

PROFESSIONAL SERVICES AGREEMENT

THIS Professional Services Agreement is made this ___ day of _____, 2018, by and between the City of Lawrence, Kansas, a municipal corporation, and Aqua Backflow, Inc. a corporation.

RECITALS

- A.** The City of Lawrence, Kansas ("City"), a municipal corporation, is in need of certain professional services, specifically to provide notifications, educational material, creation of database, software, software maintenance, secure online dashboard with full real-time data access on a mobile platform, tracking of blackflow preventers, testers, testing companies, test kit calibration and tester certifications.
- B.** Aqua Backflow, Inc. ("Consultant"), a corporation, has proficiency in such projects as demonstrated in its proposal to the City which is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein.
- C.** The City wishes to engage Consultant as an independent contractor to perform the needed services, which are described in detail in the document entitled "Scope of Services" (a copy of that document is affixed hereto as Exhibit A, pages 4-5).
- D.** The Consultant is willing and able to provide the services for which the City wishes to engage it and agrees to perform those services in accordance with the terms and conditions of this Professional Services Agreement, as set forth below.

AGREEMENT

NOW, THEREFORE, in light of the mutual promises and obligations contained herein, and in exchange for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties, the parties agree as follows:

SECTION 1. Engagement. The City hereby engages Consultant as an independent contractor to perform the services hereinafter described and Consultant hereby accepts that engagement.

SECTION 2. Services.

- (a) Scope of Services.** Consultant shall perform those services ("Contract Services") specifically described in the Scope of Services, which document is affixed hereto as Exhibit A, pages 4-5, and is incorporated herein by reference as if set forth in full. The parties may agree at any time to expand

or modify the scope of the Contract Services. Such agreement shall be in writing and shall be attached to this Professional Services Agreement as an Addendum.

- (b) **Subcontracting Services.** Consultant may not, without first obtaining written consent of the City, subcontract any of the Contract Services.
- (c) **Time of Performance.** Time is an important element of this Agreement. Upon execution of this Professional Services Agreement, Consultant shall commence performance of the Contract Services in accordance with the time-table established at Exhibit A, page 6.
- (d) **Expiration.** The "Initial Term" of this Professional Services Agreement shall be one year and shall commence upon the execution of this document and shall expire at midnight on _____, 201_. The provisions regarding indemnity and insurance shall survive the expiration of this Professional Services Agreement.
- (e) **Qualified Personnel.** Consultant shall provide sufficient qualified personnel to perform the Contract Services. Consultant agrees its personnel shall provide excellent customer service to City and to City's customers.
- (f) **Performance.** In performing the Contract Services, Consultant agrees to take all steps necessary for the full and effective performance of those tasks.
- (g) **Database Back-ups and System Maintenance.**
 - (i) Consultant shall have no responsibility for City's data backups except to provide access to City's automated backup process. Consultant will provide documentation of preferred methods for City to back up the City's data.
 - (ii) Consultant shall maintain system availability at a standard of 99.9% uptime during City's business hours. Consultant shall timely alert City of any system maintenance in advance of maintenance being performed. Consultant shall alert the City of any system outages as soon as possible when an outage is detected and shall provide the City regular updates until the issue is remedied.

SECTION 3. Compensation and Reimbursement of Expenses.

- (a) **Compensation.** Payments to Consultant for \$9.95 shall be made to Consultant by the backflow tester for each submission by tester entered online to the database. Consultant shall be responsible for ensuring that it collects payments, and City shall have no responsibility for collecting payments due from testers. If the City requests and receives mailed paper surveys from customers, then the City shall pay Consultant \$4 for each paper survey the City requests for distribution.
- (b) **Maximum Compensation and Reimbursement.** Unless otherwise agreed upon by the parties in writing, the maximum total amount payable to Consultant as compensation for Contract Services and any Subcontracting Services under Section 3(a), shall not exceed the sum of \$9.95/test paid by testing contractor, \$19.95 per overdue test submittal and \$4.00/paper mailed survey paid by City of Lawrence. Unless otherwise agreed by the parties in writing, Consultant shall not be requested to provide Contract Services or to incur related expenses to the extent that the cost of such Contract Services or related expenses would exceed \$9.95/test paid by testing contractor, \$19.95 per overdue test submittal and \$4.00/paper mailed survey paid by City of Lawrence. Maximum Compensation and Reimbursement for Expenses shall be based on the amounts listed on the "Cross Connection Control Program Services," which document is affixed hereto in Exhibit A, page 3, and is incorporated herein by reference as if set forth in full.
- (c) **Payment Terms.** Consultant shall send invoices to the City, not more frequently than once per month, setting forth the Contract Services performed and the amount of Compensation under Section 3(a) due under this Professional Services Agreement. To be eligible for reimbursement, all expenses shall be listed individually and shall be accompanied by receipts or other applicable documentation establishing that Consultant has incurred those expenses in the course of performing under this Professional Services Agreement. All invoices are payable within 30 days of receipt by the City. If payment is not received within thirty (30) days from the due date of such payment, Consultant may suspend further performance under one or more Work Authorizations until payments are current. The City shall notify Consultant of any disputed amount within fifteen (15) days from the date of the City's receipt of the invoice, give reasons for the objection, and timely pay any undisputed amount. The City also agrees to accept electronic invoices for services and scanned copies of receipts and other documentation. Consultant agrees to provide the City with originals before the City is obligated to pay the invoice.

