

PROFESSIONAL SERVICES AGREEMENT

THIS PROFESSIONAL SERVICES AGREEMENT is made and entered into by and between the **CITY OF MADISONVILLE, KENTUCKY**, a municipal corporation, 67 North Main Street, Madisonville, Kentucky, hereinafter referred to as the "**CITY**," and _____, hereinafter referred to as the "**CONSULTANT**," on this ____ day of _____, 2023.

WITNESSETH: On or about June 5, 2023, the **CITY** issued a Request for Proposals for Software and Implementation Services for an Enterprise Resource Planning (ERP) System to solicit responses from qualified firms offering proven, integrated solutions to replace the **CITY'S** current legacy ERP system; and

WHEREAS, on or about _____, 2023, the **CONSULTANT** submitted a written proposal to perform the services requested by **CITY** in its RFP; and

WHEREAS, based upon a review of the various proposals submitted to and received by the **CITY**, the **CITY** has determined that the **CONSULTANT** possesses the necessary qualifications and expertise to perform the services outlined in the **CONSULTANT'S** bid proposal, and the **CITY** has elected to accept the bid and to enter into a contract with the **CONSULTANT** to perform the services and provide all products, systems, software and related implementation services necessary to successfully perform all aspects of its bid proposal including ongoing maintenance, enhancements, upgrades and support;

NOW, THEREFORE, in consideration of the mutual promises and agreements of the parties set forth herein, the sufficiency of said consideration being hereby acknowledged, the parties with the intent to be legally bound do hereby agree as follows:

SECTION 1- BASIC SERVICES OF CONSULTANT

1.1. General

After written authorization is given by the **CITY** to proceed, the **CONSULTANT** shall perform professional services necessary to fully perform and implement the Enterprise Resource Planning (ERP) System outlined in its proposal as necessary to complete the **PROJECT** as described therein on a timely basis.

SECTION 2 - EXTRA WORK BY CONSULTANT

2.1. The **CITY** may desire to have the **CONSULTANT** perform work or render services in connection with this **PROJECT** other than provided by the expressed intent of this Agreement. Such work shall be considered as "Extra Work", subject to a change order, supplemental to this Agreement, setting forth the character and scope thereof and the compensation therefore. Work under such change order shall not proceed until the **CITY** gives written authorization. Should the **CITY** find it desirable to have previously satisfactorily completed and accepted plans or parts thereof revised, the **CONSULTANT**

shall make such revisions as directed in writing by the **CITY**. This work shall be considered as "Extra Work" and shall be paid as such.

- 2.2. All "Extra Work" is subject to prior written authorization of the **CITY** and necessary appropriations made by the **CITY**.

SECTION 3 - CITY 'S RESPONSIBILITIES

CITY shall:

- 3.1. Provide criteria and information as to the **CITY'S** requirements for the **PROJECT**, including design objectives and constraints, space, capacity and performance requirements, flexibility and expandability, and any budgetary limitations.
- 3.2. Assist the **CONSULTANT** by placing at its disposal available information pertinent to the Project.
- 3.3. Examine all specifications, proposals and other documents presented by the **CONSULTANT** for its consideration, and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of the **CONSULTANT**.
- 3.4. Designate in writing a person to act as the **CITY'S** representative with respect to the services to be rendered under this Agreement. Such person shall have complete authority to transmit instructions, receive information, interpret, and define the **CITY'S** policies and decisions with respect to materials, equipment, elements, and systems pertinent to the **CONSULTANT'S** services.
- 3.5. Give written notice to the **CONSULTANT** whenever the **CITY** observes or otherwise becomes aware of any development that affects the scope or timing of the **CONSULTANT'S** services, or any defect in the work of Contractor(s).
- 3.6. Furnish or direct the **CONSULTANT** to provide, necessary Extra Work as stipulated in Section Two (2) of this Agreement or other services as required.

