

RESOLUTION R-2024-12

**A RESOLUTION AUTHORIZING THE EXECUTION OF AGREEMENT NO. 441 WITH  
FOSTER & FOSTER, INC. FOR ACTUARIAL SERVICES FOR A FIVE (5) YEAR TERM  
AND A TOTAL AMOUNT NOT TO EXCEED \$87,000**

**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 23-214) for Actuarial Services and received and reviewed four (4) proposals; and

**WHEREAS**, staff determined that the proposal submitted by Foster & Foster, Inc. meets the City's needs; and

**WHEREAS**, Foster & Foster, Inc. submitted a proposal to provide Actuarial Services for the City for a five (5) year term for a total amount not to exceed \$87,000 (Year 1-\$14,700, Year 2-\$19,600, Year 3-\$15,600, Year 4-\$20,600, and Year 5-\$16,500); and

**WHEREAS**, the City budgeted funds in the 2024 General Fund-Finance Department Actuarial Services account for a total amount of \$17,000 for Actuarial Services; and

**WHEREAS**, both parties agree to the terms and conditions set forth in the Request for Proposal and the agreement contained in the City's proposal package for Actuarial Services; and

**WHEREAS**, the corporate authorities of the City of Wheaton, DuPage County, Illinois find it reasonable and appropriate to enter into an agreement with Foster & Foster, Inc., located at 184 Shuman Boulevard, Suite 305, Naperville, Illinois 60563, for Actuarial Services for a five (5) year term and a total amount not to exceed \$87,000.

**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. 441 with Foster & Foster, Inc., for Actuarial Services; and that a copy of that certain City of Wheaton Agreement No. 441 is on file with the City Clerk's office and is incorporated herein as if fully set forth as Exhibit A.

**ADOPTED** this 5<sup>th</sup> day of February 2024.

  
Philip J. Suer  
Mayor

ATTEST:

  
Andrea Resedale

City Clerk

Roll Call Vote:

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

Nays: None

Absent: None

Motion Carried Unanimously

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

THIS AGREEMENT is made and entered into this 6<sup>th</sup> day of February 2024, by and between the CITY OF WHEATON, an Illinois municipal corporation ("City"), located at 303 W. Wesley Street, Wheaton, Illinois, 60187 and Foster & Foster, Inc. ("Actuary"), located at 184 Shuman Blvd., Suite 305, Naperville, Illinois 60563. City and Actuary 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 actuarial services firm to provide actuarial 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 Actuary has submitted a proposal to provide professional actuarial services for the City ("Proposal"), which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit B**, and represents that it has the necessary expertise and experience to furnish such professional actuarial services upon the terms and conditions set forth herein below; and

WHEREAS, the City finds that the Actuary's proposal meets the City's requirements for the professional actuarial 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 Actuary'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**.

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 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 Actuary to perform professional actuarial services ("Services") in strict accordance with this Professional Services Agreement, including the terms and conditions contained in the RFP (**Group Exhibit A**) and scope of services in the attached Proposal (**Group Exhibit B**). For and in consideration of the Agreement Amount indicated in **Section 4.1** herein, the Actuary 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 actuarial services required under this Agreement. 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 Client Information.** The City shall provide Actuary with all such direction, materials, information, and access to a City representative as may be necessary for Actuary to render the Services. Actuary shall not be responsible for verifying the accuracy or completeness of any information supplied to Actuary by the City. To the extent such information is known by the Actuary to be inaccurate or incomplete, written notice shall be given to the City of the nature of the inaccurate or incomplete information and any material, time, or expense required to correct the information shall be billed as an Additional Service outside of the relevant scope of services. Upon request of the City at any time, or the suspension or termination of this Agreement, Actuary shall promptly return to the City all documents provided to Actuary by the City during the performance of the Services.

**2.3 Reporting.** The Actuary shall regularly report to the City's Finance Director, or his 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.

**2.4 Time of Performance.** The Actuary shall perform the Services within the Term of this Agreement as set forth in **Section 9.1** of this Agreement, and in accordance with the

schedule of services as indicated in the attached Proposal (**Group Exhibit B**), to the extent such a schedule of services is provided in the Proposal, and in accordance with any other completion schedule or milestones which may be separately agreed upon in writing by the Parties. Actuary represents that it has the professional personnel required to perform the Services in conformance with such conditions. Upon request of City, Actuary shall provide a more detailed schedule of anticipated performance to meet the schedule of services.

**2.5 Additional Services.** The Actuary shall provide only the Services specified in this Agreement, and the attached **Group Exhibits A and B**. The Actuary acknowledges and agrees that the City shall not be liable for any costs incurred by the Actuary in connection with any services provided by the Actuary 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 Actuary 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 Actuary'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 Actuary before the commencement of any Additional Services.

**2.6 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 \$35,000 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.

