
**CITY OF ROCKVILLE, MARYLAND
CONTRACT**

Request for Proposal 30-25 – Advanced Metering Infrastructure Project

This **CONTRACT** (“**Contract**”) is entered into as of this ____ day of _____ 2026 (“**Effective Date**”) by and between **THE MAYOR AND COUNCIL OF ROCKVILLE** (“**Mayor and Council**” or “**City**”), and **FERGUSON ENTERPRISES, LLC d/b/a FERGUSON WATERWORKS** (“**Contractor**”). Individually, the Mayor and Council and the Contractor may each be referred to hereinafter as the “**Party**,” or collectively as the “**Parties**.”

RECITALS

- A. **WHEREAS**, the Mayor and Council is a municipal corporation duly organized and existing under the laws of the State of Maryland with the power to carry on its business as it is now being conducted under the laws of the State of Maryland and the Rockville City Charter; and
- B. **WHEREAS**, the Contractor is a limited liability company duly organized and in good standing in the state of Virginia, authorized to conduct business in the State of Maryland, and has the background, knowledge, experience and expertise to perform the obligations set forth in this Contract; and
- C. **WHEREAS**, in accordance with the Chapter 17 of the Procurement Ordinance, on July 31, 2025, the Department of Procurement issued Request for Proposal 30-25 for hardware equipment, software, and services (both construction and professional) for the City’s comprehensive Advanced Metering Infrastructure project (“**RFP 30-25**”); and
- D. **WHEREAS**, the City issued the following addendums to RFP 30-25: Addendum 1, issued on September 3, 2025; Addendum 2, issued on September 24, 2025; Addendum 3, issued on October 5, 2025; and Addendum 4, issued on October 7, 2025 (collectively, “**Addendums**”); and
- E. **WHEREAS**, RFP 30-25 and the Addendums are collectively referred to herein as the “**Solicitation**”; and
- F. **WHEREAS**, in response to the Solicitation, the Contractor submitted a proposal on October 15, 2025 (“**Proposal**”); and
- G. **WHEREAS**, at the City’s written request, Contractor provided clarifications to its proposal. The City’s letters and Contractor’s clarifications (collectively, “**Clarifications**”) are attached hereto and incorporated herein as **Attachment 1**; and
- H. **WHEREAS**, the City and Contractor engaged in negotiations subsequent to the Clarifications, which are memorialized in negotiation letters (collectively, “**Negotiation Letters**”) attached hereto and incorporated herein as **Attachment 2**; and

- I. **WHEREAS**, on [REDACTED], 2026, in accordance with Section 17-39(a) of the Procurement Ordinance, the Mayor and Council awarded this Contract to the Contractor and authorized the City Manager to execute this Contract on its behalf, subject to approval as to legal form by the City Attorney.

End of Recitals

DRAFT

NOW, THEREFORE, IN CONSIDERATION of the foregoing and the covenants, warranties and agreements of the Parties hereto, as are hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by each Party hereto, the Parties hereby agree as follows:

ARTICLE I INCORPORATION OF RECITALS; DEFINITIONS

Section 1.01. Incorporation of Recitals. The foregoing recitals above and documents referenced herein are an integral part of this Contract and set forth the intentions of the Parties and the premises on which the Parties have decided to enter into this Contract. Accordingly, the foregoing recitals are fully incorporated into this Contract by this reference as if fully set forth herein. In the event of any conflict between this Contract and any documents referenced herein, the terms of this Contract shall govern and control.

Section 1.02. Definitions. In addition to other terms defined herein, each of the following terms shall have the meaning assigned to it, such definitions to be applicable equally to the singular and the plural forms of such terms and to all genders:

“Applicable Code Requirements” means all federal, State of Maryland, Montgomery County and City of Rockville laws, statutes, building codes, ordinances and regulations of governmental authorities having jurisdiction over the Work, Site, Contractor or City.

“Applications for Payment” means detailed applications for payment submitted on a standard form such as the AIA G702 form, or such other form as otherwise required by the City.

“City of Rockville Change Order” means a duly authorized instrument issued by the Purchasing Agent or her authorized designee in accordance with the Procurement Ordinance which operates to amend the scope of Work, and which may also amend the Contract Sum or the Contract Time.

“City of Rockville Notice to Proceed” means the written notice issued by the Purchasing Agent or her authorized designee in accordance with the Procurement Ordinance to the Contractor to begin the Work.

“Contract Documents” means and consists of the following documents, which are on file with the City Department of Procurement and are hereby incorporated into this Contract as though fully restated by reference:

1. City of Rockville Change Order
2. This Contract
3. Addendums
4. Negotiation Letters
5. Clarifications

6. Proposal
7. RFP 30-25
8. City of Rockville Notice to Proceed
9. Performance, Payment and Warranty Bonds

For purposes of construing, interpreting and resolving inconsistencies between and among the provisions of this Contract, the Contract Documents shall have the order of precedence as set forth above. If a claimed inconsistency cannot be resolved through the order of precedence, the Parties shall confer in good faith to determine which document or provision shall govern. If the Parties are unable to reach agreement, the City Manager shall have the sole power to decide which document or provision shall govern as may be in the best interests of the City. Omissions of scope or specificity in documents with precedence shall not constitute an inconsistency with succeeding documents, for the purposes of this contract. In the event of a conflict between the documents constituting the Negotiation Letters or a conflict between the documents constituting the Clarifications, the terms of the most recently dated document shall prevail.

“Contract Sum” means the total amount of compensation provided for in Article III that is payable to the Contractor for the performance of the Work in accordance with the Contract Documents, including adjustments made by a City of Rockville Change Order.

“Day” whether capitalized or not, unless otherwise specifically provided, means calendar day, including weekends and legal holidays.

“Delay” means, whether capitalized or not, any circumstances involving disruption, hindrance, or interference in the performance of the Work within the Contract Time.

“Department of Procurement” means the City’s Department of Procurement.

“Department of Public Works” means the City’s Department of Public Works.

“Extra Work” means additional Work or costs due to a change in the Work that is not described in or reasonably inferable from the Contract Documents which may be the basis for an adjustment of the Contract Sum under the terms of the Contract Documents. Extra Work shall not include additional Work or costs arising from Contractor’s failure to perform any of its duties or obligations under the Contract Documents.

“Final Completion” means the final and full completion of all Work required by the Contract Documents, including the City’s acceptance of all deliverables, to the satisfaction of the City Manager or his written designee, pursuant to Article II.

“Losses” means the losses or costs that directly results from a breach of this Contract.

“Procurement Ordinance” means Chapter 17 of the Rockville City Code, as amended.

“Project Manager” means the Project Manager listed in the Solicitation, or such other City staff person as may be designated by the Director of the City’s Department of Public Works to manage the Project.

“Purchasing Agent” means the person designated as purchasing agent pursuant to the Procurement Ordinance.