SECTION 4. Termination of Professional Services Agreement. The parties may terminate this Agreement at any time, for convenience or for cause, upon ten (10) days written Notice to the other party. In the event that the City terminates the Agreement for convenience, then it shall pay Consultant for Contract Services satisfactorily performed by the Consultant and for all associated expenses incurred therewith prior to the termination. Under no circumstance, in the event of termination of this Professional Services Agreement, will the Consultant be entitled to recover anticipated profits or consequential damages. The provisions regarding indemnity and insurance shall survive the termination of this Professional Services Agreement.

SECTION 5. Reports and Documents.

- (a) **Property and Possession.** All reports, studies, analyses, memoranda, and related data and material, as may be developed during the performance of the Contract Services, shall be submitted to and shall be the exclusive property of the City, which shall have the right to use the same for any purpose without further compensation or liability to Consultant. Consultant may use its own proprietary software for the purposes of generating the data required by this Professional Services Agreement. The parties agree that the City shall retain all rights to the data generated, but that the Consultant shall retain all rights to the proprietary software.
- (b) **Status of Documents upon Expiration or Termination.** If this Professional Service Agreement expires or is terminated for any reason, including cause, all finished or unfinished documents prepared as part of the Contract Services shall immediately be transmitted to the City by Consultant, with the exception of the Consultant's proprietary software, as noted in Section 5(a).
- (b) **Confidentiality.** Consultant shall not release to any person except the City and its authorized agents any reports or related materials prepared for the City by the Consultant as the Contract Services and maintained confidentially by the City. This Professional Services Agreement, however, does not preclude Consultant from providing any service (whether or not similar in nature to the Contract Services hereunder) in behalf of other clients in the City of Lawrence, Kansas, or elsewhere.

All reports and documents prepared, assembled, or compiled by Consultant pursuant to the terms of this Professional Services Agreement are to be considered confidential and Consultant agrees that it will not, without prior written consent of the City, submit or make the same available to any individual, agency, public body, or organization other than

the City and its authorized agents, except as may otherwise herein be provided.

(c) Use of Information

Consultant agrees it shall not:

- (A)** Use any list of names or addresses contained in or derived from the records or information for the purpose of selling or offering for sale any property or service to any person listed; or
- (B)** sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records or information for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed.

SECTION 6. Compliance with Equal Opportunity Laws, Regulations, and Rules

- (a)** Consultant agrees that it shall comply with all provisions of the Kansas Acts Against Discrimination of 1953 ("KAAD"), codified as amended at K.S.A. 44-1001 *et seq.*, and the Kansas Age Discrimination in Employment Act of 1983 ("KADEA"), codified as amended at K.S.A. 44-1111 *et seq.* and shall not discriminate against any person, in the course of performing under this Professional Services Agreement, because of that person's race, religion, sex, disability, national origin, ancestry, sexual orientation, gender identity, familial status, or age.
- (b)** In all solicitations or advertisements for employees, Consultant shall include the phrase "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission ("KHRC").
- (c)** If Consultant fails to comply with the manner in which Consultant reports to the KHRC in accordance with the provisions of K.S.A. 44-1031 and any amendment thereto, Consultant shall be deemed to have breached the present Professional Services Agreement and the City shall, in accordance with Section 5, have the right to cancel, terminate, or suspend the terms of this Professional Services Agreement, either in whole or in part.
- (d)** If Consultant is found guilty or liable for any violation of the KAAD or the KADEA by way of a final decision or order of the KHRC, then Consultant shall be deemed to have breached the present Professional Services Agreement and the City shall, in accordance with Section 5, have the right

to cancel, terminate, or suspend the terms of this Professional Services Agreement, either in whole or in part.

