

**AGREEMENT FOR
DESIGN CONSULTANT SERVICES**

BETWEEN

COUNTY OF DURHAM

AND

SMITH AND GARDNER, INC.

PROJECT: Southern Durham County Solid Waste Convenience Center Sites

OWNER'S PROJECT NO: RFQ – 19-007 Southern Sites

DATE: 1/8/2019

AGREEMENT FOR DESIGN CONSULTANT SERVICES

This Contract for Design Consultant Services is made, and entered into this the 8th day of January, 2019, by and between the **COUNTY OF DURHAM**, a political subdivision of the State of North Carolina, (hereinafter "**OWNER**"), and **SMITH AND GARDNER, INC.**, EID# 561734959 (hereinafter "**DESIGNER OR DESIGN CONSULTANT**"), whose principal place of business is: 14 N. Boylan Avenue, Raleigh, NC 27603.

For Professional Services in connection with the Project known as:

UPGRADES TO SOUTHERN DURHAM COUNTY SOLID WASTE CONVENIENCE SITES

The Owner and the Design Consultant hereby agree as set forth below:

ARTICLE 1

DEFINITIONS

The following words and phrases where appearing in initial capitalization, shall for the purposes of this Agreement have the following meanings:

- 1.1 **Project.** The Project shall be as described above.
- 1.2 **Services.** The Services to be performed by the Design Consultant under this Agreement shall consist of the Basic Services described in Article 3 and any Additional Services under described in Article 7.
- 1.3 **Construction Contract Documents.** The Construction Contract Documents shall consist of the plans and specifications prepared by the Design Consultant, and any addenda and change orders thereto, and the Construction Contract between Owner and Contractor, all of which shall be compatible and consistent with this Agreement.
- 1.4 **Contractor.** The Contractor is the person or entity which enters into an agreement with the Owner to perform the construction of any or all of the Project, including, without limitation, the providing of labor, materials, and equipment incorporated or to be incorporated into the Project. The term "Contractor" means the Contractor or its authorized representative, but excludes the Owner's Representative and the Design Consultant.
- 1.5 **Basic Services Compensation.** Basic Services Compensation shall be the lump sum fee designated in Article 4 to be paid by the Owner to the Design Consultant in connection with the performance of the Basic Services by the Design Consultant.
- 1.6 **Preliminary Programming.** The Preliminary Programming or "Program" is the preliminary written summary of the requirements of the facility which sets forth the Owner's design objectives, constraints and criteria, including space requirements and relationships, quality levels, flexibility and expandability, special equipment and systems and site requirements, as described in Exhibit A. The Design Consultant shall use the preliminary programming work of the Owner as a starting point for all final programming as part of the Design Consultant's Basic Services. All final programming and space profiling is the expressed responsibility of the Design Consultant.

- 1.7 Management Plan. The Management Plan is the description and definition of the phasing, sequencing and timing of the major project activities for design, construction procurement, construction and occupancy as described in Exhibit B.
- 1.8 Design Phase Change Order. A Design Phase Change Order is the form of documentation from the Owner approving and authorizing a modification to the Program, Budget, Management Plan, or previously approved Design Phase documents.

ARTICLE 2

RELATIONSHIP OF THE PARTIES

- 2.1 Design Consultant Services. The Design Consultant shall provide professional architectural/engineering services for the Project in accordance with the terms and conditions of this Agreement and all applicable codes and laws. The Design Consultant's performance of services shall be as professional consultant to the Owner to carry out the activities of Project design and construction administration and to provide the technical documents and observations to achieve the Owner's Project objectives.
- 2.2 Owner Representation. The Owner shall designate a Project Manager to serve as the Owner's Representative. The Owner's Representative has no design responsibilities of any nature. None of the activities of the Owner's Representative supplant or conflict with the design, budget or any other services and responsibilities customarily furnished by the Design Consultant or sub-consultants in accordance with generally accepted architectural/engineering practices except as otherwise modified by this Agreement. Instructions by the Owner to the Design Consultant relating to services performed by the Design Consultant will be issued or made by or through and in accordance with procedural, organizational, and documentation standards established by the Owner's Representative. Communications and submittals of the Design Consultant to the Owner and Contractor shall be in writing and issued or made in accord with similar procedural and documentation standards established by the Owner's Representative. The Owner's Representative shall have the authority to establish procedures, consistent with this Agreement, to be followed by the Design Consultant and Contractor and to call periodic conferences to be attended by the Design Consultant, and his sub-consultants, throughout the term of this Agreement.
- 2.3 Other Consultants. The Owner may provide drawings, consultation, recommendations, suggestions, data and/or other information relating to the Project from other Consultants under separate contract with the Owner, including but not limited to: Surveyor, Utility Locating Service, Geo-technical Consultant, and/or Materials Testing Consultant. The Design Consultant is responsible for the coordination of survey, existing utility location, geo-technical services, and/or material testing, including all coordination with surveyor, soils engineers, utility locating contractor, City and/or County officials, required for Project.
- 2.4 Design Consultant Representation.
- 2.4.1 The Design Consultant shall provide a list of all consultants (and sub-consultants if applicable) which the Design Consultant intends to utilize on the Project prior to commencing work on the Project. The list shall include such information on the qualifications of the consultants as may be requested by the Owner. The Owner will review the consultants proposed. The Design Consultant shall not retain a consultant to which the Owner has a reasonable objection. The Design Consultant shall use individuals or firms that are licensed and regularly engaged in the fields of expertise required for this Project. In addition, the Design Consultant shall use an individual or firm with specific expertise in roofing for any projects containing any roofing work. The Design Consultant will also require regular inspections by roofing manufacturer and certification that roofing system was installed in accordance with installation guidelines.