“Record Documents” means the warranties, guarantees and other documents required to be submitted by Contractor as a condition of Final Compensation.

“Site” means the physical site or sites located within the City of Rockville where the Work is to be performed, including all adjacent areas for staging, storage, parking and temporary offices.

“Substantial Completion” means the completion of all Work excluding Contractor’s submission to the City of a final closeout package.

“Work” means all labor, materials, equipment, services, construction, installation, permits, fees, licenses and taxes, and all other things necessary for the Contractor to perform its obligations under this Contract, including without limitation, any changes or additions requested by the City, in accordance with the Contract Documents and all Applicable Code Requirements.

“Working Day” means any calendar day other than Saturday, Sunday, or the following holidays as observed by the City of Rockville: New Year's Day, Martin Luther King's Birthday, President's Day, Memorial Day, Juneteenth, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, Thanksgiving Friday, Christmas Day, and all days of general and congressional elections throughout the State of Maryland.

Section 1.03. General. Any other capitalized term to which a meaning is expressly given in this Contract shall have the meaning assigned to it, such definitions to be applicable equally to the singular and the plural forms of such terms and to all genders. The defined terms used in the preamble and recitals of this Contract have been included for convenience of reference only, and the meaning, construction and interpretation of all defined terms shall be determined by reference to this Article I notwithstanding any contrary definition in the preamble or recitals hereof. The titles and headings of the sections of this Contract have been inserted for convenience of reference only and are not to be considered a part hereof and shall not in any way modify or restrict any of the terms or provisions hereof or be considered or given any effect in construing this Contract or any provision hereof or in ascertaining intent, if any question of intent shall arise.

End of Article I

ARTICLE II

TERM, PERFORMANCE OF WORK AND COMPLETION OF PROJECT

Section 2.01. Contract Term. The term of this Contract shall begin on the Effective Date and shall expire upon Final Completion, unless earlier terminated pursuant to Article VIII.

Section 2.02. Project Managers. The following staff members of the Public Works Department is the City's designated "**Project Manager**":

Yaolin Fennell, Principal Civil Engineer
City Hall
Department of Public Works
111 Maryland Avenue
Rockville, MD 20850
Telephone: 240-314-8525
Email: yfennell@rockvillemd.gov

It shall be the Contractor's responsibility to ensure that the applicable Project Manager is kept informed on the progress of the Work. The City Manager or designee may modify the designated Project Managers by notifying the Contractor in writing of any such modification.

Section 2.03. Exclusion. Notwithstanding Paragraph 49 on page 47 of RFP 30-25, Contractor may continue its existing retail and consulting operations in the municipal limits of the City during the term of this Contract.

Section 2.04. Performance of Work. The Contractor agrees to perform all Work required for Final Completion of the Project, as specified in the Contract Documents. The Contractor shall provide, furnish, and supply all things necessary and incidental for the timely performance of the Work, including, but not limited to, provision of all necessary labor, materials, equipment, transportation, and utilities, unless otherwise specified in the Contract Documents. Contractor also agrees to use its best efforts to complete the Work in a professional and expeditious manner and to meet or exceed the performance standards required by the Contract Documents.

Section 2.05. Progress and Completion.

(a) **Time is of the Essence.** Time is of the essence with respect to all time limits set forth in the Contract Documents.

(b) **Notice to Proceed.** Contract must commence the Work within 10 calendar days from the date of issuance of a Notice to Proceed by the Purchasing Agent.

(c) **Work Progress.**

(i) Contractor shall proceed expeditiously with adequate forces and shall achieve Final Completion on or before August 18, 2028, or such other date as established by a City of Rockville Change Order (the "**Contract Time**").

(ii) The Contractor shall deliver a finalized, detailed Integrated Master Schedule within thirty (30) days of the issuance of the Notice to Proceed. This schedule shall be subject to the review and written approval of the Project Manager.

(iii) If the City determines and notifies Contractor that Contractor's progress is such that Contractor will not complete the Work within the Contract Time, Contractor shall, immediately and at no additional cost to City, take all measures necessary, including working such overtime and additional shifts (other than the City's permitted construction work hours of 7:00 AM to 5:00 PM, Monday through Friday), to ensure Substantial Completion within the Contract Time. Upon receipt of such notice from City, Contractor shall immediately respond in writing setting forth a detailed plan for accelerating the Work in a manner acceptable to City. Contractor shall not be entitled to any reimbursement or payment of costs, expenses or damages incurred as a result of an acceleration of the Work. City may also take all necessary measures to prevent the need for subsequent accelerations of the Work. Contractor shall reimburse City, or City may withhold from payment due to Contractor, sums expended by City to perform such measures.

(iv) During unfavorable weather, wet ground or other unsuitable construction conditions, Contractor shall confine the operations to Work that will not be affected adversely by such conditions. No portion of the Work shall be constructed under conditions which would affect adversely the quality thereof, unless special means or precautions are taken by Contractor to perform the Work in a proper and satisfactory manner.

(d) Delay.

(i) If the Contractor is delayed in the Work by any act of neglect of the City or by a separate contractor employed by the City, or by any changes, strikes, lockouts, fires, unusual delays in transportation or delay authorized by the City, the City shall review the cause of such delay and shall make an extension of time if warranted. All claims for extensions must be made by written notice sent to the Project Manager within ten (10) Days after the date when the alleged cause for the extension of time occurred. All such claims shall state specifically the amount of time of the delay the Contractor believes to have suffered. Failure to provide such written notice within the prescribed time shall not constitute a waiver of the Contractor's right to an extension of time or equitable adjustment, provide that the Contractor submits such notice to the Project Manager as soon as reasonably practicable. No extension of time shall be deemed granted unless the Project Manager expressly grants an extension of time by written notice to the Contractor.

(ii) By executing this Contract, the Contractor expressly waives any claim for extra monetary compensation for delays, whether ordered by the City or not, caused by delays in funding, governmental approvals, private or public companies' actions, inclement weather, site conditions, or from any cause whatsoever, except to the extent such delay is caused by events of Force Majeure as described in Section 2.05(d)(iii). The Contractor shall adjust its operation to continue the Work at other locations under this Contract, if available, and as directed by the City. If it is necessary to discontinue the work temporarily, the Contractor shall resume work within 48 hours of notice from the City. The City may adjust the completion date to compensate for the lost day(s) on a day-for-day basis, if the City finds that the Contractor could not make up for such lost

day(s) by reallocating its forces or rescheduling the work, up to the time remaining on the original schedule at the time of shutdown.

