

## PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement ("Agreement"), dated as of September 12, 2018 (the "Effective Date"), is by and between the **Town of Lake Lure** (hereinafter "Client"), with an office at 2948 Memorial Highway, Lake Lure, NC 28746 and **Schnabel Engineering South, P.C.** (hereinafter "Consultant") with an office at 11-A Oak Branch Drive, Greensboro, NC 27408 (hereinafter collectively "Parties").

This Agreement is specific to services ("Services") required to rehabilitate and/or upgrade Lake Lure Dam, its hydro-electric generating facility, and appurtenances to meet NCDEQ Dam Safety requirements and extend the service life of the facility ("Project"). Services may include review of existing documents, investigation of the existing condition of the structure, analysis of existing and proposed conditions, design of repairs or modifications, bidding support, construction administration and oversight, and related services. The work will be performed in phases, and the Scope of Work, fees and method of compensation, schedule, and deliverables of service will be presented in individual Task Order Proposals for each phase. Services provided under this Agreement will be performed under the supervision of a Professional Engineer licensed in the State of North Carolina.

In consideration of the mutual agreements herein expressed, the Parties contract, covenant, and agree as follows:

### 1. SCOPE OF SERVICES/COMPENSATION.

1.1 Consultant shall perform the Services set forth in individual Task Orders, which shall be governed by this Agreement. Each executed Task Order shall include the Scope of Work, fee compensation amounts and method of billing, the schedule of performance, and descriptions of the deliverables of Services..

1.2 Client shall pay Consultant for Services rendered under this Agreement on the basis set forth in each executed Task Order.

**2. TERM OF AGREEMENT.** Upon execution by the Parties, this Agreement shall have the Effective Date as set forth above and shall remain in force until all obligations related to the Services have been fulfilled, unless sooner terminated as provided herein.

### 3. ENTIRE AGREEMENT.

3.1 The Agreement between Consultant and Client consists of this Agreement, executed Task Orders, and any exhibits or attachments attached or incorporated herein. Together these elements will constitute the entire Agreement, superseding all prior written or oral negotiations, statements, representations, correspondence, and/or agreements. The Services to be provided by Consultant pursuant to this Agreement are described in each executed Task Order and include the Scope of Work. Both Client and Consultant must mutually acknowledge any changes to this Agreement in writing. All work performed by Consultant on or relating to the Project is subject to the terms and limitations of this Agreement.

3.2 If work is performed, but the parties do not reach agreement concerning modifications to the Scope of Work or compensation, then the terms and conditions of this Agreement apply to such work. Disputes concerning modifications to Scope of Work or compensation shall be resolved pursuant to Article 15, "Dispute Resolution."

### 4. STANDARD OF CARE, DISCLAIMER OF WARRANTIES.

4.1 Consultant shall perform Services under this Agreement in a manner consistent with the level of care and skill ordinarily exercised by members of the profession currently practicing in the same locality under similar conditions. NO OTHER REPRESENTATION AND NO WARRANTY OR GUARANTEE, EITHER EXPRESS OR IMPLIED, IS INCLUDED OR INTENDED BY THIS AGREEMENT.

### 5. SITE ACCESS, SITE CONDITIONS, SAMPLES.

5.1 Client will provide rights of entry and access for Consultant to perform its Services.

5.2 Consultant will take reasonable precautions to avoid damage or injury to subterranean structures or utilities in the prosecution of his work. Client agrees to advise Consultant of known or

suspected underground features in the area of the work, and Consultant will not be responsible for damage to below grade features not brought to its attention, or incorrectly shown on plans provided.

5.3 Client shall promptly pay and be responsible for the removal and lawful disposal of contaminated samples and cuttings, and hazardous substances, unless other arrangements are mutually agreed in writing.

## **6. OWNERSHIP OF DOCUMENTS, RESTRICTIONS ON REUSE.**

6.1 All documents, including opinions, conclusions, certificates, reports, drawings and specifications and other documents, prepared or furnished by Consultant and Consultant's independent professional consultants pursuant to this Agreement (collectively "Documents") are instruments of Service. Consultant retains all ownership and property interests in the Documents, including all common law, statutory and other reserved rights, including copyrights, whether or not the Project is completed. Consultant will provide signed and sealed versions of the final deliverables to the Client in both hard copy and electronic format. Client may make and retain copies of them for information and reference in connection with permitting, financing, bidding and construction of renovations and facility improvements relating to the Lake Lure Dam, Hydro-electric Plant and appurtenances as addressed by this Project; however, such copies are not intended or represented to be suitable for reuse by others, and may not be used on other projects or for additions to this Project outside the Scope of the Work.

6.2 At Client's request, Client may negotiate with Consultant to acquire ownership of Documents for a mutually agreed amount. If Client acquires ownership of Documents prepared by Consultant, Client agrees: a) that any subsequent reuse or modification of them by Client or any party obtaining them through Client will be at Client's sole risk and without liability to Consultant, and b) Client will defend, indemnify and hold harmless Consultant from and against any claims, damages, and liabilities arising from or related to any use, reuse or modification of Documents by Client or any party obtaining them through Client. Client agrees that Consultant may retain copies of all documents for its files.