- 2.4.2 The Design Consultant shall provide to the Owner a list of the proposed key project personnel of the Design Consultant and its consultants to be assigned to the Project. This list shall include such information on the professional background of each of the assigned personnel as may be requested by the Owner, through the Owner's Representative. Such key personnel and consultants shall be satisfactory to the Owner and shall not be changed except with the consent of the Owner unless said personnel cease to be in the Design Consultant's (or its consultants, if applicable) employ.
- 2.4.3 Security Background Checks. The Design Consultant is responsible for requesting and paying for criminal history checks on all individuals providing services under this contract who will be obtaining County identification badges and allowed unescorted access to County facilities. Background checks can be provided by any vendor or from a North Carolina State agency, providing that the criminal history check is done nationwide. The Sheriff's Office will conduct background investigations for those Design Consultant employees who will be working at the Courthouse or Detention Center. A criminal history will not automatically disqualify a Design Consultant's employee from employment on a County contract unless explicitly mandated by law.

The Design Consultant will send the results of the background checks to their County point of contact who will provide them to the Durham County Security Manager. The Security Manager will individually assess and determine the degree to which the nature of a person's criminal conduct has a direct and/or specific negative bearing on a person's fitness or ability to perform contract services in Durham County buildings. The Security Manager will consult the Legal Office on any negative determinations. The Security Manager will notify the Design Consultant's County point of contact of the results of the review. A Design Consultant can appeal a negative determination by the Security Manager to the County Manager for final disposition. Appeals need to be submitted in writing to the contract point of contact within 30 days of notice of a decision to remove or deny an individual from working the County contract due to adverse information in the background check.

This information will be updated annually by the Design Consultant, 90 days prior to the renewal or extension of the contract, and submitted to their County point of contact who will provide them to the Durham County Security Manager. Personnel without a currently approved background check will have their access to those buildings restricted.

Additional background screening may be necessary at specific county buildings. The Design Consultant shall provide names of all individuals in the Contractor communications log and to the County Representative. This information will be reviewed annually.

For those Design Consultant employees who will be working at the Courthouse or Detention Center, the Sheriff's Office will make the security determination. The Contractor will provide the results of their background check to the Major for Support Services who will conduct an additional investigation and then individually assess and determine the degree to which the nature of a person's criminal conduct has a direct and/or specific negative bearing on a person's fitness or ability to perform contract services in the Courthouse or Detention Facility. A Contractor can appeal a negative determination to the Chief Deputy for final disposition. Appeals need to be submitted in writing to the Chief Deputy within 30 days of notice of a decision to remove or deny an individual from working the contract due to adverse information in the background check. While an appeal is pending, the employee will not be allowed access to the Courthouse or Detention Facility. This information will be updated by the

Design Consultant and submitted to the Sheriff's Office annually, 90 days prior to the renewal or extension of the contract. Personnel without a currently approved background check will have their access to those buildings restricted.

- 2.4.4 The Design Consultant shall receive, compile and report all M/WBE participation of all of its sub-consultants and vendors of this project in a format acceptable to Owner at the commencement of design, and on a monthly basis, should any change from the preliminary submission occur.
- 2.5 Division of Responsibilities/Services. The Design Consultant understands and agrees that should the Owner's Representative or other consultant provide the Design Consultant with any estimating assistance, cost or time control recommendations or other consultation, recommendations or suggestions, any or all such activities on the part of the Owner's Representative, consultant, or any other representative of the Owner shall in no way relieve the Design Consultant of the responsibility of fulfilling its obligations and responsibilities under this Agreement.
- 2.6 Compliance with Laws. Design Consultant shall abide by all applicable statutes, rules, regulations, laws, and executive orders Federal, State and Local as they relate to, but are not limited to, (i) services in general, (ii) payment of employees, subcontractors and agents, (iii) the Occupational Safety and Health Administration, (iv) the Fair Labor Standards Act, and (v) the Wage and Hour Division. In the event Design Consultant is determined by the final order of a court or appropriate agency to be in violation of any Federal, State or Local statute, rule, regulation, law or executive order or this provision, this Contract may be canceled, terminated or suspended in whole or in part by COUNTY and Design Consultant may be declared ineligible for further COUNTY contracts.