(iii) Force Majeure. Neither Party shall be liable for any failure or delay in performing its obligations under this Contract to the extent such failure or delay results from events beyond its reasonable control, including acts of God, war, terrorism, labor difficulties, governmental tariffs, accidents, inability to obtain materials, or delays of carriers or suppliers, excluding Subcontractors. The affected Party shall provide prompt written notice to the other Party of the force majeure event and shall use reasonable efforts to mitigate its effects. The Contract Time shall be extended on a day-for-day basis for the duration of any such force majeure event affecting the Contractor's performance.

(e) Change Orders.

(i) The City, without invalidating the contract, may issue written City of Rockville Change Orders pursuant to Section 17-40 of the Procurement Ordinance. All such changes, or additional work must be authorized in writing by the Purchasing Agent or her authorized designee prior to starting such work. Costs shall be limited to the cost of materials, labor, supervision, and office personnel directly involved in and attributed to the change. All costs and/or credits to the City for a change in the work shall be determined by the unit price bid or by mutual agreement.

(ii) The Contractor shall do all work that may be required to complete the work contemplated by a City of Rockville Change Order at the unit prices bid or at a lump sum price to be mutually agreed upon.

(iii) The Contractor shall perform Extra Work, for which there is no quantity or price included in the Contract, whenever it is deemed necessary or desirable, to complete fully the Work as modified by a City of Rockville Change Order, and such work shall be done in accordance with the specifications therefore, or in the best workmanlike manner as directed. Where such a price or sum cannot be agreed upon by both parties, or where this method of payment is impracticable, the Project Manager may order the Contractor to do such work on a force account basis in accordance with Section 2.05(f).

(iv) The Contractor may submit a written request for a City of Rockville Change Order to the Project Manager in the event the Contractor believes a City of Rockville Change Order is warranted or desirable. The City is under no obligation to issue or respond to a requested City of Rockville Change Order.

(f) Force Account Work. The Contractor will be compensated in accordance with the following when required to perform Work on a force account basis:

- (i) Labor. For all labor and for foremen in direct charge of the specific operations the Contractor shall receive the actual wages for each and every hour that said labor and foremen are actually engaged in such work.

- (ii) Materials. For materials accepted by the Project Manager and incorporated into the project, the Contractor shall receive the actual cost of such materials, including transportation charges paid by him (exclusive of machinery rentals as hereinafter set forth). Excess materials delivered to the job site and not incorporated into the project will not be paid for and it is the Contractor's responsibility to remove said excess material from the job site.
- (iii) Equipment. For any machinery or special equipment (other than small equipment tools, whether rented or owned), the use of which has been authorized in writing, by the Project Manager the Contractor shall receive the rates agreed upon in writing before such work is begun which price shall include fuel, oil and miscellaneous necessities, or the Contractor shall receive those rates which may be specified elsewhere in the Special Provisions. For the purpose of definition, equipment with a new cost of \$1000 or less will be considered small tools and equipment.
- (iv) Materials and Supplies Not Incorporated in the Work. For materials and supplies expended in the performance of the work (excluding those required for rented equipment) and approved by the Project Manager, the Contractor shall receive the actual cost of such materials and supplies used.
- (v) Subcontractors. The Contractor shall receive the actual cost of work performed by a subcontractor. Subcontractor's cost is to be determined as in i, ii, iii, and iv above, plus the fixed fee for overhead and profit allowance computed as in vii.
- (vi) Superintendence. No additional allowance shall be made for general superintendence, the use of small tools, or other costs for which no specific allowance is herein provided
- (vii) Contractor's Fixed Fee. The procurement officer and the Contractor shall negotiate a fixed fee for force account work performed pursuant to this specification by his force and by his subcontractors. The City shall pay 10 percent of i. as compensation for overhead and profit for the work performed. The Contractor shall proceed diligently with the performance of the force account work to completion. The Contractor's fixed fee shall include an amount equal to the sum of 65 percent of i., which shall include, but not be limited to the following:

(1) Compensation for all costs paid to, or in behalf of, workmen by reason of subsistence and travel allowances, health and welfare benefits, pension fund benefits or other benefits that may be required

by collective bargaining agreement or other employment contract generally applicable to the classes of labor employed in the work; and

(2) Bond premiums, property damage, liability and workmen's compensation insurance premiums, unemployment insurance contributions and Social Security taxes on the force account work.

In addition, the Contractor's fixed fee may include an amount not to exceed 10 percent of ii. unless specifically authorized by the Project Manager in advance of the work; 5 percent of iv., and 5 percent of v with the exception of that portion chargeable to equipment as defined above.

(viii) Compensation. The compensation as set forth above shall be received by the Contractor as payment in full for change order work done on a force account basis. At the end of each day, the Contractor's representatives and the Project Manager, shall compare records of the cost of work as ordered on a force account basis. Differences shall be immediately resolved and any unresolved difference shall be brought to the attention of the Project Manager by written notice from the Contractor within two working days of the occurrence.

(ix) Statements. No payment will be made for work performed on a force account basis until the Contractor furnishes the Project Manager duplicate itemized statements of the cost of such force account work detailed as to the following:

(1) Name, classification, date, daily hours, total hours, rate, and extension for such workmen. Contractor shall provide certified payrolls

(2) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment. Contractor shall provide original receipted invoices.

(3) Quantities of materials, prices and extensions. Contractor shall provide original receipted invoices.

(4) Transportation of materials. Contractor shall provide original receipted invoices.

If, however, the materials used in the force account work are not specifically purchased for such work but are taken from the Contractor's stock, then in lieu of the original invoices the statements shall contain or be accompanied by an affidavit of the

Contractor which shall certify that such materials were taken from his stock that the quantity claimed was actually used and that the price and transportation of the material as claimed represent actual cost. Any request for payment under this Section should be submitted in the order outlined by the above.

The Contractor shall be responsible for all damages resulting from work done on a force-account basis, the same as if this work had been included in the original Contract.

Work performed without previous written order by the Project Manager will not be paid.

(g) Liquidated Damages. If the Contractor fails to achieve Final Completion of the Work within the Contract Time, the Mayor and Council may assess liquidated damages on a daily basis for each day of unexcused delay in achieving Final Completion, based on the amount of four hundred dollars (\$400) per Day, not including Sundays, or as otherwise specified in the Solicitation. Liquidated damages may also be separately assessed for failure to meet milestones specified elsewhere in the Contract Documents, regardless of impact on the time for achieving Final Completion. The assessment of liquidated damages is not a penalty but considered to be a reasonable estimate of the amount of damages the Mayor and Council will suffer by delay in completion of the Work. The Mayor and Council is entitled to setoff the amount of liquidated damages assessed against any payments otherwise due to the Contractor, including, but not limited to, setoff against release of retention, provided that all undisputed amounts shall be paid in accordance with Section 3.02. Prior to exercising any right of setoff under this Section, the City shall provide the Contractor with written notice of the amount to be set off and the basis therefor, and the Contractor shall have ten (10) Days to cure. If the total amount of liquidated damages assessed exceeds the amount of unreleased retention, the Mayor and Council is entitled to recover the balance from the Contractor or its sureties. Occupancy or use of the Work in whole or in part prior to Final Completion shall not operate as a waiver of City's right to assess liquidated damages.