SECTION 4 - PERIOD OF SERVICES

- 4.1. Time is of the essence in the performance of this Agreement and the **CONSULTANT** shall perform the services in accordance with the **PROJECT** schedule. Failure of the **CONSULTANT** to strictly adhere to the schedule may result in the termination of this Agreement by the **CITY**.
- 4.2. Prior to the commencement of work the **CITY** and the **CONSULTANT** shall reasonably agree upon the order of module implementation and the projected timeline for each module implementation for the orderly and continuous progress of the **PROJECT** without undue delays.

4.3. If a delay results from the acts of the **CITY** or another entity that is required to permit or approve the work or services, an extension of time for such delay will be considered by the **CITY**.

4.3.1. If the above type of delay occurs and the **CONSULTANT** wants an extension of time, it must, within ten (10) days from the date of the delay, apply in writing to the **CITY** for an extension of time for a reasonable period, which must be agreed upon by the **CITY**.

4.3.2. If the extension of time is approved by the **CITY**, the **PROJECT** schedule shall be revised to reflect the extension. Such extension of time to the completion date shall in no way be construed to operate as a waiver on the part of the **CITY** of any of its other rights in the Agreement.

4.3.3. If the above type of delay would prevent complete performance of the **PROJECT** within ninety (90) days of the time specified therein, the **CITY** shall have the option of cancelling the **PROJECT** or otherwise adjusting the scope of the services or work and any related fees.

4.3.4. If delays result solely by reason of acts of the **CONSULTANT**, the **CONSULTANT** must immediately notify the **CITY** in the event of such delay, and provide the **CITY** a written action plan within five (5) business days on how it will reasonably attempt to resolve the delay. If the parties cannot mutually agree to an extension of time or an adjustment, Section 6.5 under "DISPUTES" of this Agreement shall apply. If the above type of delay would prevent complete performance of the **PROJECT** within ninety (90) days of the time specified therein, the **CITY** shall have the option of cancelling the **PROJECT** or otherwise adjusting the scope of the services or work and any related fees.

SECTION 5 - PAYMENTS TO CONSULTANT

5.1. Methods of Payment for Services of CONSULTANT

5.1.1. For Basic Services

The **CITY** shall pay the **CONSULTANT** in accordance with the rates and charges set forth in the **CONSULTANT'S** response to RFP # **ERP-0628**, unless otherwise agreed to by the parties by change order duly approved by **CITY** and subject to any necessary appropriations being made by the **CITY**.

5.1.1.a. Fees payable to the **CONSULTANT** shall be paid according to schedule set forth in **EXHIBIT C - Pricing** and shall be based upon the work performed as of that date.

5.1.1.b. The **CONSULTANT** shall receive prior written approval of the **CITY** prior to proceeding with said work. The **CITY'S** designated agent in Section 8.1.1 shall be the only person authorized to provide such approval.

5.2. Times of Payment

5.2.1. The **CONSULTANT** shall submit statements based upon the **CONSULTANT'S** estimate of the proportion of the total services actually completed at the time of billing the **CITY** shall respond to the **CONSULTANT'S** statements within thirty (30) days, either denying payment or making payment.

5.3. Other Provisions Concerning Payments

5.3.1. In the event the Agreement is terminated by the **CITY** without fault on the part of the **CONSULTANT**, the **CONSULTANT** shall be paid for the work performed or services rendered for which it has not already been paid as determined by mutual agreement between the **CITY** and the **CONSULTANT**.

5.3.2. In the event the services of the **CONSULTANT** are terminated by the **CITY** for fault on the part of the **CONSULTANT**, the **CONSULTANT** shall be paid reasonable value of the work performed or services rendered and delivered for which it has not already been paid, and the amount to be paid shall be determined by the **CITY**.

SECTION 6 - GENERAL CONSIDERATIONS

6.1. Termination

6.1.1. The **CONSULTANT** may only terminate this Agreement due to the **CITY'S** material breach of the terms hereof which breach causes the **CONSULTANT** to be unable to perform its duties and responsibilities under this Agreement and upon forty-five (45) days written advance notice to the **CITY**.

