

## **CONSULTING AGREEMENT**

**THIS CONSULTING AGREEMENT** (“Consulting Agreement” or “Agreement”) is made and entered into this 11th day of September, 2018, by and between **Merrick & Company**, a Colorado Corporation, whose address is 2480 West 26<sup>th</sup> Ave., Suite B225, Denver, Colorado 80211 (hereinafter referred to as “Consultant”) and the **TOWN OF ERIE, COLORADO**, a Colorado municipal corporation, whose address is 645 Holbrook Street, P.O. Box 750, Erie, Colorado 80516 (hereinafter referred to as “Town” or “Erie”).

### **W I T N E S S E T H**

**WHEREAS**, the Town desires to engage the Consultant to render the professional services described in this Consulting Agreement and the Consultant is qualified and willing to perform such services in accordance with, and subject to the provisions of this Consulting Agreement; and,

**WHEREAS**, legal authority exists to engage the Consultant and sufficient funds have been budgeted and are available for the work to be performed by the Consultant under this Agreement, and other necessary approvals have been obtained.

**NOW, THEREFORE**, in consideration of the mutual promises, covenants and obligations of the parties hereto, the terms, covenants and conditions hereof, and intending to be legally bound, the Town and the Consultant agree as follows:

1. The Project. The Consultant's services are engaged under this Consulting Agreement for the following project: **Construction Management for the Erie Parkway 30 inch Waterline Relocation, P18-266** (“Project”).

2. Consultant’s Services. The Consultant shall, during the term of this Agreement, provide the services to the Town as set forth in Exhibit “A”, attached hereto and incorporated herein by this reference (the “Services”). The Consultant shall perform the Services competently, efficiently, and in accordance with the highest standards of its profession. The Consultant shall perform the Services meeting all industry safety standards.

3. Additional Services. The Town may request the Consultant to perform additional work or phases of the Project in addition to the Services. The Consultant agrees to perform the additional work or phases of the Project if the Town so requests, either pursuant to an amendment to this Consulting Agreement or a new agreement in which the Town and the Consultant shall define the scope of, and additional payment for, the additional work or phases of the Project.

4. Compensation. In consideration for the performance of the Services, the Town shall pay to the Consultant a fee in the total amount of **\$55,612**, and payable in accordance with the payment schedule, as set forth in Exhibit “A”, attached hereto and incorporated herein by this reference.

5. Reimbursable Expenses. The Town agrees to reimburse the Consultant for the reimbursable expenses incurred by the Consultant in connection with the Services, such expenses to be described in detail in Exhibit “A”. Travel expenses between the Town and the Consultant's office shall not be considered reimbursable expenses. The Consultant shall maintain an accurate record of all such expenses and provide itemized records and copies of receipts when submitting such expenses to the Town for reimbursement. The maximum amount reimbursable by the Town

to the Consultant under this Consulting Agreement shall be set forth on Exhibit "A". Such expenses not described on Exhibit "A", shall not be reimbursed by the Town.

6. Commencement and Completion of Services. The Consultant understands and agrees that time is an essential requirement of this Consulting Agreement. The term of this Consulting Agreement shall commence on the date of this agreement and shall end on **December 31, 2018**. The Services shall be completed as soon as good practice and due diligence will permit.

7. Termination.

A. This Consulting Agreement may be terminated by either party upon Ten (10) days prior written notice to the other party in the event of a substantial failure by the other party to fulfill its obligations under this Consulting Agreement through no fault of the terminating party.

B. This Consulting Agreement may be terminated by the Town in its sole discretion upon Ten (10) days prior written notice to the Consultant.

C. In the event of termination as provided for in this paragraph, the Town shall pay the Consultant in full for Services performed to the date of notice of termination plus any Services the Town deems necessary during the notice period. Said compensation shall be paid upon the Consultant's delivering or otherwise making available to the Town all data, drawings, specifications, reports, estimates, summaries and such other information and materials as may have been accumulated by the Consultant in performing the Services included in this Consulting Agreement, whether completed or in progress.