(h) Special Damages.

(i) The Contractor shall reimburse the Mayor and Council, upon demand, for (1) any and all fines and penalties imposed on the Mayor and Council in connection with the Contractor's failure to attain Substantial Completion, Final Completion, or any other date for performance according to the Contract Time, and (2) any and all costs and expenses, including reasonable attorneys' fees, incurred by the Mayor and Council for engineering, construction observation, inspection, administrative services, or any other work or services needed or otherwise utilized or obtained after the time specified for performance.

(ii) After the Contractor achieves Substantial Completion, if the Contractor shall neglect, refuse, or fail to complete any component of the remaining Work within the Contract Time, the Contractor shall reimburse the Mayor and Council for any and all costs and expenses, including reasonable attorneys' fees, incurred by the Mayor and Council for engineering, construction observation, inspection, administrative services, or any other work or services needed

or otherwise utilized or obtained after the time specified for Work to be completed and ready for final payment.

(iii) The special damages imposed in this Section are supplemental to any liquidated damages for delayed completion established in the Contract.

(iv) The Mayor and Council may, but in no event be obligated to, complete all or any portion of the Work not timely performed in full by the Contractor, on behalf of the Contractor and at the Contractor's sole cost and expense. The Contractor shall, on demand, reimburse the Mayor and Council the positive difference, if any, between (i) all costs and expenses incurred by the Mayor and Council in connection with so performing on behalf of Contractor, including reasonable attorneys' fees, and (ii) the Contract Sum.

(i) Other Remedies. Subject to the terms herein, the Mayor and Council is entitled to any and all available legal and equitable remedies the Mayor and Council may have where the Mayor and Council's damages are caused by any reason other than the Contractor's failure to achieve Substantial Completion or Final Completion of the entire Work within the Contract Time.

End of Article II

ARTICLE III COMPENSATION AND PAYMENT

Section 3.01. Contract Sum.

(a) The Contractor shall be compensated for Final Completion of the Work in compliance with the Contract Documents an amount not-to-exceed Five Million Nine Hundred and Eight Thousand Seven Hundred Twenty-One and 85/100 dollars (\$5,908,721.85), consistent with the Price Sheets attached hereto and incorporated herein as **Attachment 3**. Subject to the terms of this Contract, any work performed or expenses incurred for which payment would result in a total exceeding the Contract Sum shall be at no cost to the Mayor and Council.

(b) The Mayor and Council appropriates funds on a fiscal year basis; the City's fiscal year runs from July 1 through June 30. Funds have been appropriated for the first year of this Contract through the end of the fiscal year, June 30, 2027. All payments made under this Contract after June 30, 2027, are contingent upon appropriation and encumbrance of funds. If the Mayor and Council fails to approve an appropriation to fund this Contract for a subsequent fiscal year, this Contract shall terminate on the first day of that fiscal year without further cost to the City.

Section 3.02. Payment Procedures.

(a) **Applications for Payment.**

(i) The Contractor shall submit to the Project Manager an Application for Payment for all Work performed, including tasks and deliverables completed, and expenses incurred during the preceding month. The Application for Payment must be accompanied by supporting data and documents substantiating the Contractor's right to payment, including meeting the performance acceptance and payment criteria in Appendix 06 of RFP 30-25.

(ii) The Project Manager will independently review the Applications for Payment submitted by the Contractor to determine whether the Work performed and expenses incurred are in compliance with the provisions of the Contract Documents. Except as to any charges for Work performed or expenses incurred by the Contractor which are disputed by the City, the City will use its best efforts to cause the Contractor to be paid within thirty (30) days of receipt the Contractor's correct and undisputed Application for Payment. In the event any charges or expenses are disputed by the City, the original Application for Payment shall be returned by the City to the Contractor for correction and resubmission.

(iii) The Contractor shall submit a detailed invoice for payment at the end of each month for all work completed and accepted by the City during that month. All Applications for Payment shall be forwarded to the following address:

Dan Stevens – Chief of Construction Management
Department of Public Works
850 Avery Road
Rockville, MD 20851
Telephone 240-314-8552
Email: dstevens@rockvillemd.gov

Should the Contractor fail to keep up with clean-up and restoration work, if deemed necessary by the Director of the Department of Public Works, or the Director's designee, five percent (5%) of each monthly payment will be withheld until the Contractor shows progress in keeping up with restoration and clean-up work.

(iv) *Electronic Payment Option.* The City's Vendor ACH Payment Program allows payments to be deposited directly into a designated financial institution account. Funds will be deposited into the account identified automatically and on time. There is no additional cost to participate. All transactions are conducted in a secure environment.

(v) *Payments Withheld* - The City may decline to certify payment or because of subsequently discovered evidence or observations, nullify the whole or any part of any Certification of Payment previously issued, as may be necessary to protect the City from loss because of: (1) defective work not remedied, (2) third party claim filed or evidence indicating probable filing of such claim, (3) failure of the Contractor to make payments properly to subcontractors or suppliers, (4) reasonable evidence that the work can not be completed for the unpaid balance of the contract sum, (5) reasonable evidence that the work will not be completed within the Contract time, (6) persistent failure to carry out the work. Prior to withholding any payment under this Section, the City shall provide the Contractor with written notice specifying the grounds for withholding and the amount to be withheld, and the Contractor shall have ten (10) Working Days to cure the identified deficiency. All undisputed amounts shall remain payable notwithstanding any withholding under this Section.

(vi) *Payment to Subcontractor.*

A. Within seven days after receipt of amounts paid by the City for work performed by a subcontractor under this Contract, the Contractor shall either: (A) pay the subcontractor for the proportionate share of the total payment received from the City attributable to the work performed by the subcontractor under this Contract; or (B) notify the City and the subcontractor, in writing, of the Contractor's intention to withhold all or a part of the subcontractor's payment and the reason for non-payment. In no event shall the City be liable for the Contractor's failure to pay a subcontractor. The Contractor warrants that all Work and products furnished under this Contract shall be free of liens to the extent payment has been received by the Contractor.

B. The Contractor shall promptly pay each subcontractor and supplier for work completed upon receipt of payment from the City the amount to which said subcontractor is entitled, reflecting any percentage retained from payments to the Contractor on account of each subcontractors work. The Contractor shall, by an appropriate agreement with each subcontractor, require each subcontractor to make prompt payments to his subcontractors in a similar manner.

The City shall be under no obligation to pay or to see to the payment of any moneys to any subcontractor except as may otherwise be required by law.

C. The City shall be under no obligation to pay or see to the payment of any moneys to any subcontractor except as may otherwise be required by law.