ARTICLE 3

BASIC SERVICES

- 3.1.1 Scope of Services.
- 3.1.2 The Basic Services to be provided by the Design Consultant shall be performed in the phases described hereinafter and shall include architectural, landscape architectural, and civil engineering services in development of a facility master plan. The Basic Services to be performed by the Design Consultant consist of professional tasks which have as their objective design, production of the facility master plan, which will be taken to Schematic Design. The Basic Services shall be performed consistent with the standard of care ordinarily exercised by members of the engineering and consulting profession practicing under similar conditions at the same time and locality the Basic Services are performed.
- 3.1.3 This Agreement describes the Design Consultant's Basic Services
- 3.1.3 The services described below are under the Project Phases in which they customarily occur. This order is for convenience only and does not necessarily reflect the sequence in which a service will actually be performed, or necessarily limit the Project, or a designated portion of the Project, to one of each Phase. The Owner reserves the right to designate the phasing of segregated portions of the Work and to modify the Management Plan, within the terms and conditions of this Agreement.
- 3.1.4 At existing facilities where additions and/or renovations are to take place, the Design Consultant is to verify, by on-site analysis and inspection, the compatibility of all existing systems, including, but not limited to fire alarm, security, video surveillance, CATV, voice / data, telephone,

intercom, mechanical and electrical. The Design Consultant shall report, in writing, to the Owner any compatibility issues and make appropriate written recommendations to the Owner.

- 3.1.6 The DESIGN CONSULTANT shall use the preliminary programming work of the Owner as a starting point for all final programming as part of the Design Consultant's Basic Services. All final programming and space profiling is the expressed responsibility of the Design Consultant. The Design Consultant will measure the existing facility to verify the accuracy of existing drawings, should they exist.

3.2 Scope of Work

3.3 Data Acquisition, Facility Review/Research and Demand Growth Projections

The project team will review site usage and demographic data; develop draft growth projections; and perform initial site visits prior to the project kick-off meeting. This will allow the project team to better understand facility constraints, operations and usage prior to the project kick-off meeting. We believe this approach will provide a more productive, working, project kick-off meeting that would allow the team to immediately begin developing concept plans, in response to our data review and County feedback.

3.4 Project Kick-Off Meeting

Following data collection and initial site visits, the project team will attend a project kick-off meeting with the County to: 1) discuss the general project approach, schedule, expectations and deliverables; and 2) to review collected data and identify County goals for each of the two convenience center sites.

3.5 Concept Design Parkwood

The project team will discuss facility needs with County personnel during the project kick-off meeting and will prepare up to two (2) conceptual design plans for the Parkwood Convenience Center Site that will include (1) a plan that utilizes the current facility configuration and grade and (2) a plan that maximizes the site's usage, with the only constraints being egress and site boundaries and setbacks. Each concept will take into consideration:

- Traffic flow;
- Site aesthetics;
- Existing and future locations of County provided services;
- Expandability for potential future throughput (as applicable);
- Site storm water management;
- Site security; and
- Ease of maintenance and operations.

The project team will present draft concept designs along with planning level cost estimates to the County at a meeting and based on feedback will prepare a final concept design that would be presented in a public meeting to obtain citizen/customer feedback. Based on the outcome of the meeting, the DESIGN CONSULTANT will prepare a final conceptual design along with a preliminary opinion of probable construction costs (OPCC). Draft concepts will be hand drawn and the final concept will be computer generated.

3.6 Concept Design Redwood

The project team will prepare up to three (3) concept plans for the Redwood Convenience Center Site that will include (1) a plan that utilizes the current configuration; (2) a plan that maximizes the site's usage, using County owned property south of the existing site and (3) a plan that maximizes the site's usage using the foreclosure properties to the north. Each concept will consider the same planning elements identified for Parkwood.

The project team will present the concept designs to the County at a meeting and based on feedback will prepare up to two (2) final concept designs that would be presented in a public meeting to allow the opportunity to obtain citizen/customer feedback. Based on the outcome of the public meeting, the DESIGN CONSULTANT will prepare a final conceptual design along with the opinion of probable construction costs (OPCC). Draft concepts will be hand drawn and the two final concepts will be computer generated.

3.7 Master Plan Development - Parkwood

Following review and approval of the final concept plan design, the project team will finalize one (1) master plan for the Parkwood site based on agreed upon program parameters and citizen/customer feedback.

3.8 Master Plan Development - Redwood

Following review and approval of the final concept plan design, the project team will finalize one (1) master plan for the Redwood site based on agreed upon program parameters and citizen/customer feedback.

3.9 Project Meetings

The DESIGN CONSULTANT and its subconsultants have budgeted four (4) meetings with Durham County in addition to the Project Kick-Off Meeting (Task 2) including:

- Parkwood Concept Plan Review
- Redwood Concept Plan Review
- Parkwood Master Plan Review
- Redwood Master Plan Review

The project kick-off meeting will include Smith and Gardner Engineers, Huffman Architects, MBP and the Timmons Group.

Concept and master plan review meetings will include Smith and Gardner Engineers, Timmons Group and Huffman Architects (as needed). The concept meetings and master plan meetings for Parkwood and Redwood may be combined to eliminate two project meetings; however, we believe that the Parkwood facility is less complex and would be ready for review within a tighter schedule.

