

**RESOLUTION R-2024-17**

**A RESOLUTION AUTHORIZING THE EXECUTION OF AGREEMENT NO. 438 WITH TERRACON CONSULTANTS, INC. FOR A CITYWIDE FACILITIES CONDITION ASSESSMENT THROUGH THE SOURCEWELL PURCHASING COOPERATIVE FOR A TOTAL AMOUNT NOT TO EXCEED \$116,766**

**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**, pursuant to the Illinois Governmental Joint Purchasing Act (30 ILCS 525/1, *et seq.*), the City may purchase personal property, supplies, and services joining with other governmental units; and Illinois State Statutes authorize municipal governments to jointly purchase supplies; and

**WHEREAS**, Sourcewell is a state of Minnesota local government unit and service cooperative purchasing program created by the Minnesota legislature under the laws of the State of Minnesota (Minnesota Statutes Section 123A.21) and is authorized to contract with eligible entities to perform governmental functions including the purchase of goods and services; and

**WHEREAS**, the City participates in the Sourcewell cooperative purchasing program, which establishes contracts for a variety of products and services through public and competitive solicitations, and permits member governments to purchase products and services through those contracts; and

**WHEREAS**, Sourcewell contract #020421 has been publicly and competitively bid for Facility Assessment Services and Planning with Related Services; and

**WHEREAS**, Sourcewell has identified Terracon Consultants, Inc. located in Glendale Heights, Illinois, as the low responsible bidder for Sourcewell contract #020421; and

**WHEREAS**, the City budgeted funds in the Building Renewal Fund for an amount of \$100,000 for Facility and Assessment Services. Adding the software subscription and training would bring the total cost to \$116,766; over budget by \$16,766. Reserves are available in the Building Renewal Fund to accommodate the additional cost; and

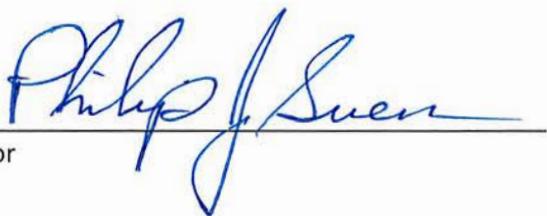
**WHEREAS**, the corporate authorities of the City of Wheaton have determined that it is in the best interest of the City to procure a Citywide Facilities Condition Assessment from Terracon Consultants, Inc. located at 192 Exchange Blvd, Glendale Heights, Illinois, 60139 in accordance with Sourcewell contract #020421 for a total amount not to exceed \$116,766.

**NOW THEREFORE, BE IT RESOLVED** by the Mayor and the 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. 438 with Terracon Consultants, Inc. for a Citywide Facilities Condition Assessment; and that a copy of that certain City of Wheaton Agreement No. 438 is on file with the City Clerk's Office and is incorporated herein as if fully set forth as Exhibit A.

ADOPTED this 20<sup>th</sup> day of February 2024.

Mayor



ATTEST:



City Clerk

Roll Call Vote:

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

Nays: None  
Absent: None

Motion Carried Unanimously

**CITY OF WHEATON, ILLINOIS**  
**CONSULTING SERVICES AGREEMENT FOR**  
**A CITYWIDE FACILITIES CONDITION ASSESSMENT**

**THIS AGREEMENT** is made and entered into this 21st 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 **Terracon Consultants, Inc.**, ("Consultant"), located at 192 Exchange Blvd, Glendale Heights, Illinois 60139. City and Consultant are at times collectively referred to hereinafter as the "Parties."