(b) Final Payment.

(i) Upon reaching Substantial Completion for the Project, the Contractor may submit a written Application for Final Payment. The Contractor must submit with the Application for Final Payment all supporting documentation and data applicable to the monthly requests for payment referenced above.

(ii) Within thirty (30) Days after the approval of the final payment request, the City will pay to the Contractor the amount remaining after deducting from the total amount of the final estimate all such sums as have hereto before been paid to the Contractor under the provision of the Contract and also such amounts as the City has or may be authorized under the Contract to reserve or retain.

(iii) The final payment shall not become due until the Contractor submits to the Project Manager:

A. An affidavit that all payrolls, bills for materials and equipment and other indebtedness connected with the work for which the City or his property might in any way be responsible, have been paid;

B. Consent of surety to final payment;

C. If requested, data establishing payment or satisfaction of obligations, such as receipt, release and waivers of liens arising out of the Contract; and

D. All punch list items and deliverables are completed to the satisfaction of the Project Manager.

(iv) If any subcontractor refuses to furnish a release or waiver of liens required by the City, the Contractor may furnish a bond satisfactory to the City to indemnify him against any such lien. If any such lien remains unsatisfied after all payments are made, the Contractor shall refund to the City all moneys that the latter may be compelled to pay in discharging such lien, including all costs and reasonable attorney fees.

(v) All guarantees and warranties required by this Contract shall be furnished by the Contractor and shall be delivered to the Project Manager before final payment is made.

(vi) Acceptance by the Contractor of final payment shall operate as a release to the Mayor and Council and every officer and agent thereof, from all claims and liabilities to the Contractor for anything done or furnished or relating to the work under the Contract Documents.

Section 3.03. Waiver. Payment to the Contractor for Work performed and expenses incurred for pursuant to this Contract shall not be deemed to waive defects in the Work performed by the Contractor.

Section 3.04. Errors and Omissions. The Contractor is solely responsible for costs, including, but not limited to, increases in the cost of performing the Work, arising from or caused by the Contractor's errors and omissions, as applicable, including, but not limited to, the costs of corrections of such errors and omissions, any change order markup costs, or costs arising from delay caused by the errors and omissions or unreasonable delay in correcting the errors and omissions.

End of Article III

ARTICLE IV. CONTRACTOR COVENANTS AND OBLIGATIONS

Section 4.01. Contractor Qualifications. The Contractor covenants that it, its employees, agents and subcontractors, if any, have and shall maintain during the term of this Contract all licenses, permits, qualifications, insurance and approvals of whatever nature that are legally required to perform the Work.

Section 4.02. Standard of Care. The Contractor covenants that the Work shall be performed by qualified, experienced and well-supervised personnel. All services performed in connection with this Contract shall be performed in a manner consistent with the standard of care under Maryland law applicable to those who specialize in providing such services for projects of the type, scope, and complexity of the Projects.

Section 4.03. Compliance with Law. The Contractor covenants that it shall keep itself informed concerning and shall perform all Work in accordance with all ordinances, resolutions, rules, and regulations of the City and any applicable Federal, State of Maryland or Montgomery County, Maryland laws and regulations in effect at the time the Work is performed.

Section 4.04. Licenses, Permits, Fees and Assessments. The Contractor covenants that it shall obtain at its sole cost and expense such licenses, permits and approvals as may be required by law for the performance of the Work required under the Contract Documents. The Contractor shall have the sole obligation to pay for any fees, assessments and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Contractor's performance of the Work required under the Contract Documents, and shall indemnify, defend and hold harmless the City, its officers, employees or agents of the City, against any such fees, assessments, taxes, penalties or interest levied, assessed or imposed against the City.

Section 4.05. Conflict of Interest. The Contractor covenants that neither it, nor any officer or principal of its firm, has or shall acquire any interest, directly or indirectly, which would conflict in any manner with the interests of the City or which would in any way hinder the Contractor's performance of Work. The Contractor further covenants that in the performance of the Work, no person having any such interest shall be employed by it as an officer, employee, agent or subcontractor without the express written consent of the City Manager. The Contractor agrees to avoid conflicts of interest or the appearance of any conflicts of interest with the interests of the City in the performance of this Contract. The Contractor further covenants that, in the performance of this Contract, it will not employ subcontractors or other persons or parties having such an interest. The Contractor certifies that no person who has or will have any financial interest under this Contract is a member, officer or employee of the City; this provision will be interpreted in accordance with the applicable provisions of the Rockville City Code, as amended from time to time. The Contractor agrees to notify the City Manager or designee if any conflict arises.

Section 4.06. Compliance with ADA. The Contractor covenants and agrees that pursuant to the Americans with Disabilities Act of 1990, as amended (the "ADA"), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor or subcontractor, are required to be accessible to the disabled public. The Contractor will perform the Work specified in this Contract in a manner that complies with the ADA and any other applicable

federal, state and local disability rights laws and regulations, as amended from time to time. The Contractor will not discriminate against persons with disabilities in the performance of the Work, benefits or activities provided under the Contract Documents.

Section 4.07. Design Errors or Omissions. The Contractor acknowledges that prior to executing this Contract, the Contractor reviewed the drawings, specifications and other Contract Documents and have notified the City of any errors, omissions, or discrepancies in the documents of which it was aware. Contractor shall not make or be entitled to any claim for any adjustment to the Contract Time or the Contract Sum for errors or omissions in the Construction Documents that Contractor discovered or, in the exercise of its standard of care as a contractor and not as a design professional, should reasonably have discovered using ordinary diligence, and did not bring to the attention of the City in a timely manner.

Section 4.08. Differing Site Conditions.

(a) The Contractor shall promptly, and before such conditions are disturbed, give a written notice to the Project Manager of (1) subsurface or latent physical conditions at a Site which differ materially from those indicated in this Contract, or (2) unknown physical conditions at a Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this Contract.

(b) The Project Manager shall investigate a Site's conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this Contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this Contract and the Contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the Contract under this clause shall be allowed, unless the Contractor has given the written notice required; *provided*, that the time prescribed in (a) above for giving written notice may be extended by the Project Manager.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this Contract.

End of Article IV

ARTICLE V. RECORDS, REPORTS, AUDIT, AND RELEASE OF INFORMATION

Section 5.01. Records. The Contractor shall keep and require its subcontractors, if any, to keep, such ledgers books of accounts, invoices, vouchers, canceled checks, records, reports, studies, documents or other information relating to the disbursements charged to City and Work performed hereunder (the “**Books and Records**”), as shall be necessary to enable the Project Manager to evaluate the performance of the Work. All such documents shall be maintained in accordance with generally accepted accounting principles and shall be complete and detailed. The City Manager and his designee shall have full and free access to such Books and Records at all times during normal business hours of the City of Rockville, including the right to inspect, copy, audit and make records and transcripts from such records. Such records shall be maintained for a period of five (5) years following Final Completion, and the City shall have access to such records in the event any audit is required. In the event of dissolution of the Contractor’s business, custody of the Books and Records shall be given to City, and access may be provided by the Contractor’s successor in interest.