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

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

**3.1      Actuary's Representative.** The Actuary shall designate an individual who will serve as Actuary'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. Actuary shall also provide the City with the name, email address and phone number of the Actuary's representative who, in the case of an off-hours emergency, can be readily accessible and available for a quick response. The Actuary shall notify the City as soon as practicable prior to terminating the employment of, reassigning, or receiving notice of the resignation of, the Actuary's representative, and shall immediately notify the City in writing of any change in the identity and/or contact information of the Actuary's representative. The Actuary 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.

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

**3.3      Use of Subcontractors.** The Actuary 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 Actuary shall be acceptable to, and approved in advance by, the City. The City's approval of any subcontractor or subcontract shall not relieve the Actuary 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 Actuary. For purposes of this Agreement, the term "Actuary" shall be deemed also to refer to all subcontractors of the Actuary, and every subcontract shall include a provision binding the subcontractor to all provisions of this Agreement. Upon the City's request Actuary 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 actuarial practices, the Actuary shall immediately upon notice from the City remove and replace such personnel or subcontractor. The Actuary 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 Actuary or with any vendor solicited or recommended by the Actuary.

**3.6     Corporate Authorities of the City.** Notwithstanding any provision of this Agreement, any negotiations, or agreements with, or representations by the Actuary 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 Actuary 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 Actuary for the Services performed under this Agreement shall not exceed **\$87,000** (Year 1-\$14,700, Year 2-\$19,600, Year 3-\$15,600, Year 4-\$20,600, and Year 5-\$16,500), including reimbursable expenses, without the prior express written authorization of the City.

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

**4.5 Interest Waiver.** Actuary 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 Actuary 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 Actuary 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 Ownership of Deliverables.** Except to the extent of Actuary's proprietary techniques, methodologies and report formats (collectively, "Actuary's Proprietary Information"), all documents, data, and other tangible materials authored or prepared and delivered by Actuary to the City under the terms of this Agreement (collectively the "Deliverables"), are the sole and exclusive property of the City once paid for by the City, unless it is otherwise excused from payment. 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. Actuary shall deliver such Deliverables to the City upon its request, upon termination of this Agreement, or in any event upon completion of the Services.

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 Actuary within thirty (30) days after receipt of notice from the City specifying the deficiency, at no cost to the City. Actuary'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 Actuary or its respective subcontractors, subject to the license granted herein. With respect to such Deliverables and other Intellectual

Property Rights used or delivered in the performance of Services, Actuary, upon execution of this Agreement, grants to the City (for use by the City and its employees, contractors, and agents) an irrevocable, perpetual, nonexclusive, worldwide, royalty-free license to use the Intellectual Property Rights included or contained in or incorporated into the Deliverables, in the ordinary course of the City's business. 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, in the course of the City's business. The Actuary shall obtain for the City substantially similar licenses from its consultants and subcontractors consistent with this Agreement. Actuary's obligation shall be to use commercially reasonable efforts to obtain such license rights and in the event the Actuary cannot obtain a substantially similar license from a consultant or subcontractor as required herein, Actuary 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 the purpose for which it is needed.

**5.3 Warranty.** Actuary 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 Services be) vested in the Actuary or (ii) Actuary will be able to grant the City the license rights referred to in **Section 5.2**.

**5.4 Infringement Claims.** If the City becomes subject to a claim of intellectual property infringement or if Actuary believes it may be subject to such a claim, Actuary 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 Actuary relating to or impacted by the infringing material and all costs incurred by the City resulting from such infringement. Actuary shall give prompt written notice to the City if Actuary believes that any information or technology furnished by City or that City directs the Actuary 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 Deliverable or any Intellectual Property Rights as a result of any claim identified in **Section 5.4**, Actuary 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 Actuary 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.** Actuary 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 Deliverables 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 Actuary 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 Deliverable(s) or any other Services provided pursuant to this Agreement shall not be construed to relieve Actuary of any obligation under this **Section 5.**

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

## **SECTION 6.    REPRESENTATIONS OF ACTUARY.**

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

**6.2    Solvency.** The Actuary 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, Actuary, without regard to the availability or unavailability of any insurance, either of the City or of the Actuary, shall indemnify, and hold harmless, the City, its past, present, and future elected officials, directors, officers, employees, (hereinafter collectively referred to as the "City Indemnitees"), 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, arising out of or related to any claims, demands, lawsuits or proceedings of any nature made or brought against the City Indemnitees by any third party (hereinafter collectively referred to as "Claim" or "Claims") to the extent caused by any willful or negligent error, omission, or act of the Actuary, its agents, representatives, or of any person employed by Actuary, or of anyone for whose acts the Actuary is legally liable, in the performance or failure to perform professional services under this Agreement. City will promptly notify Actuary 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 Actuary shall pay all damages, settlements, costs and expenses, including defense costs, fees and expenses, as required by the indemnification in this provision.