WHEREAS, the City has determined that it is reasonable and appropriate to engage a consulting firm to provide a Citywide Facilities Condition Assessment (hereinafter, "**Consulting Services**"), consistent with the Request for Proposal ("RFP") which is attached hereto and incorporated herein as if fully set forth as **Exhibit A**; and

WHEREAS, the Consultant has submitted to the City a proposal of the cost to provide the requested Consulting Services to meet the City's needs ("**Proposal**"), which is attached hereto and incorporated herein as if fully set forth as **Exhibit B**; and

WHEREAS, Consultant represents that it has the necessary expertise and experience to furnish such Consulting Services upon the terms and conditions set forth herein below; and

WHEREAS, the City finds that the Consultant's Proposal meets the City's requirements for the 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 Contract Documents consist of this Agreement and the following attached exhibits which are incorporated into this Agreement:

- a. The City's RFQ and all related documents is attached as **Exhibit A**;
- b. The Consultant's Quote and all related documents is attached as **Exhibit B**;
- c. Insurance Coverage for Professional Services 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 the 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. Any inconsistency between the services as stated by the City in **Exhibit A** and the services as set forth by the Consultant in **Exhibit B** shall be controlled by the services as stated by the City in **Exhibit A**, unless specifically waived in writing.

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

**2.1 Retention and Services.** The City retains the Consultant to perform Consulting Services. For and in consideration of the Agreement Amount indicated in **Section 4.1** herein, the Consultant promises and agrees that it shall, at its own cost and expense, provide all of the professional Consulting Services ("Services"), in accordance with the Scope of Services requirements stated within the City's RFP (**Exhibit A**), and the Proposal submitted by the Consultant (**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 Time of Performance.** The Consultant shall perform the Services within the Term of this Agreement as set forth in **Section 8.1** of this Agreement, in accordance with the schedule of services as indicated in the attached quote (**Exhibit B**) and **Exhibit A**, and in accordance with any other completion schedule or milestones which may be separately agreed upon in writing by the parties. Consultant represents that it has the professional and technical personnel required to perform the Services in conformance with such conditions. Upon request of City, Consultant shall provide a more detailed schedule of anticipated performance to meet the schedule of services.

**2.3 Additional Services.** The Consultant shall provide only the Services specified in this Agreement, and the attached **Exhibit A** and **Exhibit B**. The Consultant acknowledges and agrees that the City shall not be liable for any costs incurred by the Consultant in connection with any services provided by the Consultant 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 Consultant 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 Consultant's cost proposal included in **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 Consultant before the commencement of any Additional Services.

**2.4 Changes and Alterations.** Any changes or alterations to this Project affecting, inclusive of, but not limited to, scope, cost, milestones, deadlines, or other significant factors shall be integrated in writing on a City of Wheaton Change Order Form (**Exhibit E**); verbal approval is not considered a Change Order and is not authorization to proceed. All Change Orders shall clearly identify the impact of cost and the effect on the time required to perform the Services. Any proposed change to the Project that increases the Agreement price or the costs to be expended by the Consultant 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.

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

### **SECTION 3. PERSONNEL; SUBCONTRACTORS.**

**3.1 Availability of Personnel.** The Consultant shall provide all personnel necessary to complete the Services including, without limitation, any Key Project Personnel identified in the Quote. The Consultant shall notify the City as soon as practicable prior to terminating the employment of, reassigning, or receiving notice of the resignation of, any Key Project Personnel. The Consultant 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 Use of Subcontractors.** The Consultant 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 Consultant shall be acceptable to, and approved in advance by, the City. The City's approval of any subcontractor or subcontract shall not relieve the Consultant 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 Consultant. For purposes of this Agreement, the term "Consultant" shall be deemed also to refer to all subcontractors of the Consultant, and every subcontract shall include a provision binding the subcontractor to all provisions of this Agreement.

**3.3 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 consulting practices, the Consultant shall immediately upon notice from the City remove and replace such personnel or subcontractor. The Consultant 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.

**3.4 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 Consultant or with any vendor solicited or recommended by the Consultant.

**3.5 Corporate Authorities of the City.** Notwithstanding any provision of this Agreement, any negotiations, or agreements with, or representations by the Consultant 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 Consultant 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 Consultant for the Services performed under this Agreement shall not exceed **\$116,766 (\$101,091 for Base Facility Assessment, \$13,613 Paragon Software Subscription for Year One, and \$2,062 Software Training Cost)** including reimbursable expenses, without the prior express written authorization of the City.