Section 5.02. Reports. The Contractor shall periodically prepare and submit to the Project Manager such reports concerning the Work as the Project Manager shall require. The Contractor hereby acknowledges that the Final Completion of all Projects is a priority for the City. For this reason, the Contractor agrees that if the Contractor becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the Work, the Contractor shall promptly notify the Project Manager of said fact, circumstance, technique or event and the estimated increased or decreased cost related thereto.

Section 5.03. Right to Audit. The City retains the right to review and audit the Contractor's or Subcontractor's compliance with the provisions of the Contract Documents (the “**City's Audit Right**”). The City's Audit Right includes reasonable right of access to the Contractor’s or Subcontractor’s premises, and the right to inspect, photocopy, and retain copies of the Books and Records outside of the Contractor 's premises if deemed necessary by the City in its sole discretion. The City shall keep these Books and Records confidential to the extent permitted by law.

Section 5.04. Confidentiality and Release of Information.

(a) All information gained or work product produced by the Contractor in performance the Work shall be considered confidential, unless such information is in the public domain or already known to the Contractor. The Contractor shall not release or disclose any such information or work product to persons or entities other than the City without prior written authorization from the City Manager.

(b) The Contractor, its officers, employees, agents or subcontractors, shall not, without prior written authorization from the City Manager or unless requested by the City Attorney, voluntarily provide documents, declarations, letters of support, testimony at depositions, response to interrogatories or other information concerning the work performed under the Contract Documents. Response to a subpoena or court order shall not be considered "voluntary" provided the Contractor gives City notice of such court order or subpoena.

(c) If the Contractor, or any officer, employee, agent or subcontractor of the Contractor, provides any information or work product in violation of this Contract, then the City shall have the right to reimbursement and indemnity from the Contractor for any damages, costs and fees, including attorneys' fees, caused by or incurred as a result of the Contractor's conduct.

(d) The Contractor shall promptly notify the City Attorney should the Contractor, its officers, employees, agents or subcontractors be served with any summons, complaint, subpoena, notice of deposition, request for documents, interrogatories, request for admissions or other discovery request, court order or subpoena from any party regarding this Contract and the Work performed hereunder. The City Attorney or his designee retains the right, but has no obligation, to represent the Contractor or be present at any deposition, hearing or similar proceeding. The Contractor agrees to cooperate fully with the City and to provide the City with the opportunity to review any response to discovery requests provided by the Contractor. However, this right to review any such response does not imply or mean the right by the City to control, direct, or rewrite said response.

End of Article V

ARTICLE VI. INSURANCE AND INDEMNIFICATION

Section 6.01. Insurance Requirement.

(a) Prior to execution of this Contract by the City, the Contractor must obtain, at its sole cost and expense, and keep in force and effect during the term of this Contract, including all extensions, an insurance policy meeting the requirements of Appendix 05 of RFP 30-25, as evidenced at the time of the execution of this Contract by a certificate of insurance provided to the Risk Manager for the City of Rockville (the “**Risk Manager**”).

(b) In the event the Contractor subcontracts any portion of the Work, the contract between the Contractor and such subcontractor shall require the subcontractor to maintain the same policies of insurance that the Contractor is required to maintain pursuant to Section 6.01(a), and such certificates and endorsements shall be provided to the Risk Manager.

Section 6.02. Indemnification. To the full extent permitted by law, the Contractor agrees to indemnify, defend and hold harmless the Mayor and Council and its appointed officers, employees and agents against, and will hold and save them and each of them harmless from, any and all actions, either judicial, administrative, arbitration or regulatory claims, damages to persons (including death) or damage to tangible property (herein “**Claims or Liabilities**”) that may be asserted or claimed by a third party to the extent caused by the negligence or willful misconduct of the Contractor, its officers, employees, agents, subcontractors, or invitees, or any individual or entity for which the Contractor is legally liable, and in connection therewith:

(a) The Contractor will defend any action or actions filed in connection with any of said Claims or Liabilities and will pay all costs and expenses, including legal costs and attorneys’ fees incurred in connection therewith;

(b) The Contractor will promptly pay any judgment rendered against the Mayor and Council, its appointed officers, agents or employees for any such Claims or Liabilities; and the Contractor agrees to save and hold the Mayor and Council, its appointed officers, agents, and employees harmless therefrom; and

(c) In the event the Mayor and Council, its appointed officers, agents or employees is made a party to any action or proceeding filed or prosecuted against the Contractor for such Claims or Liabilities, the Contractor agrees to pay to the Mayor and Council, its appointed officers, agents or employees, any and all costs and expenses incurred by the Mayor and Council, its appointed officers, agents or employees in such action or proceeding, including but not limited to, legal costs and attorneys’ fees.

The Contractor shall incorporate similar indemnity agreements with its subcontractors and if it fails to do so the Contractor shall be fully responsible to indemnify City hereunder therefore, and failure of City to monitor compliance with these provisions shall not be a waiver hereof. This indemnification includes Claims or Liabilities arising from any negligent or wrongful act, error or omission, or reckless or willful misconduct of the Contractor in the performance of services hereunder. The provisions of this Section do not apply to Claims or Liabilities occurring as a result

of the City's sole negligence or willful acts or omissions. To the extent any Claim or Liability results in part from the City's negligence, the Contractor's indemnification obligation shall be limited to the portion of such Claim or Liability attributable to the Contractor's negligence or willful misconduct. The indemnity obligation shall be binding on successors and assigns of the Contractor and shall survive termination of this Contract.

Section 6.03. Limitation of Liability. EXCEPT AS PROVIDED IN SECTION 2.05(h), NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, OR PUNITIVE DAMAGES, INCLUDING LOST PROFITS, LOST REVENUES, LOST BUSINESS OPPORTUNITIES, OR DOWNTIME COSTS, ARISING OUT OF OR RELATED TO THIS CONTRACT, REGARDLESS OF WHETHER SUCH DAMAGES ARE BASED ON CONTRACT, TORT, STRICT LIABILITY, OR ANY OTHER THEORY.

Section 6.03. Sufficiency of Insurer or Surety. Insurance or bonds required by the Contract Documents shall be satisfactory only if issued by companies qualified to do business in Maryland, rated "A" or better in the most recent edition of Best Rating Guide, The Key Rating Guide or in the Federal Register, and only if they are of a financial category Class VII or better, unless such requirements are waived by the Risk Manager due to unique circumstances. If this Contract continues for more than 3 years duration, or in the event the Risk Manager determines that the Work to be performed under the Contract Documents creates an increased or decreased risk of loss to the City, the Contractor agrees that the minimum limits of the insurance policies and the performance bond (if any) may be changed accordingly upon receipt of written notice from the Risk Manager; provided that the Contractor shall have the right to appeal a determination of increased coverage by the Risk Manager to the City Manager within 10 days of receipt of notice from the Risk Manager.