To the extent damages are incurred by the City as a result of the acts or inaction of Actuary, its agents, affiliates, assigns or affiliated parties, City shall be entitled to recover damages provided by law without limitation as to form or amount. Actuary agrees to accept any and all liability for Actuary's agents, affiliates, assign, or affiliated parties, including but not limited to, Actuary's subcontractors or vendors performing Services for City.

**7.1.2 Additional Indemnification Obligation requirements.** Actuary is not obligated to indemnify the City or City Indemnitees for the City's or the City Indemnitees' own negligence. In the event that any Claim for indemnification hereunder arises from the negligence or willful misconduct of both the Actuary 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.

**7.1.3 Kotecki Waiver.** Actuary (and any subcontractor into whose subcontract this clause is incorporated) 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. Actuary 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 Actuary'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 Actuary's execution of this Agreement, the Actuary 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 Actuary'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 Actuary. All subcontractors shall comply with each and every insurance provision in **Exhibit C**. Actuary 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 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 Actuary are for the benefit of the City and no other party.

## **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; 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 Actuary from a source other than the City prior to the time of disclosure of said information to the Actuary 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 Actuary or the City; or (iv) to have been supplied to the Actuary 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 Actuary.** The Actuary 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. Actuary 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, Actuary agrees not to disclose City Confidential Information to anyone except 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. If Actuary is compelled to disclose City Confidential Information by law, legal process or authority, Actuary will, to the extent not prohibited by law, immediately notify the City in writing prior to the disclosure of such information. If Actuary 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 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 Actuary's expense as City may reasonably require to notify others regarding such unauthorized access, use, or disclosure, and remedy such unauthorized access, use or disclosure.

**8.3 Security of Confidential Information.** Actuary 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 authorized 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, Actuary 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** 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.

**8.4      Subcontractors and Survival.** Actuary shall include provisions consistent with this **Section 8** in any agreement with any of the Actuary's vendors, subcontractors or other affiliated parties providing any Services under this Agreement. The provisions of this **Section 8** shall survive the termination 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 Actuary, 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. 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 Actuary. In the event that this Agreement is so terminated, the City shall pay Actuary for the Services performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly or indirectly, to Actuary's breach of this Agreement. The written notice required under this subsection shall be either (i) served personally during regular business hours or (ii) served by facsimile during regular business hours or (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 Actuary'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. Actuary shall provide the City with its representative's e-mail address upon its execution of this Agreement. On receiving such notice, Actuary shall, unless the notice directs otherwise, immediately discontinue all Services under this Agreement. As soon as practicable after receiving the termination notice, Actuary shall submit an invoice to the City showing in detail the Services performed under this Agreement up to the termination date. Actuary's receipt of payment for Services rendered upon City's termination of this Agreement, is Actuary'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 Actuary to provide all finished or unfinished documents and data and other information of any kind prepared by Actuary in connection with the performance of the Services under this Agreement. Actuary 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 Actuary 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 Actuary.** The City may require the Actuary, 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 Actuary 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 Actuary 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 Actuary, any and all costs, including attorneys' fees and administrative expenses, incurred by the City as the result of any Event of Default by the Actuary or as a result of actions taken by the City in response to any Event of Default by the Actuary.

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

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

**10.3 No Delinquent Taxes.** The Actuary represents and certifies that the Actuary 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 Actuary 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 the Illinois 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 Actuary represents and certifies that the Actuary 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 Actuary 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 Actuary has, in procuring this Agreement, colluded with any other person, firm, or corporation, then the Actuary 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 Actuary 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 Actuary 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 Actuary further represents and warrants to the City that the Actuary 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 Actuary 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.** Actuary shall comply with all federal and state laws prohibiting discrimination because of, or requiring affirmative action based on race, color, religion, sex, sexual orientation, marital status, order of protection status, national origin or ancestry, 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**.

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

**10.11 Execution of Certifications.** Actuary 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 Actuary 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 Actuary 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 Actuary 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 Actuary:

Foster & Foster, Inc.  
Attn: Jason Franken  
184 Shuman Blvd., Suite 305  
Naperville, IL 60563  
E-Mail: [jason.franken@foster-foster.com](mailto:jason.franken@foster-foster.com)

If to the City:

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

**11.15 Contract Numbering.** The faces of all invoices and documents shall contain the following contract number **441** 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.** Actuary 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 Actuary 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 Actuary 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 Actuary is an individual, the Actuary 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 16th day of February, 2024.

CITY OF WHEATON, an Illinois municipal corp.

By: Philip J. Suer Date: 2/6/2024  
Mayor

ATTEST:

By: Andrea Rosedale  
City Clerk

Foster & Foster, Inc.

By: Jason Final Date: 2/6/2024  
Signature  
Its: Principal

ATTEST:

By: Shadia S. Hernandez  
Signature  
Title: Notary, Administrative Assistant.