6.1.2. The **CITY** shall have the right to terminate this Agreement on the occurrence of any of the following events: the filing of a petition in bankruptcy or reorganization by the **CONSULTANT** or an involuntary petition filed against the **CONSULTANT**; the sale of the **CONSULTANT'S** business; or the assignment of this Agreement by the **CONSULTANT** without the prior written consent of the **CITY**.

6.1.3. The **CITY** may terminate this Agreement for cause upon thirty (30) business days written advance notice to the **CONSULTANT**. The **CITY** reserves the right to terminate the Agreement for any reason whatsoever, with or without cause, at any time upon forty five (45) days written advance notice to the **CONSULTANT**.

6.2. Ownership and Reuse of Documents

6.2.1. All documents, including raw data, reports, drawings and specifications, prepared by the **CONSULTANT** pursuant to this Agreement shall be delivered to and, upon payment in full of all amounts owed to the **CONSULTANT** hereunder, become the property of the **CITY**. The **CITY** shall have the right to reuse same without restriction or limitation, but without liability or legal exposure to the **CONSULTANT**.

6.2.2 **CONSULTANT** shall defend actions or claims charging infringement of any copyright or software license by reason of the use or adoption of any software, designs, drawings or specifications supplied by it, and it shall hold harmless the **CITY** from loss or damage resulting therefrom.

6.3. Legal Responsibilities and Legal Relations

6.3.1. The **CONSULTANT** shall familiarize itself with and shall at all times comply with all federal, state, and local laws, ordinances, and regulations that in any manner affect the services of this Agreement.

6.3.2. In performing the services hereunder, the **CONSULTANT** and its subconsultants, employees, agents and representatives shall not be deemed or construed to be employees of the **CITY** in any manner whatsoever. Except as otherwise provided in this Agreement, the **CONSULTANT** shall be acting as an independent contractor. The **CONSULTANT** shall not hold itself out as, nor claim to be, an officer or employee of the **CITY** by reason hereof and shall not make any claim, demand or application to or for any right or privilege applicable to an officer or employee of the **CITY**. The **CONSULTANT** shall be solely responsible for any claims for wages or compensation by the **CONSULTANT'S** employees, agents and representatives, including consultants, and shall save and hold the **CITY** harmless therefrom.

6.3.3. The parties hereto agree that causes of actions between the parties shall be governed by applicable provisions of the Kentucky Revised Statutes, and that venue of any legal action shall be a court of appropriate jurisdiction in Hopkins County, Kentucky. The parties further agree that Kentucky law shall apply with respect to the interpretation of any provision of this Agreement.

6.4. Successors and Assigns

6.4.1. The **CONSULTANT** binds itself and its partners, successors, executors, administrators, assigns and legal representatives to this Agreement in respect to all covenants, agreements, and obligations of this Agreement. The **CONSULTANT** shall not assign any interest, obligation or benefit in this Agreement nor transfer any interest in the same, whether by assignment or novation, without prior written consent of the **CITY**.

6.4.2. The **CONSULTANT** shall not subcontract more than ten percent (10%) of the work, based upon dollar value of the work. The **CONSULTANT** shall obtain written approval prior to subletting or assigning any services contained in this Agreement, and consent to sublet or assign any part of this Agreement shall not be construed to relieve the **CONSULTANT** of any responsibility for compliance with the provisions of this Agreement.

6.4.3. Nothing herein shall be construed to give any rights or benefits hereunder to anyone other than the **CITY** and the **CONSULTANT**.

6.5. Disputes

Except as otherwise provided in this Agreement, any dispute hereunder may be resolved by agreement of the **CITY'S** Agent (Section 8.1.1) in consultation with the Mayor and the **CONSULTANT**.

6.6. Accuracy of CONSULTANT'S Work

All professional services shall be performed by **CONSULTANT** or under **CONSULTANT'S** supervision. All professional services to be provided by **CONSULTANT** pursuant to this Agreement shall be provided by personnel experienced in their respective fields and in a manner consistent with the standards of care, diligence and skill ordinarily exercised by professional consultants in accordance with sound professional practices.