End of Article VI

ARTICLE VII. REPRESENTATIONS AND WARRANTIES; CERTIFICATION

Section 7.01. Contractor's Representations. As a material inducement to the Mayor and Council's entry into this Contract, the Contractor hereby (i) makes the following representations and warranties to the Mayor and Council, as of the Effective Date, (ii) covenants that until the expiration or earlier termination of this Contract, upon learning of any fact or condition which would cause any of the warranties and representations in this Contract not to be true, the Contractor shall immediately give written notice of such fact or condition to the Mayor and Council, (iii) acknowledges that the Mayor and Council shall rely upon the Contractor's representations made herein notwithstanding any investigation made by or on behalf of the Mayor and Council, and (iv) agrees that such representations and warranties shall survive termination of this Contract:

(a) **Organization.** The Contractor is a duly organized and validly existing business entity and is in good standing under the laws of the State of Maryland and has the power and authority to carry on its business in the State of Maryland.

(b) **Authority of the Contractor.** The Contractor has full power and authority to execute and deliver this Contract, to execute and deliver the Contract Documents and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Contract, and to perform and observe the terms and provisions of all of the above.

(c) **Authority of Persons Executing Documents.** This Contract and the other Contract Documents and all other documents or instruments executed and delivered or to be executed and delivered pursuant to this Contract have been (to the extent scheduled to be delivered as of the date hereof) or will be (to the extent scheduled to be delivered subsequent to the date hereof) executed and delivered by persons who are duly authorized to execute and deliver the same for and on behalf of the Contractor, and all actions required under the Contractor's organizational documents and applicable governing law for the authorization, execution, delivery and performance of this Contract and the other Contract Documents and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Contract, have been or will be duly taken prior to delivery of each document or instrument.

(d) **Valid Binding Agreements.** This Contract and the other Contract Documents and all other documents or instruments which have been executed and delivered pursuant to or in connection with this Contract constitute or, if not yet executed or delivered, will when so executed and delivered constitute, legal, valid and binding obligations of the Contractor enforceable against it in accordance with their respective terms.

(e) **No Breach of Law or Agreement.** Neither the execution nor delivery of this Contract and the other Contract Documents or any other documents or instruments executed and delivered, or to be executed or delivered, pursuant to this Contract, nor the performance of any provision, condition, covenant or other term hereof or thereof, will conflict with or result in a breach of any statute, rule or regulation, or any judgment, decree or order of any court, board, commission or agency whatsoever binding on the Contractor, or any provision of the organizational documents of the Contractor, or will materially conflict with or constitute a material breach of or a material default under any agreement to which Contractor is a party.

(f) Compliance with Laws; Consents and Approvals. The Contractor shall comply with all applicable laws, ordinances, rules and regulations of the federal government, the State of Maryland, Montgomery County, Maryland, and the City of Rockville, and shall comply with all applicable directions, rules and regulations of the fire marshal, health officers, building inspectors and other officers of any such government or agency.

(g) No Pending Litigation, Etc. Neither Contractor nor any principal (or beneficiary) of Contractor is subject to any pending, threatened or current litigation, merger or acquisition, corporate or other restructuring or financial oversight.

(h) No Bankruptcy, Insolvency. Neither Contractor nor any of Contractor's principals (or beneficiaries) is currently subject to any voluntary or involuntary bankruptcy or other insolvency, reorganization, bankruptcy, receivership or other similar proceeding, Contractor has no knowledge of any of the same pending or being imminent, none of such parties have been subject to any of the same at any time during the 10 year period immediately preceding the Effective Date, and Contractor has not made an assignment for the benefit of its creditors.

(i) No Violation of Order, Etc. Contractor is not in violation of any order, decree or judgment arising out of, connected with or otherwise related to the design, construction, operation or management of any facility, building, project or system.

Section 7.02. Contractor's Certifications. The Contractor certifies to the Mayor and Council that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing this Contract. For the purposes of this Section 7.02: "**corrupt practice**" means the offering, giving, receiving, or soliciting of anything of value likely to influence the action of a public official in the bidding process or in this Contract execution; "**fraudulent practice**" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of the Mayor and Council, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive the Mayor and Council of the benefits of free and open competition; "**collusive practice**" means a scheme or arrangement between two or more bidders, with or without the knowledge of the Mayor and Council or City of Rockville staff, a purpose of which is to establish bid prices at artificial, non-competitive levels; and "**coercive practice**" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of this Contract.

Section 7.03. Warranties. In addition to any other product warranties required by the Contract Documents, the Contractor shall provide warranties for all Master Meter products installed or provided to the City under this Contract in accordance with the Consolidated Measurement and Systems Products & Meter Accuracy Warranty attached hereto and incorporated herein as **Attachment 4**.

Section 7.04. Loyalty Pricing. Within 30 days from the City's issuance of a Notice to Proceed, Contractor agrees to enroll the City in the Master Meter loyalty pricing program for at least the duration of the Master Meter warranties provided under Section 7.03.

Section 7.05 Additional Agreements. Contractor warrants that all additional agreements necessary for Final Completion and subsequent operation of the Work to be performed under this

Contract are attached hereto and incorporated herein as **Attachment 5**. The City shall be under no obligation to execute any further agreements or vendor security/data protection questionnaires for the performance of the Work, Final Completion, or subsequent operation of any software, services, infrastructure, or any other component of the Work after Final Completion.

End of Article VII

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ARTICLE VIII. DEFAULTS AND REMEDIES

Section 8.01. Default.

(a) Notice of Default. In the event that the Mayor and Council determines, in its sole discretion, that Contractor has failed or refused to perform any of the obligations set forth in the Contract Documents, or is in breach of any provision of the Contract Documents, the City Manager may give written notice of default to the Contractor in the manner specified for the giving of notices in the Contract, with a copy to Contractor's performance bond surety.

(b) Opportunity to Cure. Except for emergencies, the Contractor shall cure any default in performance of its obligations under the Contract Documents within five (5) Working Days (or such shorter time as the City Manager may reasonably require) after receipt of written notice. However, if the breach cannot be reasonably cured within such time, the Contractor will commence to cure the breach within five (5) Working Days (or such shorter time as the City Manager may reasonably require) and will diligently and continuously prosecute such cure to completion within a reasonable time.

Section 8.02. Mayor and Council's Rights and Remedies.