8. Insurance.

8.1 Consultant shall procure and maintain, and shall cause any subcontractor of Consultant to procure and maintain, the minimum insurance coverages listed below. Such coverages shall be procured and maintained with forms and insurers acceptable to the Town. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by Consultant pursuant to paragraph 17 of this Consulting Agreement. In case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

A. Workmen's Compensation Insurance and Employer's Liability Insurance to cover obligations imposed by applicable laws for any employee of Consultant or a subcontractor engaged in the performance of work under this Consulting Agreement.

B. General liability insurance with minimum combined single limits of One Million Dollars (\$1,000,000) each occurrence and One Million Dollars (\$2,000,000) aggregate. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employees' acts), blanket contractual, products, and completed operations. The policy shall contain a severability of interests provision.

C. Comprehensive Automobile Liability insurance within single limits for bodily injury and property damage of not less than One Million Dollars (\$1,000,000) each occurrence and One Million Dollars (\$2,000,000) aggregate with respect to each of Consultant's owned, hired or non-owned vehicles assigned to or used in the performance of this Consulting Agreement. The policy shall contain a severability of interests provision.

D. Professional Liability insurance within minimum single limits of not less than One Million Dollars (\$1,000,000) each occurrence and One Million Dollars (\$2,000,000) aggregate.

8.2 The policies required by subparagraphs B and C, above shall be endorsed to include the Town and the Town's officers and employees as additional insureds. Every policy required above shall be primary insurance, and any insurance carried by the Town, its officers, or its employees, or carried by or provided through any insurance pool of the Town, shall be excess and not contributory insurance to that provided by the Consultant. The Consultant shall be solely responsible for any deductible losses under any policy required above.

8.3 A certificate of insurance shall be completed by the Consultant's insurance agent and provided to the Town as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be reviewed and approved by the Town prior to commencement of the Consulting Agreement. The certificate shall identify this Consulting Agreement and shall provide that the coverages afforded under the policies shall not be cancelled until at least thirty (30) days prior written notice has been given to the Town. Consultant shall notify the Town within ten (10) days if the coverages afforded under the policies are materially changed. The completed Certificate of Insurance shall be sent to: Town Clerk, Town of Erie, PO Box 750, Erie, CO 80516

8.4 Notwithstanding any other portion of this Consulting Agreement, failure on the part of Consultant to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of this Consulting Agreement for which the Town may immediately terminate this Consulting Agreement, or, at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all money so paid by the Town shall be repaid by the Consultant to the Town upon demand, or the Town may offset the cost of the premiums against any money due to the Consultant from the Town.

8.5 The parties hereto understand and agree that the Town is relying on, and does not waive or intend to waive by any provision of this Consulting Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, Section 24-10-101, et seq., C.R.S., as from time to time amended, or any other law, protection or limitation otherwise available to the Town, its officers, or its employees.

9. Payment of Subcontractors. Consultant shall contract with and pay any and all subcontractors used by Consultant in the performance of the Project. The Town shall in no event have any liability to any subconsultant, and Consultant shall hold the Town harmless with respect to any payments alleged to be due to Consultant's subcontractors.

10. Compliance with Applicable Laws. In connection with the execution of this Consulting Agreement, the Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, or disability. Such actions 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 apprenticeship. Consultant shall comply with the Americans with Disabilities Act (Public Law 101-336), and all applicable regulations and rules promulgated by the Equal Employment Opportunity Commission and the Colorado Civil Rights Commission. At all times during the performance of the Agreement, Consultant shall strictly

adhere to all applicable federal, state and Town laws that have been or may hereafter be established. This shall include, without limitation, the United States Department of Labor standards. As used in this paragraph, and hereafter, the term "laws" shall include, without limitation, all federal, state and Town codes, charters, ordinances, laws, standards, rules and regulations. The indemnification and termination provisions of this Consulting Agreement shall apply with respect to Consultant's failure to comply with all applicable laws or regulations.

10A. No Discrimination In Employment. In connection with the performance of work under this Agreement, Consultant agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified on the basis of race, color, ancestry, creed, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability and further agrees to insert the foregoing provision in all subcontracts hereunder

11. Prohibited Interest.

A. The Consultant agrees that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its Services hereunder. The Consultant further agrees that in the performance of the Consulting Agreement, no person having any such interest shall be employed.