- (e) In any subcontract, to which the City consents in accordance with Section 2(b) of this Professional Services Agreement, Consultant agrees to include the language of Sections 6(a) through 6(d) and agrees to make such language applicable to any subcontractor hereunder.
- (f) Consultant also agrees to comply with the American with Disabilities Act of 1990 ("ADA"), codified as amended at 42 U.S.C. § 12101 *et seq.*, as well as all other federal, state, and local laws, ordinances, rules, and regulations applicable to this project and to furnish any and all certification that may be required by federal, state, or local governmental agencies in connection therewith.

SECTION 7. Insurance.

- (a) **General.** Consultant shall secure and maintain, throughout the duration of this Professional Services Agreement, Insurance (on an occurrence basis unless otherwise agreed in writing) of such types and in at least such amounts as required herein. Consultant shall provide certificates of insurance and renewals thereof on forms approved by the City. The City shall be notified by receipt of written notice from the insurer at least thirty days prior to material modifications or cancellation of any policy listed on the certificate.
- (b) **Notice of Claim.** Consultant, upon receiving notice of any claim in connection with its performance of Contract Services under this Professional Services Agreement, shall promptly notify the City, providing full details thereof, including an estimate of the amount of loss or liability.
- (c) **Reduction of Policy Limits.** Consultant shall monitor and promptly notify the City of any reduction in limits of protection afforded under any policy listed in the Certificate (or otherwise required by this Professional Services Agreement) if the Consultant's limits of protection have been impaired or reduced to such extent that the limits fall below the minimum amounts required hereunder. In that event, Consultant shall promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the City.
- (d) **Insurance Required.** Consultant agrees to secure and maintain the following insurance:

(i) **General Liability:**

General Aggregate: \$500,000.00
Personal and Advertising Injury: \$500,000.00
Each Occurrence: \$500,000.00

Additionally, the policy must include the following:

- (A) Broad Form Contractual/Contractually Assumed Liability;
- (B) Independent Contractors
- (C) Name the City of Lawrence, Kansas, as an additional insured.

(ii) **Automobile Liability:**

The Policy shall protect Consultant against claims for bodily injury and/or property damage arising out of the ownership or use of all owned, hired, or non-owned vehicles and must include protection for either (A) any automobile or (B) all owned automobiles and all hired and non-owned automobiles. (C) The Policy must also name the City of Lawrence, Kansas, as an additional insured.

Limits:

Each Accident, Combined Single Limits
Bodily Injury and Property Damage: \$500,000.00

(iii) **Workers' Compensation:**

Bodily Injury by Accident: \$100,000.00 each accident
Injury by Disease: \$500,000.00
Bodily Injury by Disease: \$100,000.00 each employee

If Consultant has no employees, it must execute a waiver on a form provided by the City.

(iv) **Professional Liability:**

The Consultant shall maintain through the duration of the Professional Services Agreement, Professional Liability Insurance in an amount not less than One Million Dollars (\$1,000,000.00) and shall provide the City with certification thereof.

(e) **Insurance Ratings.** For the purposes of this Professional Services Agreement, the City will only accept coverage from an insurance carrier that offers proof:

- (i)
 - (A) that it is licensed to do business in the State of Kansas;
 - (B) that it carries a Best's policyholder rating of A- or better; and
 - (C) that it carries at least a Class VIII financial rating. **OR**
 - (ii) that it is a company mutually agreed upon by the City and Consultant.
- (f) **Certificate of Insurance Forms**. The parties agree that certification of insurance coverage under this Professional Services Agreement shall be on the City's standard Certificate of Insurance Form or on other forms acceptable to the City.

SECTION 8. Indemnification. Consultant agrees to defend, indemnify, and otherwise hold harmless the City, its commissioners, officers, employees, and agents from claims, actions, damages, costs, liabilities, settlements, judgments, expenses, or lawsuits, including reasonable attorneys' fees, but only to the extent that such are caused by Consultant's non-performance under this Professional Services Agreement or by Consultant's negligence in performing any action necessary for the performance under this Professional Services Agreement. (For the purposes of this Section, Consultant means Consultant or any person acting in behalf of Consultant or for whom Consultant is responsible). Neither party shall be liable to the other party for incidental, indirect, special, or consequential damages.

SECTION 9. Quality Assurance. Consultant agrees that it shall perform its work and services under this Professional Services Agreement in accordance with recognized professional standards. Further, Consultant agrees that it shall perform its work and service under this Professional Services Agreement with professional expertise, skills, and knowledge of proficient industry procedures and techniques in all relevant subject matters. Consultant agrees that, accordingly, it shall be capable of performing the necessary consulting and other services required by the City and possesses the ready comprehension of the required subject matter and the expertise to provide the services set forth in this Contract and Exhibit A.

SECTION 10. Entire Agreement.