The **CONSULTANT** shall be required to perform this Agreement in accordance with the degree of ordinary and reasonable skill and care usually exercised by professionals prevailing at the time, place and under similar conditions as the services hereunder are rendered.

The **CONSULTANT** shall be responsible for the accuracy of all work, even though raw data, reports and specifications have been accepted by the **CITY**, and it shall make any necessary revisions or corrections resulting from its errors and/or omissions for no additional compensation. Failure on the part of the **CONSULTANT** to provide the expected level of accuracy may be grounds for the **CITY** to terminate this Agreement.

6.7. Security Clause

The **CONSULTANT** certifies that it shall not at any time release or divulge any information concerning the services covered by this Agreement to any person or any public or private organization except the **CITY** without prior approval of the **CITY** unless required to do so by law

6.8. Access to Records

The **CONSULTANT** and its subconsultants shall maintain all books, documents, papers, and accounting records, and make such materials available at their respective offices at all reasonable times during the Agreement period and for three (3) years from the date of final payment under the Agreement for inspection by the **CITY**, and copies thereof shall be furnished if requested.

6.9. Risk Management Provisions, Insurance and Indemnification

6.9.1. Definitions

The **CONSULTANT** understands and agrees that the Risk Management Provisions of this Agreement define the responsibilities of the **CONSULTANT** to the **CITY**.

As used in these Risk Management Provisions, the terms "**CONSULTANT**" and "**CITY**" shall be defined as follows:

- a. **CONSULTANT** means the Consultant and its employees, agents, servants, owner's, principals, licensees, assigns and subcontractors of any tier.

- b. **CITY** means the City of Madisonville and its elected and appointed officials, employees, agents, boards, assigns and successors in interest.

6.9.2. Indemnification and Hold Harmless Provision

- (1) **Indemnification for Professional Liability.** When the law establishes a professional standard of care for the **CONSULTANT'S** services, to the fullest extent permitted by law, the **CONSULTANT** shall indemnify, protect, defend and hold harmless the **CITY** and any and all of its officials, employees and agents ("Indemnified Parties") from and against any and all losses, liabilities, damages, costs and expenses, including attorney's fees and costs to the extent same are caused in whole or in part by any negligent or wrongful act, error or omission of the **CONSULTANT**, its officers, agents, employees or subcontractors or any entity or individual that the **CONSULTANT** shall bear the legal liability thereof) in the performance of professional services under this agreement.
- (2) **Indemnification for Other Than Professional Liability.** Other than in the performance of professional services and to the full extent permitted by law, the **CONSULTANT** shall indemnify, defend and hold harmless the **CITY**, and any and all of its employees, officials and agents from and against any liability (including liability for claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, including attorney's fees and costs, court costs, interest, defense costs, and expert witness fees), where the same arise out of, are a consequence of, or are in any way attributable to, in whole or in part, the performance of this Agreement by the **CONSULTANT** or by any individual or entity for which the **CONSULTANT** is legally liable, including but not limited to officers, agents, employees or subcontractors of the **CONSULTANT**.
- (3) **General Indemnification Provisions.** The **CONSULTANT** agrees to obtain executed indemnity agreements with provisions identical to those set forth here in this section from each and every subcontractor or any other person or entity involved by, for, with or on behalf of the **CONSULTANT** in the performance of this agreement. In the event the **CONSULTANT** fails to obtain such indemnity obligations from others as required here, the **CONSULTANT** agrees to be fully responsible according to the terms of this section. Failure of the **CITY** to monitor compliance with these requirements imposes no additional obligations on the **CITY** and will in no way act as a waiver of any rights hereunder. This obligation to indemnify and defend the **CITY** as set forth here is binding on the successors, assigns or heirs of the **CONSULTANT** and shall survive the termination of this agreement or this section.
- (4) In the event the **CITY** is alleged to be liable based upon the above, the **CONSULTANT** shall defend such allegations and shall bear all costs, fees and expenses of such defense, including but not limited to, all reasonable attorneys' fees and expenses, court costs, and expert witness fees and expenses, using attorneys approved in writing by the **CITY**, which approval shall not be unreasonably withheld. Notwithstanding, the **CONSULTANT** shall not be required to defend or bear the costs and expenses of defending any liability

alleged against the **CITY** to extend it is alleged to arise solely by the negligence or willful misconduct of the **CITY** .

- (5) These provisions shall in no way be limited by any financial responsibility or insurance requirements, and shall survive the termination of this agreement.
- (6) The City of Madisonville (**CITY**) is a political subdivision of the Commonwealth of Kentucky. The **CONSULTANT** acknowledges and agrees that the **CITY** is unable to provide indemnity or otherwise save, hold harmless, or defend the **CONSULTANT** in any manner.

6.9.3. Financial Responsibility

The **CONSULTANT** understands and agrees that the **CONSULTANT** shall, prior to final acceptance of the **CONSULTANT'S** proposal and the commencement of any work; demonstrate the ability to assure compliance with the Indemnity Agreement and other provisions of this Agreement.

6.9.4. Insurance Requirements

6.9.4.1. Required Insurance Coverage

The **CONSULTANT** shall procure and maintain for the duration of this Agreement the following or equivalent insurance policies at no less than the limits shown below and cause its subcontractors to maintain similar insurance with limits acceptable to the **CITY** in order to protect the **CITY** against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the **CONSULTANT**. The cost of such insurance shall be included in any proposal:

<u>Coverage</u>	<u>Limits</u>
General Liability (Insurance Services Office Form CG 00 01)	\$1 million per occurrence, \$2 million aggregate or \$2 million combined single limit
Commercial Automobile Liability (Insurance Services Office Form CA 0001)	combined single, \$1 million per occurrence
Professional Liability	\$1 million per occurrence, \$2 million aggregate
Worker's Compensation	Statutory
Employer's Liability	\$500,000.00

The policies above shall contain the following conditions:

- a. The **CITY** shall be named as an additional insured in the General Liability Policy and Commercial Automobile Liability Policy.
- b. The General Liability Policy shall be primary to any insurance or self-insurance retained by the **CITY**.
- c. The General Liability Policy shall include Business Interruption coverage.
- d. The General Liability Policy shall include a Pollution Liability endorsement and/or Environmental Casualty coverage unless it is deemed not to apply by the **CITY**.
- e. The General Liability Policy shall have a Professional Liability endorsement (including Errors and Omissions), which shall include Business interruption coverage and this policy or endorsement shall include Environmental Casualty coverage for any services performed pursuant to the contract, and/or a separate Professional Liability Policy shall be obtained, unless it is deemed not to apply by the **CITY**. (The **CITY** does not need to be named as additional insured).
- f. The **CITY** shall be provided at least 30 days advance written notice via certified mail, return receipt requested, in the event any of the required policies are canceled or non-renewed.
- g. The Professional Liability policy shall be maintained for a minimum of three years beyond the completion date of the project, to the extent commercially available. If not commercially available, the **CONSULTANT** shall notify the **CITY** and obtain similar insurance that is commercially available and acceptable to the **CITY**.
- h. Said coverage shall be written by insurers acceptable to **CITY** and shall be in a form acceptable to the **CITY** Insurance placed with insurers with a rating classification of no less than Excellent (A or A-) and a financial size category of no less than VIII, as defined by the most current Best's Key Rating Guide shall be deemed automatically acceptable.

6.9.4.2. Renewals

After insurance has been approved by the **CITY**, evidence of renewal of an expiring policy must be submitted to the **CITY**, and may be submitted on a manually signed renewal endorsement form. If the policy or carrier has changed, however, new evidence of coverage must be submitted in accordance with these Insurance Requirements.

6.9.4.3. Right to Review, Audit and Inspect

The **CONSULTANT** understands and agrees that the **CITY** may review, audit and inspect any and all of the **CONSULTANT'S** records and operations to insure compliance with these Insurance Requirements.