B. No official or employee of the Town shall have any interest, direct or indirect, in the Consultant, this Consulting Agreement or the proceeds therefrom.

12. Independent Contractor. The Consultant shall perform all Services as an independent contractor, and nothing in this Consulting Agreement is intended to or shall create a relationship of employer-employee, joint venturers, or partners, between the parties. The Consultant shall be solely responsible for all federal and state income taxes attributable to the monies payable to the Consultant for the Services.

13. Books and Records. The Consultant's books and records with respect to the Services and reimbursable costs shall be kept in accordance with generally accepted accounting principles and practices, consistently applied, and will be made available for the Town's inspection at all reasonable times at the places where the same may be kept. The Consultant shall not be required to retain such books and records for more than three (3) years after completion of the services.

14. Obligation of Non-Disclosure. The Consultant agrees to keep confidential any and all drawings, reports, documents, memoranda, research, plans, analysis, maps, photographs, designs, information and work product either provided by the Town or generated by the Consultant pursuant to this Consulting Agreement, or provided to the Consultant by other consultants. Consultant shall make use of the information or items set forth hereinabove for any purpose, including public hearings of the Town, as expressly directed by the Town, for the Town's benefit. Consultant shall not use the information or items set forth hereinabove for its own account, or another's account, or in any manner detrimental to the Town. The Town acknowledges the need to share said information and items referred to hereinabove with the Consultant's subconsultants under this Consulting Agreement, and hereby approves such sharing and use.

15. Acknowledgement of Ownership. Consultant acknowledges that all drawings documents, information and materials relating to the Services performed and the Project for which

the Services are performed, as well as those items described in paragraph 14, are or shall become, upon termination of this Consulting Agreement, the exclusive property of the Town.

16. Return of Information. Promptly upon the Town's request, and in any event upon the termination of this Consulting Agreement for any reason, all documents, materials and writings, as well as those items described in paragraph 14, and all copies thereof provided by the Town to the Consultant, directly or indirectly, shall be returned by the Consultant to the Town.

17. Professional Liability. The Consultant shall exercise in its performance of the Services hereunder the standard of care required by Colorado law. The Consultant shall be liable to the Town for any loss, damages, or costs incurred by the Town for the repair, replacement or correction of any part of the Project which is deficient or defective as a result of any failure of the Consultant to comply with this standard.

18. Communications. All communications relating to the day-to-day Services for the Project shall be exchanged between the respective Project representatives of the Town and the Consultant who will be designated by the parties promptly upon commencement of the Services.

19. Indemnification. Consultant agrees to indemnify and save harmless the Town against any and all claims, debts, demands, damages or obligations which may be asserted against the Town arising by reason of, or in connection with, any alleged act or omission of Consultant or any person claiming under, by or through Consultant, at Consultant's own expense using those attorneys that the Town deems appropriate. If, however, it becomes necessary for the Town to defend any action arising by reason of, or in connection with, any alleged act or omission of Consultant or any person claiming under, by or through Consultant seeking to impose liability for such claim or demand, Consultant shall pay all court costs, witness fees, expert witness fees, and attorney's fees, incurred by the Town in effecting such defense in addition to any other sums which the Town may be called upon to pay by reason of the entry of any judgment, assessment, bond, writ or levy against the Town in the litigation in which such claims are asserted. Consultant shall be subrogated to any and all amounts paid by it on behalf of the Town to any claims that the Town may have as a result of said payments to any person or third persons which are the reason or cause of said payments.

20. No Assignment. Consultant's duties and obligations pursuant to this Consulting Agreement require a particular expertise and skill, and may not be assigned to any third party or agency without the express written consent of the Town, which consent may be withheld at the sole discretion of the Town.

21. Notices. Any notices required or permitted hereunder shall be sufficient if personally delivered or if sent by certified mail, return receipt requested, addressed as follows:

If to the Town:

Director of Public Works  
Town of Erie  
P.O. Box 750  
Erie, Colorado 80516

With a copy (which shall not constitute notice) to:

Kendra L. Carberry  
Hoffmann, Parker, Wilson & Carberry, P.C.  
P.O. Box 750  
645 Holbrook Street

Erie, CO 80516

If to the Consultant:

Terrence P. Kenyon  
2480 W. 26<sup>th</sup> Street, Unit B255  
Denver, Colorado 80211

Notices personally delivered shall be effective upon delivery. Mailed notices shall be effective three (3) business days after mailing.