- (a) This Professional Services Agreement, and Exhibit A, represent the entire and integrated agreement between the City and Consultant and supersedes all prior negotiations, representations, or agreements between the parties, whether written or oral. This Professional Services Agreement may be amended only by a written instrument signed by both the City and the Consultant. Written and signed amendments shall automatically become a part of this Professional Services Agreement and shall

supersede any inconsistent provision herein; provided, however, that any apparent inconsistency shall be resolved, if possible, by construing the provisions as mutually complementary and supplementary.

- (b) No oral orders, objections, claims, or notices by any party to the other shall affect or modify any of the terms or obligations set forth in this Professional Services Agreement; and none of its provisions shall be deemed waived or modified by reason of any act whatsoever, other than by a definitely agreed waiver, modification, or amendment made in writing and signed by both parties. No evidence of notice, waiver modification, or amendment, other than evidence of such in writing, shall be introduced as evidence at any proceeding, either legal or administrative.

SECTION 11. Assignment. This Professional Services Agreement is non-assignable by the Consultant and any subcontractor of Consultant approved by the City in accordance with Section 2(b).

SECTION 12. Notices. All notices, demands, or other communications, which may be or are required to be given by any party to any other party under this Professional Services Agreement, shall be in writing and shall be hand-delivered, mailed by first class mail, registered or certified mail, return receipt requested, postage prepaid, or sent by overnight express mail, postage prepaid, return receipt requested, to the following addresses:

- (a) **If to Consultant:**
Aqua Backflow, Inc.
977 Elizabeth Street
Elgin, IL 60120
Attn: Tom Staroske

- (b) **If to the City:**
City of Lawrence, Kansas
6 East 6th Street
P. O. Box 708
Lawrence, Kansas 66044
Attn: Tom Hogan

SECTION 13. Authorizations. Each person executing this Professional Services Agreement in behalf of the City and Consultant hereby represents and warrants that he or she has the authority to bind his or her respective party hereto and that all acts requisite to confer authorization to enter into this Professional Services Agreement have been taken and completed.

SECTION 14. Independent Contractor. In no event, while performing under this Professional Services Agreement, shall Consultant be deemed to be acting as an employee of the City; rather, Consultant shall be deemed to be an independent contractor. Nothing expressed herein or implied herein shall be construed as creating between Consultant and the City the relationships of employer and employee, principal and agent, a partnership, or a joint venture.

SECTION 15. Kansas Cash-Basis Law. This Professional Services Agreement must comply with the applicable provisions of the Kansas Cash-Basis Law of 1933, codified as amended at K.S.A. 10-1101 *et seq.* The City, in its own behalf is obligated only to make payments under this Professional Services Agreement as may be lawfully made from funds budgeted and appropriated for the purposes set forth in this Professional Services Agreement during the City's current budget year. In the event that the City does not so budget and appropriate funds, the parties acknowledge and agree that they shall be relieved of all obligations under this Professional Services Agreement without penalty. To the extent that the City does so budget and appropriate funds for the purposes set forth in this Agreement, the obligations of the parties shall remain as provided herein.

SECTION 16. Conflict of Interest. Consultant is currently unaware of any conflict of interest with any party affected by this Professional Services Agreement and agrees that, if any conflict or potential conflict of interest should arise in the future, it will give notice to the City immediately.

SECTION 17. Legal Action. The parties agree that the appropriate venues for any legal actions arising out of this Professional Services Agreement are the District Court of Douglas County, Kansas, or, if federal jurisdiction exists, the United States District Court for the District of Kansas.

SECTION 18. Force Majeure. Neither party shall be deemed to be at default under this Professional Services Agreement to the extent that any delay in performance results from any cause beyond its reasonable control and without its intentional act or negligence.

SECTION 19. Captions. The Captions of this Professional Services Agreement are for convenience only and are not meant by the parties to define, limit, or enlarge the scope of this Professional Services Agreement or its terms.

SECTION 20. Recitals. The recitals set forth at the beginning of this Professional Services Agreement are adopted and incorporated herein by reference as if set forth in full and shall be effective as if repeated *verbatim*.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year last written above.

Notary Public

My Appointment Expires:

Aqua Backflow, Inc.

Title: _____

ACKNOWLEDGMENT

THE STATE OF KANSAS)
) ss:
THE COUNTY OF _____)

BE IT REMEMBERED, that on this ____ day of _____, 201_, before me the undersigned, a notary public in and for the County and State aforesaid, came _____, as _____ of ____ Corporation, who is personally known to me to be the same person who executed this instrument in writing, and said person fully acknowledged this instrument to be the act and deed of the aforementioned entity.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year last written above.

Notary Public

My Appointment Expires: