence of, and terms and conditions of, this Agreement; and other information that should reasonably be understood to be confidential. City Confidential Information shall not include information that can be demonstrated: (i) to have been rightfully in the possession of the Auditor from a source other than the City prior to the time of disclosure of said information to the Auditor 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 Auditor or the City; or (iv) to have been supplied to the Auditor 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 Auditor.** The Auditor 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. Auditor shall treat the Confidential Information as it would treat its own confidential trade secret or business information and shall only use such information for purposes of performing its obligations under this Agreement. Except as otherwise provided in this paragraph or in Section 5, Auditor agrees not to disclose City Confidential Information to anyone except (i) its own respective employees who have a need to know such information, which employees shall be required to maintain the confidentiality of the Confidential Information in the same manner as they would the confidential trade secret or business information in their own company, or (ii) third-party service providers serving the City's account, but only if Auditor maintains internal policies, procedures, and safeguards designed to protect the confidentiality of City's Confidential Information. Auditor shall enter into confidentiality agreements with all service providers to maintain the confidentiality of City's Confidential Information and shall take reasonable precautions to determine that such service providers have appropriate procedures in place to prevent the unauthorized release of City Confidential Information to others. In the event Auditor is unable to secure an appropriate confidentiality agreement, Auditor shall request City's written consent prior to sharing any City Confidential Information with the third-party service provider. Auditor shall remain responsible for the work provided by any such third-party serviced providers engaged by Auditor. If Auditor is compelled to disclose City Confidential Information by law, legal process or authority, Auditor will, to the extent not prohibited by law, immediately notify the City in writing prior to the disclosure of such information. If Auditor becomes aware of any unauthorized access, use or disclosure of City Confidential Information, it shall: (i) take prompt and appropriate action to prevent further unauthorized access, use or disclosure; (ii) notify and cooperate with the City and any government authorities with respect



to the investigation and mitigation of any such unauthorized access, use or disclosure; (iii) take such other actions at the Auditor's expense as City may reasonably require to notify others regarding such unauthorized access, use, or disclosure, and remedy such unauthorized access, use of disclosure.

**8.3 Security of Confidential Information.** Auditor has and throughout the term of this Agreement and at any time thereafter shall maintain adequate physical, technical, administrative, and organizational safeguards to protect City's Confidential Information; ensure the security and confidentiality of City's Confidential Information and to protect City's Confidential Information from any unauthorized collection, access, use, storage, disposal, and disclosure. All safeguards will take into account the nature of City's Confidential Information and the commensurate risks associated with City's Confidential Information. Upon the termination of this Agreement, Auditor agrees to maintain all applicable safeguards regarding City Confidential Information and to return Confidential Information to City upon City's request.

**8.3 Breach of Confidentiality.** In the event of breach of the confidentiality provisions of **Section 8** and **Section 5** 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. Unless otherwise provided for elsewhere in 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 Auditor, and shall continue in full force and effect until the time that Auditor provides the City a final and complete Audit Report of calendar year ending 2026 ("**Term**"), during which Term the Auditor shall provide Services, including separate Audit Reports, for the calendar years ending December 2022, 2023, 2024, 2025 and 2026, unless otherwise terminated earlier. 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 either Party may terminate this Agreement, with or without cause, at any time upon fifteen (15) calendar days prior written notice to the other Party. Upon termination, the Auditor shall cease performance of all Services under this Agreement and shall, within fifteen (15) days of the effective date of termination, turn over to the City all information, records, documents, data, property, publications, or other material theretofore received from the City under or resulting from this Agreement, all of which is the property of the City. The Auditor shall submit a final invoice for

all work done through the effective date of termination. In the event that this Agreement is so terminated, the City shall pay Auditor for the Services performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly or indirectly, to Auditor's breach of this Agreement. In the event of termination, the City shall be free to abandon the Services and retain another Auditor to complete the Services. 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 Auditor's representative. 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. Auditor shall provide the City with its representative's e-mail address upon its execution of this Agreement. On receiving such notice, Auditor shall, unless the notice directs otherwise, immediately discontinue all Services under this Agreement. As soon as practicable after receiving the termination notice, Auditor shall submit an invoice to the City showing in detail the Services performed under this Agreement up to the termination date. Auditor's receipt of payment for Services rendered upon City's termination of this Agreement, is Auditor'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.

**9.3 Default.** If it should appear at any time that the Auditor 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 Auditor.** The City may require the Auditor, 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 Auditor 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 Auditor 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 Auditor, any and all costs, including attorneys' fees and administrative expenses, incurred by the City as the result of any Event of Default by the Auditor or as a result of actions taken by the City in response to any Event of Default by the Auditor.



## **SECTION 10. COMPLIANCE WITH LAWS AND GRANTS.**

**10.1 Generally: Permits/Codes/Business Laws/Safety Standards/Grants.** Auditor 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, 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. Auditor shall comply with all conditions of any federal, state, or local grant received by City or Auditor with respect to this Agreement or the Services. Auditor 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 Auditor's, 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 Auditor shall, within four (4) business days of the City's request, provide any documents in the Auditor'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. Auditor 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 Auditor request that the City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Auditor 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. Auditor 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 Auditor's request to utilize a lawful exemption to the City.

**10.3 No Delinquent Taxes.** The Auditor represents and certifies that the Auditor 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 Auditor 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 Auditor represents and certifies that the Auditor 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 Auditor 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 Auditor has, in procuring this Agreement, colluded with any other person, firm, or corporation, then the Auditor 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 Sexual Harassment Policy.** The Auditor shall certify that it has a written sexual harassment policy in full compliance with Section 2-105(A)(4) of the Illinois Human Rights Act, 755 ILCS 5/2-105(A)(4).

**10.6 Patriot Act (USA Freedom Act) Compliance.** The Auditor 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 Auditor further represents and warrants to the City that the Auditor 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 Auditor 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.

**10.7 Anti-Discrimination Laws.** Auditor acknowledges that it is an equal opportunity employer and the requirements of 775 ILCS 5/2-105 and 44 Ill. Adm. Code Appendix A are incorporated herein by reference as if fully set forth. The Auditor 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 Auditor's noncompliance with any provision of the Illinois Human Rights Act or any other applicable law, the Auditor 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 Auditor 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.

**10.8 Americans with Disabilities Act.** Auditor 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.

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

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

**10.11 Illinois Property Tax Code (35 ILCS 200/18-50.2).** The City of Wheaton is required under Section 100/18-50.2 of the Illinois Property Tax Code (35 ILCS 200/18-50.2) to collect and electronically publish information from vendors/contractors, and sub-vendors/subcontractors pertaining to their status as a minority-owned, women-owned, or veteran-owned business. Vendors/Contractors seeking contract award are required to complete the City's Vendor/Contractor/Subcontractor Information Reporting Form and return with their submittal to the City. This information will be electronically published on the City's website in compliance with the Property Tax Code's vendor information collection and reporting requirements. Additionally, vendors/contractors are required to provide this form to all sub-vendors/subcontractors providing goods, work, or services to the City and shall return completed forms to the City's Procurement Officer prior to the subcontractor's performance of work or services.

**10.12 Execution of Certifications.** Auditor 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 Auditor to any other person, firm, or corporation without the



prior written consent of the other party. Any attempted assignment of this Agreement made without such consent shall be void and of no effect, at the option of the non-assigning party.

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

**11.5 News Releases.** The Auditor 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 Auditor 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, electronic virus attack or infiltration, acts of civil or military disturbance, or war, strike and other labor disputes, fires, floods, other catastrophes, and other forces 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 evidenced 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 Auditor:

Sikich, LLP  
1415 W. Diehl Road, Suite 400  
Naperville, IL 60653  
Anthony M. Cervini, CPA, CFE

If to the City:

City of Wheaton  
Attn: City Clerk  
303 W. Wesley Street, PO Box 727  
Wheaton, IL 60187-0727  
E-Mail: [cityclerk@wheaton.il.us](mailto:cityclerk@wheaton.il.us)

With a copy to:

Sikich LLP  
1415 W. Diehl Road, Suite 400  
Naperville, IL 60653  
Attention: Office of General Counsel

**11.15 Contract Numbering.** The faces of all invoices and documents shall contain the following contract number **350** 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.** Auditor 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 Auditor 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 Auditor 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 Auditor is an individual, the Auditor 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 18th day of January, 2023.

CITY OF WHEATON, an Illinois municipal corp.

By: Philip J. Suess Date: 1/18/2023

ATTEST:

BY: Andrea Renedale

Title: City Clerk

Sikich, LLP

BY: [Signature] Date: 1/17/2023

Its: Partner

ATTEST:

BY: Dawn M. Saylor

Title: Admin