22. Agreement Subject to Annual Appropriation.

A. The parties hereto understand and agree that the amount of **\$55,612** has been budgeted for compensation for work done pursuant to this Consulting Agreement for the current fiscal year ending December 31, 2018. This is a full and lawful appropriation as required by appropriate statute for this project. In the event that the Town fails to appropriate sufficient funds to cover any compensation which may become due for the fiscal year beginning January 1, 2019, then, and in that event, this Consulting Agreement shall immediately terminate as of December 31, 2018, without further action of any party. The Town shall provide notice to Consultant prior to December 31, 2018, as to whether an appropriation has been made for further work anticipated following December 31, 2018.

B. The amount of money appropriated by the Town is equal to or in excess of the Consulting Agreement amounts due herein for the current fiscal year.

C. The Town shall be prohibited from issuing any change order or other form of order or directive requiring additional compensable work to be performed, which work causes the aggregate amount payable under this Consulting Agreement to exceed the amount appropriated for the original Consulting Agreement, unless Consultant is given written assurance by the Town that lawful appropriations to cover the cost of the additional work have been made or unless such work is covered under a remedy-granting provision in this Consulting Agreement.

23. Prohibition Against Employment of Illegal Aliens.

A. By its signature on this Agreement, Consultant certifies that, as of the time of its signature, it does not knowingly employ or contract with an illegal alien and that, in order to verify that it does not employ any illegal aliens, the Consultant will participate in the E-Verify Program created in Public Law 104-208, as amended, and expanded in Public Law 108-156, as amended, administered by the United States Department of Homeland Security and the Social Security Administration.

B. Consultant agrees that it shall not knowingly employ or contract with an illegal alien to perform work under this Agreement; and that it shall not enter into a contract with a subcontractor that fails to certify to the Consultant that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract.

C. Consultant has verified through participation in the E-Verify Program that the Consultant does not employ any illegal aliens.

D. Consultant shall not use the E-Verify Program procedures to undertake preemployment screening of job applicants while work under this Agreement is being performed.

E. If Consultant obtains actual knowledge that a subcontractor performing

work under this Agreement knowingly employs or contracts with an illegal alien, the Consultant shall: (1) notify the subcontractor and the Town within three days that the Consultant has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and (2) terminate the subcontract with the subcontractor if, within three days of receiving the notice required herein, the subcontractor does not stop employing or contracting with the illegal alien; except that the Consultant shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

F. The Consultant shall comply with any reasonable request by the Colorado Department of Labor and Employment made in the course of an investigation that the Department is undertaking pursuant to the authority established in C.R.S. section 8-17.5-101(5).

G. If Consultant violates a provision of this Illegal Alien section, the Town may terminate this Agreement for breach of contract. If the Agreement is so terminated, the Consultant shall be liable for actual and consequential damages to the Town. Consultant understands that, in the event of such a termination, Town is required to notify the office of the Colorado Secretary of State.

24. Attorney's Fees; Interest. In any action brought to enforce the provision(s) of this Consulting Agreement, the prevailing party shall be entitled to an award of all reasonable attorney's fees and costs, including expert witness' fees, expended or incurred, to be recovered as part of the costs therein. Any fees and expenses not paid to Consultant by the Town when due shall earn interest at the rate of six percent (6%) per annum.

25. Waiver. Failure to insist upon strict compliance with any of the terms, covenants, and/or conditions hereof shall not be deemed a waiver of such terms, covenants or conditions, nor shall any waiver or relinquishment of any right or power hereunder at any one time or more times be deemed a waiver or relinquishment of such right or power at any other time or times.

26. Amendments to Agreement. No changes, alterations or modifications to any of the provisions hereof shall be effective unless contained in a written agreement signed by both parties.

27. Entire Agreement. This Consulting Agreement shall constitute the entire agreement between the parties hereto and shall supersede all prior contracts, proposals, representations, negotiations and letters of intent, whether written or oral, pertaining to the Services.