6.9.5. Safety and Loss Control

The **CONSULTANT** shall comply with all applicable federal, state, and local safety standards related to the performance of its works or services under this Agreement and take necessary action to protect the life, health and safety and property of all of its personnel on the job site, the public, and the **CITY**.

6.9.6. Definition of Default

The **CONSULTANT** understands and agrees that the failure to comply with any of these provisions shall constitute default under this Agreement. The **CONSULTANT** also agrees that the **CITY** may elect as its option any single remedy or penalty or any combination of remedies and penalties, as available, including but not limited to purchasing insurance and charging the **CONSULTANT** for any such insurance premiums purchased, or suspending or terminating this Agreement.

SECTION 7 - EQUAL EMPLOYMENT OPPORTUNITY

During the performance of this Agreement, the **CONSULTANT** agrees as follows:

7.1. The **CONSULTANT** will not discriminate against any employee or application for employment because of race, color, religion, national origin, sex, age, or handicap. The **CONSULTANT** will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, national origin, sex, age, or handicap. Such action shall include, but not be limited to the following: employment upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeships. The **CONSULTANT** agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this non-discrimination clause.

7.2.1. The **CONSULTANT** will, in all solicitations or advertisements for employees placed by or on behalf of the **CONSULTANT**, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, national origin, sex, age (between forty and seventy), or handicap.

SECTION 8 - SPECIAL PROVISIONS, EXHIBITS, AND SCHEDULES

8.1. This Agreement is subject to the following provisions.

8.1.1. Pursuant to subparagraph 3.4 of this Agreement, the **CITY** has assigned Jeff Bell (the "**CITY'S** Agent"), as the authorized agent of the **CITY**, to monitor, direct and review the performance of work of the **CONSULTANT**. Documents, data, reports, and all matters associated with carrying out this Agreement shall be addressed to the **CITY'S** Agent or his designee. Questions by the **CONSULTANT** regarding interpretations of the terms, provisions and requirements under this Agreement shall be addressed to the **CITY'S** Agent or his designee. The **CONSULTANT** shall look only to the **CITY'S** Agent or his designee for direction in

its performance under this Agreement; no other direction shall be binding upon the **CITY**. The **CITY** shall respond to written requests by the **CONSULTANT** within thirty (30) days.

- 8.2. This Agreement, together with the Incorporated Documents (Section 1.2) constitutes the entire Agreement between the **CITY** and the **CONSULTANT** and supersedes all prior written or oral understandings. This Agreement and EXHIBITS A and B and any related schedules or documents may only be amended, supplemented, modified or canceled by a duly executed written instrument.
- 8.3. NO THIRD PARTY RIGHTS. This agreement does not create a contractual relationship with or right of action in favor of a third party against either the **CITY** or the **CONSULTANT**.
- 8.4. UNENFORCEABLE TERMS/SURVIVABILITY. If any term or provision of this Agreement shall be found to be illegal or unenforceable, this Agreement shall remain in full force and such term or provision shall be deemed stricken. The provisions of Section 6 of this Agreement shall survive its termination.

IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement as of the day and year first above written.

CITY:

CITY OF MADISONVILLE, KENTUCKY

By: _____
Kevin Cotton, Mayor

ATTEST:

Kim Blue, City Clerk

STATE OF KENTUCKY)
)
COUNTY OF HOPKINS)

The foregoing Agreement was subscribed, sworn to and acknowledged before me by Kevin Cotton and Kim Blue, Mayor and City Clerk respectively, for and on behalf of the City of Madisonville, Kentucky, persons known to me or presenting sufficient evidence of his/her identification, on this _____ day of _____, 2023.

Notary Public, State at Large, KY
My commission expires: _____
Notary No: _____

CONSULTANT:

By: _____

STATE OF _____)
)
COUNTY OF _____)

The foregoing Agreement was subscribed, sworn to and acknowledged before me by _____, as the duly authorized representative for and on behalf of _____, a, person known to me or presenting sufficient evidence of his/her identification, on this _____ day of _____, 2023.

Notary Public, State of _____
My commission expires: _____
Notary No: _____