6.3 Electronic communications and CADD data transferred by Email, websites or computer disks (collectively "E- Data") are provided only as an accommodation by Consultant for the benefit of Client. Signed paper prints of documents constitute the contract deliverables. Client assumes the risk that E-Data may differ from the paper deliverables. Client agrees to indemnify and hold harmless Consultant from and against claims, damages, and liabilities for defects or inappropriate use of E-Data created or transmitted by Consultant.

## **7. THIRD PARTY RELIANCE UPON DOCUMENTS.**

7.1 Consultant's performance of the Services, as set forth in this Agreement, is intended solely and exclusively for the Client's benefit and use. No party may claim under this Agreement as a third party beneficiary. Client agrees not to distribute, publish or otherwise disseminate Consultant's Documents, without first obtaining Consultant's prior written consent.

7.2 No third party may rely upon Consultant's Documents including, but not limited to, opinions, conclusions, certificates, reports, drawings and specifications unless Consultant has agreed to such reliance in advance and in writing.

## **8. ASSIGNMENT, SUBCONTRACTING.**

8.1 Neither Client nor Consultant may delegate, assign, sublet, or transfer all or any part of this Agreement, including its duties or interest in this Agreement without the written consent of the other party.

8.2 Notwithstanding Section 8.1, Consultant may subcontract subsurface exploration, testing, and other supplemental services without notification or consent of Client.

## **9. TERMINATION, SUSPENSION.**

9.1 Termination for Convenience. The Client may terminate this Agreement for its convenience upon twenty-one (21) days written notice to Consultant. In the event of termination for convenience, Consultant shall be compensated for all services satisfactorily performed and costs incurred up to the effective date of termination for which Consultant has not been previously compensated. Consultant shall not be reimbursed for anticipatory profits.

9.2 Termination for Cause. The Client may terminate this Agreement upon fourteen (14) days written notice may terminate this Agreement if Consultant fails to substantially perform through no fault of Client and does not commence correction of such performance within five (5) days of written notice and

diligently complete the correction thereafter. In the event of termination for fault, Consultant shall be compensated for all services satisfactorily performed and costs incurred up to effective date of termination for which Consultant has not been previously compensated. All costs and charges incurred by Client to complete the Services beyond the total compensation available under this Agreement when terminated shall be deducted from any compensation due or which may become due to Consultant, and to the extent such deduction is insufficient to cover such costs and charges to Client, Consultant shall be and remain liable to pay Client the amount of such excess.

9.3 Client's Failure to Pay. In the event of any failure of payment by Client when due, Consultant shall have the right to suspend work on the Project and may retain any and all work products whether prepared by Consultant or submitted to Consultant by others, until payment has been brought current. In such event, Consultant shall have no liability for any damages or losses that may result from any delay associated the suspension of work or for the withholding of work products. If Client's failure to pay continues for more than sixty (60) days, Consultant may terminate this Agreement effective upon written notice to Client.

#### **10. ALLOCATION OF RISK.**

10.1 Consultant's total cumulative liability to Client (including, but not limited to, attorneys' fees and costs awarded under this Agreement) irrespective of the form of action in which such liability is asserted by Client or others, shall not exceed the total compensation received by Consultant under this Agreement or \$3,000,000, whichever is greater.

10.2 Client and Consultant agree to limit each's liability to the other in the following respects: Neither party will have liability to the other for any special, consequential, incidental, exemplary, or penal losses or damages including but not limited to losses, damages or claims related to the unavailability of the other party's property or facility, shutdowns or service interruptions, loss of use, lost profits or revenue, inventory or use, charges or cost of capital or claims of the other party's customer.

10.3 The limitations of liability of this Agreement shall survive the expiration or termination of this Agreement.

#### **11. INSURANCE.**

11.1 Consultant shall procure and maintain for the duration of the Project and three years following, with insurance carriers reasonably acceptable to the Client, the following insurance coverage:

- (a) Commercial General Liability on an occurrence form, including coverage for premises and completed operations/products, Contractual Liability, General Aggregate per Project, "x cu" coverages
  - \$1,000,000 each occurrence
  - \$ 10,000 Medical Expenses
  - \$1,000,000 Personal and Advertising Injury
  - \$2,000,000 General Aggregate
  - \$2,000,000 Products/Completed Operations Aggregate
- (b) Automobile Liability - Including coverage for Owned, Hired, and Non-Owned Autos
  - \$1,000,000 Combined Single Limit
- (c) Workers Compensation and Employer's Liability
  - Statutory Limits for Workers Compensation
  - \$500,000 each accident
  - \$500,000 each occurrence by disease
  - \$500,000 by disease - policy limit
- (d) Umbrella Liability – applying over all above-referenced policies
  - \$10,000,000 each occurrence
- (e) Professional Liability
  - \$3,000,000 each claim
  - \$3,000,000 annual aggregate

11.2 Additional Insured. Except for Workers Compensation and Professional Liability, policies shall include Client as Additional Insured on a primary and noncontributory basis, to include ongoing and completed operations.