3.10 Community Meetings

The DESIGN CONSULTANT and its subconsultants have budgeted for three (3) public meetings. One (1) meeting will be held for the Parkwood Site and two (2) meetings will be held for the Redwood Site. For the Parkwood Site community meeting the project team will present the final concept plan as agreed to by the County. For the Redwood Site, the project team will hold a community meeting to review the final two (2) concept plans and a second community meeting to review the draft master plan. During these meetings the project team will present the

project elements, receive feedback from the community and use the community's feedback to inform the final master plans.

3.11 Board of Commissioners Presentation

The project team will develop a PowerPoint® presentation summarizing the results of the project master plans and opinion OPCC for the Board of Commissioners and other project stakeholders. Prior to the presentation, the DESIGN CONSULTANT will meet with the County's project team to review the presentation and address the County's comments.

ARTICLE 4

COMPENSATION

4.1 Basic Services Compensation.

The Owner shall compensate the Design Consultant on a time and materials basis in accordance with the Design Consultant's standard fee schedule provided with each proposal and in accordance with the terms and conditions of this Agreement. The Design Consultant shall invoice the Owner no more than monthly.

For the Basic Services of the Design Consultant, Basic Services Compensation shall be an amount not to exceed. **EIGHTY-SEVEN THOUSAND AND 00/100 DOLLARS (\$87,000.00)** payments on account of the Design Consultant shall be made in accordance with the attached proposal.

4.2.1 No deductions shall be made from the Design Consultant's Basic Services Compensation on account of penalty, liquidated damages, retainage or other sums withheld from payments to Contractor.

4.2.2 Deductions may be made from the Design Consultant's Basic Services Compensation on account of claims for negligent errors and omissions in the drawings, specifications and other documents prepared by the Design Consultant or in the Design Consultant's performance of its obligations under this Agreement, pending final determination of the claim

4.2.3 Payments due the Design Consultant under the Agreement shall bear interest at the legal rate commencing thirty (30) days after the date the billing is received by the Owner.

4.2.5 Reimbursable Expenses incurred while performing Basic or Additional Services shall be computed at a multiple of 1.10 times actual cost. Reimbursable Expenses shall include such reasonable, actual expenditures made by the Design Consultant, his employees, or his professional consultants in the interest of the Project, limited to the following: the reasonable expense of transportation and living when traveling from the Design Consultant's office to a location outside of the Triangle Area of North Carolina in connection with the Project; and expense of reproductions, postage and handling of Drawings and Specifications, beyond those for the Design Consultant's and sub-consultants' use and those required as the phase submittals. Before incurring any Reimbursable Expenses, the Design Consultant must request and receive written authorization from the Owner.

4.2.6 If the Project is suspended for more than six months or abandoned in whole or in part by the Owner, the Design Consultant shall be paid compensation for services performed prior to receipt of written notice from the Owner of such suspension or abandonment. If the Project is resumed after being suspended for more than twelve months, the Design Consultant's Basic Services Compensation shall be equitably adjusted.

4.3 Additional Services Compensation.

- 4.3.1 With respect to any Additional Services, as described in Article 7 herein, performed by the Design Consultant hereunder, the Design Consultant and Owner shall negotiate an equitable adjustment to the Basic Services Compensation. However, if negotiations are not successful prior to the time the additional services are needed, the Owner may direct the Design Consultant to proceed with the Additional Services on a time spent basis with Additional Services Compensation to be based on Design Consultant's standard fee schedule.
- 4.3.2 Payments for Additional Services of the Design Consultant shall be made upon presentation of the Design Consultant's statement of services, fully supported by invoices, time cards, and other documentation as requested by the Owner.
- 4.4 Accounting Records.
 - 4.4.1 Records of the Design Consultant with respect to Additional Services and payroll, and consultant and other expenses (including Reimbursable Expenses) pertaining to the Project, shall be kept according to generally accepted accounting principles and shall be available to the Owner or its authorized representative for inspection and copying at mutually convenient times.
 - 4.4.2 At the request of the Owner or its authorized representative, the Design Consultant will supply in a timely manner and certify as accurate, unaltered copies of all time sheets, invoices, and other documents to substantiate and document any and all Additional Services and Reimbursable Expenses.

ARTICLE 5

PERIOD OF SERVICE

- 5.1 Specific dates relating to the period of services are set forth in Exhibit B, Management Plan.
- 5.2 Unless earlier terminated as provided in Article 11 hereof, this Agreement shall remain in force for a period which may reasonably be required for the Basic Services and Additional Services hereunder. However, the provisions of the Agreement relating to Professional Responsibility (Paragraph 3.2); Construction Warranty (Paragraph 3.6); Professional Liability coverage (Article 9); Indemnification (Article 10); and Ownership of Documents/Confidential Information (Article 13) shall remain in effect after termination of the other provisions of the Agreement.
- 5.3 If the Project is delayed through no fault of the Design Consultant, all specific dates noted in the Management Plan that are affected by the delay will be adjusted by the number of calendar days of the delay.
- 5.4 If the Owner materially revises the Project, a reasonable time extension and/or credit shall be negotiated between the Design Consultant and the Owner.
- 5.5 Time is of the essence in this Agreement.

ARTICLE 6

OWNER'S RESPONSIBILITIES

- 6.1 The Owner shall provide full information regarding the requirements for the Project.
- 6.2 The Owner shall examine documents submitted by the Design Consultant and shall render decisions pertaining thereto promptly, to avoid unreasonable delay in the progress of the Design Consultant's Services.

- 6.3 If required for this Project, the Owner shall furnish a certified land survey of the site, giving as applicable, grades and lines of streets, alleys, pavements and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and data pertaining to existing buildings, other improvements and trees; and full information concerning available service and utility lines, both public and private, above and below grade, including inverts and depths. All associated work will be coordinated by Design Consultant as part of the Basic Services.
- 6.4 The Owner shall pay for the services of a soils engineer or other consultant, when such services are deemed necessary by the Design Consultant or Owner's Representative, to provide reports, test borings, test pits, soil bearing values, percolation tests, air and water pollution tests, ground corrosion and resistivity tests and other necessary operations for determining subsoil, air and water conditions, with appropriate professional interpretations thereof. All associated work will be coordinated by Design Consultant as part of the Basic Services.
- 6.5 The Owner shall pay for structural, mechanical, chemical and other laboratory tests, inspections and reports as required by law that are not otherwise called for in this Agreement. All associated work will be coordinated by Design Consultant as part of the Basic Services.
- 6.6 The Owner shall furnish such legal, accounting, and insurance counseling services as the Owner may deem necessary for the project and such auditing services as it may require to ascertain how, or for what purposes, the Contractor has used the moneys paid to it under the Construction Contract.
- 6.7 All services, information, surveys and reports required of the Owner shall be furnished at the Owner's expense and the Design Consultant shall be entitled to rely upon their accuracy and completeness.
- 6.8 The Owner shall furnish information and approvals required of it expeditiously, for orderly progress of the Work.
- 6.9 The Owner shall pay for and the Design Consultant shall request, expedite, and obtain all necessary permits, licenses, approvals, easements, assessments, and charges required for the construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

ARTICLE 7

ADDITIONAL SERVICES

- 7.1 If any of the following Additional Services are authorized in advance by the Owner in writing, the Design Consultant shall furnish or obtain from others the authorized Additional Services. If authorized in advance, in writing by the Owner, the Design Consultant shall be paid for these Additional Services by the Owner pursuant to Article 4.3, to the extent they exceed the obligations of the Design Consultant under this Agreement. Additional Services may include:
- 7.1.1 Providing fully detailed presentation models or presentation renderings, not included in Basic Services.
- 7.1.2 Providing financial feasibility or other special studies, not included in Basic Services.
- 7.1.3 Providing planning surveys or alternative site evaluations.
- 7.1.4 Providing design services relative to future facilities, systems and equipment which are not intended to be constructed as part of the Project other than general planning and Master Planning for future work as indicated by the Preliminary Programming.

- 7.1.5 The services of this acoustician not covered in the Basic Services shall be considered additional services.
- 7.1.6 Making major revisions in Drawings, Specifications or other documents when such revisions are inconsistent with written approvals or instructions previously given by the Owner.
- 7.1.7 Preparing supporting data and other services in connection with an Owner-initiated change order if the Basic Compensation is not commensurate with the services required of the Design Consultant.
- 7.1.8 Providing operating and maintenance manuals, training personnel for operation and maintenance, and consultation during operations other than initial start-up, and coordinating with the Contractor(s) to provide in electronic format, as designated by the Owner's Representative, detailed product and warranty information for input to the Owner's Facility Management computer system.
- 7.1.9 Providing soils sampling, classification and analysis; however, analysis of existing soils information and soils analysis during the Design Phase and recommendations needed during the Construction Phase of the Project are not considered additional services.
- 7.1.10 Providing services of interior furnishings not included in the Basic Services.
- 7.1.11 Providing professional services made necessary by the default of a Contractor or by major defects in the Work of the Contractor in the performance of the Construction Contract which the Design Consultant could not reasonably have prevented through inspection, observation or intervention.
- 7.1.12 Providing surveying services such as platting; mapping; subdivision agreements or recording subdivision plats, not included in the Basic Services.
- 7.1.13 Providing additional services prior to actual substantial completion of the Project made necessary by delays or defects in the work of the Contractor which the Design Consultant could not reasonably have prevented through inspection, observation or intervention which prolongs the Construction Contract time by more than 90 days.
- 7.1.14 Providing additional services and costs necessitated by out-of-town travel required by the Design Consultant and approved by the Owner other than visits to the Project and other than for travel required to accomplish the Basic Services.
- 7.1.15 Providing consultation concerning replacement of any Work damaged by fire or other cause during construction and furnishing professional services of the type set forth in Basic Design Services as may be required in connection with the replacement of such Work.
- 7.1.16 Providing services after payment by the Owner of the Final Payment to the Design Consultant other than services called for in the Basic Services.
- 7.1.17 Providing any other services not otherwise included in this Agreement or not customarily furnished in accordance with generally accepted architectural practices consistent with the terms of this Agreement.

ARTICLE 8

NOTICES

- 8.1 Any notice required by this Agreement or other communications to either party by the other shall be in writing and deemed given when delivered personally or when deposited in the United States Post Office, first class, postage prepaid, addressed as follows, or to such other address as shall be duly given by notice meeting the requirement of this Article.

To Owner: Durham County
Attn: General Services Department
310 South Dillard St.
Durham, NC 27701

To Design Consultant: Smith and Gardner, Inc.
Attn: Michael Brinchek, P.E.
14 N. Boylan Avenue
Raleigh, NC 27603

ARTICLE 9

INDEMNIFICATION

- 9.1 To the fullest extent permitted by law, Design Consultant shall indemnify and hold harmless Owner and Owner's employees, agents, and independent contractors, against liability for third-party claims, demands, causes of action, damages, penalties, fines, and liabilities, including but not limited to reasonable attorneys' fees incurred by the persons and entities indemnified by this section in connection therewith, to the extent caused by the negligence of Design Consultant, its employees, agents, or others for whose negligent acts or omissions Design Consultant is legally liable.
- 9.2 Except as otherwise set forth in this Agreement, the Design Consultant and the Owner shall not be liable to each other for any delays in the performance of their respective obligations and responsibilities under this Agreement which arise from causes beyond their control and without their fault or negligence, including but not limited to, any of the following events or occurrences: fire, flood, earthquake, epidemic, atmospheric condition of unusual severity, war, and strikes.

ARTICLE 10

INSURANCE

- 10.1 DESIGN CONSULTANT shall procure and maintain for the duration of the contract the following insurance coverage from an insurance company(s) possessing a rating of A-VII or higher from the A.M. Best Company and licensed to do business in North Carolina. All of the policies required of the DESIGN CONSULTANT shall contain a waiver of subrogation provision to waive all rights of recovery under subrogation or otherwise against the COUNTY. In the event DESIGN CONSULTANT'S Insurance Policy or Certificate of Insurance conflicts with the aforesaid language concerning "waiver of subrogation" this contract shall govern. DESIGN CONSULTANT shall advise the COUNTY of any cancellation, non-renewal, or material change in any policy within ten (10) days of notification of such action and provide updated certificates of insurance

evidencing renewals within fifteen (15) days of expiration. DESIGN CONSULTANT'S insurance shall be primary and any insurance or self-funded liability programs maintained by the COUNTY shall not contribute with respect to the DESIGN CONSULTANT'S insurance. Other than with respect to Professional Liability (Errors & Omissions) Insurance and Worker's Compensation and Employers Liability Insurance, COUNTY shall not be listed as an additional insured on any Insurance Policy or Certificate of Insurance of the DESIGN CONSULTANT. In the event DESIGN CONSULTANT'S Insurance Policy or Certificate of Insurance conflicts with the aforesaid language concerning "additional insured" this contract shall govern.

Commercial General Liability: Insurance Services Office (ISO) Form CG 00 01 on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal & advertising injury with limits no less than **\$2,000,000** per occurrence and **\$5,000,000** aggregate. Products-completed operations coverage shall be provided for a minimum of six (6) years following the completion of the project.

Commercial Automobile Liability: ISO Form CA 00 01 covering any auto with limit not less than **\$1,000,000** per accident for bodily injury and property damage.

Worker's Compensation and Employers Liability: as required by The State of North Carolina, with statutory limits, and Employers Liability Insurance with a limit of no less than **\$1,000,000** per occurrence.

Professional Liability (Errors & Omissions): Shall be a limit of not less than **\$5,000,000** per occurrence or claim, and **\$5,000,000** aggregate with an extended reporting period of not less than five (5) years following the completion of the project.

By requiring insurance herein, the COUNTY does not represent that coverage and limits will necessarily be adequate to protect DESIGN CONSULTANT, and such coverage and limits shall not be deemed as a limitation on DESIGN CONSULTANT's liability under the indemnities granted to the COUNTY in this Contract. DESIGN CONSULTANT shall provide the COUNTY a valid certificate of insurance, in advance of the performance of any work, exhibiting coverage required. DESIGN CONSULTANT shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein.

The failure of the COUNTY at any time to enforce the insurance provisions, to demand such certificates of insurance, or to identify a deficiency shall not constitute a waiver of those provisions, nor reduce the obligations of the DESIGN CONSULTANT to maintain such insurance or to meet its obligations under the indemnification provisions.

Notwithstanding the foregoing, nothing contained in this section shall be deemed to constitute a waiver of the governmental immunity of the COUNTY, which immunity is hereby reserved to the COUNTY.

ARTICLE 11

DISPUTE RESOLUTION PROCEDURE

- 11.1 To prevent disputes and litigation, it is agreed by the parties that any claim or dispute between the County and the Design Consultant, arising from this Agreement or the construction process, shall be sent to a qualified mediator as agreed upon by both parties to address the issue. Such request

shall be submitted to the other party in writing within ten (10) days of the claim or dispute. Upon receipt of a timely written claim, the parties shall promptly confer and agree on a qualified mediator and notify the mediator of the claim, and the mediator will conduct a mediation within forty five (45) calendar days from the date of notification, unless the mediator and both parties agree to additional time. Mediation, pursuant to this Section, shall be a precondition to initiating litigation concerning the dispute. During the pendency of any dispute and after a determination thereof, the parties to the dispute shall act in good faith to mitigate any potential damages including utilization of construction schedule changes and alternate means of construction. The costs of the mediation shall be divided equally between the parties to the dispute.

- 11.2 The mediation session shall be private and shall be held in Durham County, North Carolina. Mediation under this Article 11 shall not be the cause for a delay of the Project which is the focus of the dispute.
- 11.3 If the disputed issue cannot be resolved in mediation, the parties may seek resolution in the General Court of Justice in the County of Durham and the State of North Carolina.

ARTICLE 12

TERMINATION OF AGREEMENT

- 12.1 If: (a) the Owner abandons the Project or the Project is stopped for more than six (6) months due to actions taken by the Owner, or under an order of any court or other public authority having jurisdiction, or as a result of an act of government, such as a declaration of a national emergency making materials unavailable through no act or fault of the Design Consultant or its agents or employees, or (b) the Owner has failed to substantially perform in accordance with the provisions of this Agreement due to no fault of the Design Consultant and such non-performance continues without cure for a period of thirty (30) days after the Owner receives from the Design Consultant a written notice of such non-performance (including a detailed explanation of the actions of the Owner required for cure), the Design Consultant may, upon fifteen (15) days' additional written notice to the Owner, terminate this Agreement, without prejudice to any right or remedy otherwise available to the Owner, and recover from the Owner payment for all services performed to the date of the notice terminating this Agreement.
- 12.2 Upon the appointment of a receiver for the Design Consultant, or if the Design Consultant makes a general assignment for the benefit of creditors, the Owner may terminate this Agreement, without prejudice to any right or remedy otherwise available to the Owner, upon giving three (3) days written notice to the Design Consultant. If an order for relief is entered under the bankruptcy code with respect to the Design Consultant, the Owner may terminate this Agreement by giving three (3) days written notice to the Design Consultant unless the Design Consultant or the trustee: (a) promptly cures all breaches; (b) provides adequate assurances of future performance; (c) compensates the Owner for actual pecuniary loss resulting from such breaches; and (d) assumes the obligations of the Design Consultant within the statutory time limits.
- 12.3 If the Design Consultant persistently or repeatedly refuses or fails, except in cases for which an extension of time is provided, to supply sufficient properly skilled staff or proper materials, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority jurisdiction, or otherwise substantially violates or breaches any term or provision of this Agreement, then the Owner may, without prejudice to any right or remedy otherwise available to

the Owner, and after giving the Design Consultant seven (7) days written notice, terminate this Agreement.

- 12.4 Upon termination of this Agreement by the Owner under Paragraph 11.2 and 11.3 the Owner shall be entitled to furnish or have furnished the Services to be performed hereunder by the Design Consultant by whatever method the Owner may deem expedient. Also, in such cases, the Design Consultant shall not be entitled to receive any further payment until completion of the Work; and the total compensation to the Design Consultant under this Agreement shall be the amount which is equitable under the circumstances.
- 12.5 The Owner may, upon thirty (30) days written notice to the Design Consultant, terminate this Agreement, in whole or in part, at any time for the convenience of the Owner, without prejudice to any right or remedy otherwise available to the Owner. Upon receipt of such notice, the Design Consultant shall immediately discontinue all services affected unless such notice directs otherwise. In the event of a termination for convenience of the Owner, the Design Consultant's sole and exclusive right and remedy is to be paid for all work performed and to receive equitable adjustment for all work performed through the date of termination. The Design Consultant shall not be entitled to be paid any amount as profit for unperformed services or consideration for the termination of convenience by the Owner.
- 12.6 Should the Owner terminate this agreement as provided for under this Article, the Owner will acquire such drawings, including the ownership and use of all drawings, specifications, documents and materials relating to the Project prepared by or in the possession of the Design Consultant. The Design Consultant will turn over to the Owner in a timely manner and in good unaltered condition all original drawings, specifications, documents, materials, and computer files related to the project. Upon release from the Contract and delivery of all documents to the Owner, the Design Consultant would no longer be liable for any changes in its design by others.

ARTICLE 13

SUCCESSORS/ASSIGNMENT

- 13.1 This Agreement shall inure to the benefit of and be binding on the heirs, successors, assigns, trustees and personal representatives of the Owner, as well as the permitted assigns and trustees of the Design Consultant.
- 13.2 The Design Consultant shall not assign, sublet or transfer its interest in this Agreement without the written consent of the Owner, except that the Design Consultant may assign accounts receivable to a commercial bank or financial institution for securing loans, without prior approval of the Owner.