**4.2 Invoices and Payments.** The Consultant shall be paid in accordance with the amounts set forth in the Quote (**Exhibit B**). The Consultant shall submit an itemized invoice(s) containing sufficient detail of the Services performed to enable the City to properly evaluate the payout request along with all supporting documentation as required by the City. The City shall

pay Consultant 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 Consultant 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 Consultant.

**4.5 Interest Waiver.** Consultant 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 Consultant 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 Consultant 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 five years after the termination of the Agreement.

## **SECTION 5. REPRESENTATIONS OF CONSULTANT.**

**5.1 Standard of Care.** The Consultant represents, certifies, and warrants that it shall perform and complete the Services in a manner consistent with the level of care, skill, and diligence exercised by other recognized professional Consultants under similar circumstances at the time the services are performed. The representations, certifications, and warranties expressed shall be in addition to any other representations, certifications, and warranties

expressed in this Agreement, or expressed or implied by law, which are hereby reserved unto the City EXCEPT FOR THE STANDARD OF CARE PREVIOUSLY STATED, CONSULTANT MAKES NO WARRANTIES OR GUARANTEES, EXPRESS OR IMPLIED, RELATING TO CONSULTANT'S SERVICES AND CONSULTANT DISCLAIMS ANY IMPLIED WARRANTIES OR WARRANTIES IMPOSED BY LAW, INCLUDING WARRANTIES OR MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

**5.2 Solvency.** The Consultant 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 6. INDEMNIFICATION; INSURANCE; LIABILITY**

**6.1 Indemnification.** The Consultant, without regard to the availability or unavailability of any insurance, either of the City or of the Consultant, shall indemnify, save harmless, and pay and/or reimburse the fees and the costs to defend the City, its elected or appointed officials, directors, officers, employees, attorneys, and agents (hereinafter collectively, the "**City Indemnitees**"), in whole or in part, from and against any and all lawsuits, claims, demands, losses, damages, injuries, liabilities, fines, judgments, settlement, penalties, costs, and expenses of any kind or character (hereinafter the "**Claims**"), except as otherwise provided herein, to the extent that such matter arises from either of the following:

- a) The Consultant's breach of any term, provision, warranty, standard or requirement of this Agreement including, but not limited to, those provisions of this Agreement pertaining to the Consultant's services; or
- b) The negligence or willful misconduct of the Consultant, its employees, agents, representatives, and subcontractors.

This indemnification shall apply to the fullest extent of the law, and in the event that any provision hereof is determined to be unenforceable, the indemnification obligations shall be severable and the fullest extent of indemnification that may lawfully apply shall remain in full force and effect.

Consultant (and any subcontractor into whose subcontract this clause is incorporated) shall assume the entire liability for all personal injury claims suffered by its own employees and waives any limitation of liability defense based upon the Worker's Compensation Act and cases decided there under. Consultant agrees to indemnify and defend the City and City Indemnitees from and against all such loss, expense, damage, or injury, including reasonable attorneys' fees, which the City or City Indemnitees may sustain as a result of personal injury claims by Consultant's employees, except to the extent those claims arise as a result of the City's own negligence.

The obligation on the part of the Consultant to pay and/or reimburse the fees and the costs to defend, hold harmless, and indemnify the City shall survive the expiration or termination of this Agreement. Nothing in this Agreement shall be construed as prohibiting the City or City

Indemnitees from defending, through the selection and use of their own agents, attorneys and experts, any claims, actions, or suits brought against them arising out of the performance of this Agreement.

In the event that any claim for indemnification hereunder arises from the negligence or willful misconduct of both the Consultant and the City, the parties agree that any and all lawsuits, claims, demands, damages, liabilities, losses, fines, judgments, settlements, penalties, costs, and expenses shall be apportioned between the parties on the basis of their comparative degrees of fault, except as otherwise herein provided.

**6.2 Insurance.** Contemporaneous with the Consultant's execution of this Agreement, the Consultant 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 Services**, which is attached hereto and incorporated as if fully set forth, as **Exhibit C** to this Agreement. The City shall be included under the Consultant's insurance as an additional primary insured with respect to claims and/or liability arising out of Services performed for the City by Consultant. All subcontractors shall comply with each and every insurance provision in **Exhibit C**. Consultant 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.