28. Situs, Venue and Severability. The laws of the State of Colorado shall govern the interpretation, validity, performance and enforcement of this Consulting Agreement. For the resolution of any dispute arising hereunder, venue shall be in the Courts of the County of Weld, State of Colorado. If any provision of this Consulting Agreement shall be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this Consulting Agreement shall not be affected thereby.

29. Paragraph Headings. Paragraph headings are inserted for convenience only and in no way limit or define the interpretation to be placed upon this Consulting Agreement.

30. Binding Agreement. This Consulting Agreement shall be binding upon and for the benefit of the parties hereto, their successors and assigns.

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

**TOWN:**

**TOWN OF ERIE,**  
**a Colorado municipal corporation**

By: \_\_\_\_\_

**ATTEST:**

By: \_\_\_\_\_  
Jessica Koenig, Deputy Town Clerk

**CONSULTANT:**

**Merrick & Company,**  
**a Colorado corporation**

By: \_\_\_\_\_  
Terrence P. Kenyon, Principal

**ATTEST:**

By: \_\_\_\_\_  
Ronald E. Dvorak, Principal



**EXHIBIT "A"**

August 27, 2018

Wendi Palmer, PE  
Town of Erie  
645 Holbrook Street  
Eire, Colorado 80516

**RE: Proposal for Construction Phase Services  
30-inch Water Transmission Main Relocation**

Dear Wendi:

Merrick & Company is pleased to submit this proposal to provide engineering construction phase services for the referenced water main relocation.

#### **SCOPE OF SERVICES**

The work will include engineering related services required for construction of the project, including full time inspection and related construction services. Construction phase services would be provided upon authorization, and would likely include:

- a. Attendance at preconstruction conference.
- b. Consultation with, and advice to, the Town during construction.
- c. Preparation of elementary and supplementary sketches required to resolve problems due to actual field conditions encountered.
- d. Checking detailed construction drawings and shop and erection drawings submitted by the Contractor for compliance with design concepts.
- e. Reviewing laboratory, shop, and mill test reports on materials and equipment.
- f. Technical observation of construction by a full-time resident project engineer or representative, and by supporting staff as required. Coordination with RockSol for scheduling materials testing.
- g. Making periodic visits to the project site at intervals appropriate to the various stages of construction to observe, as an experienced and qualified design professional, the progress and quality of the executed work. Attend construction meetings.

h. Issuing instructions from the Town to the Contractor, issuing necessary interpretations and clarifications of contract documents, preparing required change orders, requiring special inspections and testing of the work, and making decisions as to acceptability of the work.

i. Preparation of Record Drawings.

## **ESTIMATED FEES**

Construction Phase services will be provided on an hourly rate plus actual expenses basis in accordance with our Schedule of Hourly Rates on file with the Town. For budgeting purposes, we have assumed 6 weeks of onsite construction observation during the construction duration. A breakdown of costs by tasks is detailed on the attached spreadsheet. The estimated construction phase budget is \$55,612.

### **Assumptions:**

In preparing this proposal, we've made the following assumptions:

- Survey to be provided by the contractor.
- Materials testing to be provided by RockSol.

Respectfully Submitted,

**Merrick & Company**




Terrence P. Kenyon, PE

Enclosures: Construction Phase Fee Estimate

## Erie Parkway 30 Inch Waterline Relocation



Item	 <b>Construction Phase Task</b>								Total
		Senior Project Manager	Senior Design Engineer	Design Engineer	Senior Inspector	Design Drafter	Clerical	Expenses	
		\$196	\$115	\$100	\$115	\$117	\$85	Cost	
1	Preconstruction Conference	4.0			6.0			\$ 50	\$ 1,524
2	Office Engineering Support:	30.0	16.0	16.0	12.0	16.0		\$ 200	\$ 12,772
	Scope Items b,c,d,e, g & h.								
3	Construction Observation	12.0			300.0			\$ 1,000	\$ 37,852
4	Prepare Record Drawings	2.0		12.0		16.0			\$ 3,464
	<b>Total</b>	48.0	16.0	28.0	318.0	32.0	0.0	1,250.0	55,612.0
	<b>Estimated Budget</b>								\$ 55,612