## **12. INDEMNIFICATION.**

12.1 Indemnification of Client. Subject to the provisions and limitations of this Agreement and to the extent allowable by law, Consultant agrees to indemnify and hold harmless Client, its shareholders, officers, directors, employees, and agents from and against any and all claims, suits, liabilities, damages, expenses (including without limitation reasonable attorney's fees and costs of defense) or other losses (collectively "Losses") to the extent caused by Consultant's negligent performance of its Services under this Agreement.

12.2 Indemnification of Consultant. Subject to the provisions and limitations of this Agreement and to the extent allowable by law, Client agrees to defend, indemnify and hold harmless Consultant from and against any and all claims by third parties related to services provided by Consultant under this Agreement, and against any and all Losses to the extent caused by the negligence of Client, its employees, agents and contractors. In addition, except to the extent caused by Consultant's sole negligence, Client expressly agrees to defend, indemnify and hold harmless Consultant from and against any and all Losses arising from or related to the existence, disposal, release, discharge, treatment or transportation of Hazardous Materials, or the exposure of any person to Hazardous Materials, or the degradation of the environment due to the presence, discharge, disposal, release of or exposure to Hazardous Material.

## **13. INVOICES, PAYMENTS.**

13.1 Payment is due without retainage upon presentation of invoice and is past due thirty (30) days from invoice date, and will not be contingent upon receipt of funds from third parties. Client agrees to pay a service charge of one percent (1%) per month or fraction thereof on past due payments under this Agreement.

13.2 It is further agreed that in the event a lien or suit is filed to enforce overdue payments under this Agreement, Consultant will be reimbursed by Client for all costs of such lien or suit and reasonable Attorney's fees in addition to accrued service charges, where the court of appropriate jurisdiction enters a finding in favor of Consultant.

**14. NOTICE.** All notices, requests, claims, demands and other communications hereunder shall be in writing. Such notices shall be given (i) by delivery in person, (ii) by a nationally recognized commercial courier service; or (iii) by United States Postal Service, registered mail, postage prepaid and return receipt requested. Notices shall be effective upon actual delivery at the following addresses:

**Client:** Town of Lake Lure  
2948 Memorial Highway  
Lake Lure, NC 28746

**Consultant:** Schnabel Engineering South, P.C.  
11-A Oak Branch Drive  
Greensboro, NC 27407

or to that address which the receiving Party may from time to time give notice to the other Party in writing. Rejection or other refusal to accept, or the inability to deliver because of changed address of which no notice was given, shall be deemed to be receipt of the notice as of the date of such rejection, refusal to accept or inability to deliver.

## **15. DISPUTE RESOLUTION.**

15.1 Claims, disputes, and other matters in controversy between Consultant and Client caused by or any way related to this Agreement will be submitted to non-binding mediation as a condition precedent to litigation. The cost for mediation including the mediator's fees, reproduction of documents, and miscellaneous out-of-pocket expenses will be borne equally by each party to this Agreement.

15.2 The law of the State of North Carolina will govern the validity of these terms, their interpretation and performance. Client and Consultant agree that venue for any litigation will be in the courts of the State of North Carolina, and Consultant and Client both hereby waive any right to initiate any action in, or remove any action to, any other jurisdiction.

**16. FORCE MAJEURE.**

16.1 Any delay in or failure of performance of, either party to this Agreement shall not constitute a default, if and to the extent such delay or failure is caused by occurrences beyond the reasonable control of the party affected, including but not limited to, acts of God or the public enemy, acts of war, public disorder, insurrection, rebellion, sabotage, flood, riot, or any causes a party is unable, with reasonable diligence, to prevent; provided, however, that a party who is prevented from performing for any reason shall immediately notify the other party in writing of the reason for the non-performance and the anticipated extent of any delay.

**17. SEVERABILITY.**

17.1 This Agreement reflects the entire agreement of the parties with respect to its terms and supersedes all prior agreements, whether written or oral. If any portion of this Agreement is void or voidable, such portion will be deemed stricken and the Agreement reformed to as closely approximate the stricken portions as the law allows.

**IN WITNESS WHEREOF**, the parties, by their duly authorized representatives, have hereunto executed this Agreement, on the day and year first above written.

**CONSULTANT:**

**Schnabel Engineering South, PC**

By: 

Name: Jonathan Pittman  
(print)

Title: Senior Vice President

Date: September 15, 2018

**CLIENT:**

**Town of Lake Lure**

By: 

Name: Kevin Cooley  
(print)

Title: Mayor

Date: Sept. 15, 2018

**Exhibits:**

None

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