**6.3 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, to the Consultant as the result of the execution, approval or attempted execution of this Agreement.

**6.4 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.*

**6.5 Third Party Beneficiaries.** There are no third-party beneficiaries of this Agreement.

**6.6 Limitation of Liability.** CITY SHALL NOT BE LIABLE TO Consultant FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, PUNITIVE, OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION, LOST PROFITS (DIRECT OR INDIRECT) AND LOST REVENUES HOWSOEVER ARISING, WHETHER OR NOT CHARACTERIZED IN NEGLIGENCE, TORT, CONTRACT OR OTHER THEORY OF LIABILITY, EVEN IF CITY HAS BEEN ADVISED OF THE POSSIBILITY OF OR COULD HAVE FORESEEN ANY SUCH DAMAGES.

## **SECTION 7. CONFIDENTIAL INFORMATION.**

**7.1 Confidential Information.** The term "**Confidential Information**" shall mean information in the possession or under the control of the City relating to the technical, business, or corporate affairs of the City; City property; user information, including, without limitation, any information pertaining to usage of the City's computer system, including and without limitation, any information obtained from server logs or other records of electronic or machine readable form; and the existence of, and terms and conditions of, this Agreement. City Confidential Information shall not include information that can be demonstrated: (i) to have been rightfully in the possession of the Consultant from a source other than the City prior to the time of disclosure of said information to the Consultant 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 Consultant or the City; or (iv) to have been supplied to the Consultant 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.

**7.2 No Disclosure of Confidential Information by the Consultant.** The Consultant acknowledges that it shall, in performing the Services for the City under this Agreement, have access to or be directly or indirectly exposed to Confidential Information. The Consultant shall hold confidential all Confidential Information and shall not disclose or use such Confidential Information without express prior written consent of the City. The Consultant shall use reasonable measures, at least as strict as those the Consultant uses to protect its own confidential information. Such measures shall include, without limitation, requiring employees and sub-consultants of the Consultant to execute a non-disclosure agreement before obtaining access to Confidential Information.

**7.3 Breach of Confidentiality.** In the event of breach of the confidentiality provisions of **Section 7** of this Agreement, it shall be conclusively presumed that irreparable injury would result to the City and there would be no adequate remedy at law. The City shall be entitled to obtain temporary and permanent injunctions, without bond and without proving damages, to enforce this Agreement. The City shall be entitled to damages for any breach of the injunction, including but not limited to compensatory, incidental, consequential, exemplary, and punitive damages. The confidentiality provisions of this Agreement survive the termination or performance of this Agreement. Nothing in this Agreement shall prevent Consultant from complying with a court order or subpoena.

## **SECTION 8. TERM; TERMINATION; and DEFAULT.**

**8.1 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 Consultant, and shall continue in full force and effect until the earlier of the following occurs: (i) the termination of this Agreement; or (ii) final completion of the Services specified in the Agreement by July 31, 2024 or

to a new date mutually agreed upon by the parties in writing, or (iii) the completion by Consultant and City of their respective obligations under this Agreement, in the event such completion occurs before the date(s) in item (ii) above. A determination of completion shall not constitute a waiver of any rights or claims which the City may have or thereafter acquire with respect to any term or provision of this Agreement. The City retains the right to utilize the services of the Consultant for future phases of this project.