ARTICLE 14

OWNERSHIP OF DOCUMENTS/CONFIDENTIAL INFORMATION

- 14.1 Drawings and Specifications as instruments of service are and shall remain the joint property of the Design Consultant and the Owner whether the Project for which they are made is built or not. With the exception of Design Consultant's standard drawings and specifications, said documents and design concept are not to be used by the Design Consultant on other projects. The Owner shall retain reproducible copies of Drawings and Specifications for information and reference and use in connection with the Owner's use and occupancy of the Project and for the Owner's future requirements of the Project's facilities including without limitation any alteration or expansion in any manner the Owner deems appropriate without additional compensation to the Design Consultant. The use of the Design and Specifications, by any person or entity, for the purpose other

than the Project as set forth herein, shall be at the full risk of such person or entity and the Design Consultant shall be relieved of any liability whatsoever, including claims for personal injury, property damage, or death as a result of such other use.

- 14.2 In order for the Design Consultant to fulfill this Agreement effectively, it may be necessary or desirable for the Owner to disclose to the Design Consultant confidential and proprietary information and trade secrets pertaining to the Owner's past, present and future activities. The Design Consultant hereby agrees to treat any and all information gained by it as a result of the Services performed hereunder as strictly confidential. The Design Consultant further agrees that it will not disclose during the period of this Agreement or thereafter to anyone outside of the authorized Project team (1) Owner's trade secrets or (2) Owner's confidential and proprietary information.

ARTICLE 15

ADDITIONAL PROVISIONS

- 15.1 Whenever renderings, photographs of renderings, photographs of models, photographs, drawings, announcements, or other illustration or information of the Project are released for public information, advertisement or publicity, appropriate and proper credit for architectural and other services shall be given to the Design Consultant and Owner respectively.
- 15.2 The payment of any sums by the Owner shall not constitute a waiver of any claims for damages by the Owner for any breach of the Agreement by the Design Consultant.
- 15.3 This Agreement and its Exhibits and Attachments represent the entire and integrated agreement between the Owner and the Design Consultant and supersede all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Design Consultant.
- 15.4 This Agreement shall be governed by the laws of the State of North Carolina, U.S.A. All actions relating in any way to this Contract shall be brought in the General Court of Justice in the County of Durham and the State of North Carolina.
- 15.5 If any one or more of the provisions contained in this Agreement, for any reason, are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions thereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.
- 15.6 Except where specifically stated otherwise, all periods of time stated in terms of days shall be considered periods calculated in calendar days.
- 15.7 The headings or captions within this Agreement shall be deemed set forth in the manner presented for the purposes of reference only and shall not control or otherwise affect the information set forth therein or interpretation thereof.
- 15.8 For the purpose of this Agreement unless the context clearly indicates otherwise, the singular includes the plural, and the plural includes the singular.
- 15.9 This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and the counterparts shall constitute one and the same instrument, which shall be sufficient evidence by any one thereof.
- 15.10 E-Verify. As a condition of payment for services rendered under this agreement, Design Consultant shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes. Further, if Design Consultant provides the services to the County utilizing a

subcontractor, the Design Consultant shall require the subcontractor to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes as well. The Design Consultant shall verify, by affidavit, compliance of the terms of this section upon request by the COUNTY.

- 15.11 Employment Advertising Requirements. The Design Consultant shall post local job openings, in connection with this contract, with the City of Durham's Office of Economic and Workforce Development, the North Carolina Department of Commerce-Division of Employment Services (formerly ESC, Employment Security Commission) and with the Durham County Department of Social Services throughout term of this Agreement; provided that the foregoing requirement does not limit the Design Consultant's ability to advertise and/or otherwise post job openings with other organizations or media outlets.
- 15.12 **REQUIRED PROVISIONS FOR CONTRACTS/AGREEMENTS/GRANTS UTILIZING FEDERAL FUNDS.** Pursuant to the Federal Uniform Guidance Appendix II to 2 CFR Part 200, if Federal Funds are involved in this Contract/Agreement/Grant Agreement, by executing this Contract/Agreement/Grant Agreement, the Contractor/Vendor/Grantee, certifies that it agrees to and is in compliance with the provisions specified in Exhibit B – Federal Uniform Guidance Contract Provisions Certification. The parties stipulate that Federal Funds are not involved in this Contract/Agreement/Project.

In witness whereof, each individual executing this agreement acknowledges that he/she/it is authorized to execute this agreement and further acknowledges the execution of this agreement the day and year first written above.

OWNER: COUNTY OF DURHAM

By: _____
Wendell Davis, County Manager

This instrument has been pre-audited in the manner required
by the Local Government Budget and Fiscal Control Act.

Susan Tezai, Durham County Chief Financial Officer

DESIGN CONSULTANT: SMITH AND GARDNER, INC.

By: _____
Stacey Smith, P.E., President Senior Engineer

Witness: _____
W. Michael Brinchek, P.E.