**8.2 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 Consultant. In the event that this Agreement is so terminated, the City shall pay Consultant for the Services performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly, or indirectly, to Consultant 's breach of this Agreement. The written notice required under this subsection shall be either (i) served personally during regular business hours; (ii) served by facsimile during regular business hours (iii) served by certified or registered mail, return receipt requested, addressed to the address listed at the end of this Agreement with postage prepaid and deposited in the United States mail or (iv) by e-mail sent to the Consultant 's Key Project Personnel. Notice served personally, by facsimile transmission or e-mail shall be effective upon receipt, and notice served by mail shall be effective upon receipt as verified by the United States Postal Service. Consultant shall provide the City with its Key Project Personnel's e-mail address upon its execution of this Agreement. On receiving such notice, Consultant shall, unless the notice directs otherwise, immediately discontinue all Services under this Agreement. As soon as practicable after receiving the termination notice, Consultant shall submit an invoice to the City showing in detail the Services performed under this Agreement up to the termination date. Consultant's receipt of payment for Services rendered upon City's termination of this Agreement, is Consultant'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 Consultant to provide all finished or unfinished documents and data and other information of any kind prepared by Consultant in connection with the performance of the Services under this Agreement. Consultant shall be required to provide such documents, data, and other information within fifteen (15) days of the request.

**8.3 Default.** If it should appear at any time that the Consultant 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:

**1. Cure by Consultant.** The City may require the Consultant, 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 Consultant and the Services into compliance with this Agreement.

**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 Consultant for the Services performed or reimbursable expenses actually incurred as of the effective date of termination.

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

## **SECTION 9. COMPLIANCE WITH LAWS AND GRANTS.**

**9.1 Generally: Permits/Codes/Business Laws/Safety Standards/Grants.** Consultant 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. Consultant shall comply with all conditions of any federal, state, or local grant received by City or Consultant with respect to this Agreement or the Services. Consultant 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 Consultant's, or its sub-consultants, 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.

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

**9.3 No Delinquent Taxes.** The Consultant represents and certifies that the Consultant 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 Consultant 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.*

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

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

**9.6 Anti-Discrimination Laws.** Consultant is an equal opportunity employer and the requirements of 775 ILCS 5/2-105 and 44 III. ADM Code APPENDIX A are incorporated herein as though fully set forth. The Consultant 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 Consultant's noncompliance with any provision of the Illinois Human Rights Act or any other applicable law, the Consultant 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 Consultant 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.

**9.7 Americans with Disabilities Act.** Consultant 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.

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

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

**9.10 Illinois Property Tax Code (35 ILCS 200/18-50.2).** The City of Wheaton is required under Section 200/18-50.2 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. Current City Vendors/sub-vendors/contractors/subcontractors should return this form to the City within thirty (30) days of receipt of this form from the City. 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.

**9.11 Execution of Certifications.** Consultant 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 10. GENERAL PROVISIONS.**

**10.1 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.

**10.2 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.

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

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

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

**10.6 Work Products.** Designs, drawings, plans, specifications, photos, reports, information, observations, calculations, notes, studies, logbooks, instructions, manuals, models, recommendations, printed and electronic files, and any other data or information, in any form, prepared, collected, or received by the Consultant in connection with any or all of the Services to be performed under this Agreement ("**Documents**") shall be and remain the exclusive property of the City upon receipt of payment. At the City's request, or upon termination of this Agreement, the Consultant shall cause the Documents to be promptly delivered to the City.

**10.7 Waiver.** Any failure of either the City or the Consultant 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. Consultant shall not be liable for the unauthorized reuse or modification of its work product.

**10.8 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.

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

**10.10 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.

**10.11 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.

**10.12 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.

**10.13 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.

**10.14 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.

**10.15 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 Consultant:

Terracon Consultants, Inc.  
Attn: Ronnie Choi  
192 Exchange Blvd  
Glendale Heights, IL 60139  
E-Mail: ronnie.choi@terracon.com

If to the City:

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

**10.16 Contract Numbering.** The faces of all invoices and documents shall contain the following contract number **438** for reference purposes.

**10.17 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.

**10.18 Authority to Enter Agreement.** Consultant 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 Consultant 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 Consultant 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 Consultant is an individual, the Consultant 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 21st day of  
February 2024.

**CITY OF WHEATON, an Illinois municipal corp.**

By:

Philip J. Suen

Mayor

Date:

2/21/2024

ATTEST:

By:

Andrea Rosedale

City Clerk

**Terracon Consultants, Inc.**

By:

D. R. B.

Signature

Date: 2/14/2024

Its: National Director of Facilities Assessments

ATTEST:

By:

RL S

Signature

Title: Senior Project Manager