(a) Remedies Upon Default. If the Contractor fails to cure any default of this Contract within the time period set forth above in Section 8.01, then the Mayor and Council may pursue any remedies available under law or equity, including, without limitation, the following:

(i) *Delete Certain Services.* The Mayor and Council may, without terminating the Contract, delete certain portions of the Work, reserving to itself all rights to Losses related thereto.

(ii) *Perform and Withhold.* The Mayor and Council may, without terminating the Contract, engage others to perform the Work or portion of the Work that has not been adequately performed by the Contractor and withhold the cost thereof to the Mayor and Council from future payments to the Contractor, reserving to itself all rights to Losses related thereto.

(iii) *Suspend the Contract.* The Mayor and Council may, without terminating the Contract and reserving to itself all rights to Losses related thereto, suspend all or any portion of this Contract for as long a period of time as the Mayor and Council determines, in its sole discretion, appropriate, in which event the Mayor and Council shall have no obligation to adjust the Contract Sum or Contract Time, and shall have no liability to the Contractor for damages if the Mayor and Council directs Contractor to resume Work.

(iv) *Terminate the Contract for Default.* The Mayor and Council shall have the right to terminate this Contract, in whole or in part, upon the failure of Contractor to promptly cure any default as required by Section 8.01. The Mayor and Council's election to terminate this Contract for default shall be communicated by giving the Contractor a written notice of termination in the manner specified for the giving of notices in the Contract. Any notice of termination given

to the Contractor by the Mayor and Council shall be effective immediately, unless otherwise provided therein.

(v) *Invoke the Performance Bond.* The Mayor and Council may, with or without terminating the Contract and reserving to itself all rights to Losses related thereto, exercise its rights under the Performance Bond.

(vi) *Additional Provisions.* All of the Mayor and Council's rights and remedies under this Contract are cumulative and shall be in addition to those rights and remedies available in law or in equity. Designation in the Contract Documents of certain breaches as material shall not waive the Mayor and Council's authority to designate other breaches as material nor limit the Mayor and Council's right to terminate this Contract or prevent the Mayor and Council from terminating the Contract Documents for breaches that are not material. The Mayor and Council's determination of whether there has been noncompliance with the Contract so as to warrant exercise by the Mayor and Council of its rights and remedies for default under this Contract, shall be binding on all Parties. No termination or action taken by the Mayor and Council after such termination shall prejudice any other rights or remedies of the Mayor and Council provided by law or equity or by the Contract Documents upon such termination; and the Mayor and Council may proceed against the Contractor to recover all liquidated damages and Losses suffered by the Mayor and Council.

(b) Delays by Sureties. Time being of the essence in the performance of the Work, if the Contractor's surety fails to arrange for completion of the Work in accordance with the Performance Bond, within seven (7) Days from the date of the notice of termination, the Contractor's surety shall be deemed to have waived its right to complete the Work under this Contract, and the Mayor and Council may immediately make arrangements for the completion of the Work through use of its own forces, by hiring a replacement contractor, or by any other means that the Mayor and Council determines advisable under the circumstances. The Contractor and its surety shall be jointly and severally liable for any additional cost incurred by the Mayor and Council to complete the Work following termination. In addition, the Mayor and Council shall have the right to use any materials, supplies, and equipment belonging to the Contractor and located at a Site for the purposes of completing the remaining Work.

(c) Damages to Mayor and Council.

(i) *For Contractor's Default.* The Mayor and Council will be entitled to recovery of all Losses under law or equity in the event of the Contractor's default under the Contract Documents.

(ii) *Compensation for Losses.* In the event that the Mayor and Council's Losses arise from the Contractor's default under the Contract Documents, the Mayor and Council shall be entitled to deduct the cost of such Losses from monies otherwise payable to the Contractor. If the Losses incurred by the Mayor and Council exceed the amount payable, the Contractor shall be liable to the Mayor and Council for the difference and shall promptly remit same to the Mayor and Council.

(d) Suspension by Mayor and Council.

(i) *Suspension for Convenience.* The Mayor and Council may, at any time and from time to time, without cause, order the Contractor, in writing, to suspend, delay, or interrupt the Work in whole or in part for such period of time, up to an aggregate of fifty percent (50%) of the Contract Time. The order shall be specifically identified as a Suspension Order by the Mayor and Council. Upon receipt of a Suspension Order, the Contractor shall, at the Mayor and Council's expense, comply with the order and take all reasonable steps to minimize costs allocable to the Work covered by the Suspension Order. During the Suspension or extension of the Suspension, if any, the Mayor and Council shall either cancel the Suspension Order or, by Change Order, delete the Work covered by the Suspension Order. If a Suspension Order is canceled or expires, the Contractor shall resume and continue with the Work. A Change Order will be issued to cover any adjustments of the Contract Sum or the Contract Time necessarily caused by such suspension. A Suspension Order shall not be the exclusive method for the Mayor and Council to stop the Work.

(ii) *Suspension for Cause.* In addition to all other remedies available to the Mayor and Council, if the Contractor fails to perform or correct work in accordance with the Contract Documents, the Mayor and Council may immediately order the Work, or any portion thereof, suspended until the cause for the suspension has been eliminated to the Mayor and Council's satisfaction. The Contractor shall not be entitled to an increase in Contract Time or Contract Sum for a suspension occasioned by the Contractor's failure to comply with the Contract Documents. The Mayor and Council's right to suspend the Work shall not give rise to a duty to suspend the Work, and the Mayor and Council's failure to suspend the Work shall not constitute a defense to the Contractor's failure to comply with the requirements of the Contract Documents.

(e) Termination Without Cause. The Mayor and Council may, at its sole discretion and without cause, terminate this Contract in part or in whole upon written notice to the Contractor. The termination is effective ten (10) Days after the notice is issued, unless a different time is given in the notice. The compensation allowed under this Section 8.02(e) shall be the Contractor's sole and exclusive compensation for such termination, and the Contractor waives any claim for other compensation or losses, including, but not limited to, loss of anticipated profits, loss of revenue, lost opportunity, or other consequential, direct, indirect or incidental damages of any kind resulting from termination without cause. Termination pursuant to this provision does not relieve the Contractor or its sureties from any of their obligations for Losses arising from or related to the Work performed by the Contractor.

(i) *Compensation.* Following such termination and within forty-five (45) Days after receipt of a billing from the Contractor seeking payment of sums authorized by this Paragraph 8.02(e)(i), the Mayor and Council shall pay the following to the Contractor as Contractor's sole compensation for performance of the Work:

A. For Work Performed. The amount of the Contract Sum allocable to the portion of the Work properly performed by the Contractor as of the date of termination, less sums previously paid to Contractor.

B. For Close-out Costs. Reasonable costs of the Contractor and its Subcontractors: (i) Demobilizing and (ii) Administering the close-out of its participation in a Project (including, without limitation, all billing and accounting functions, not including attorney

or expert fees) for a period of no longer than thirty (30) Days after receipt of the notice of termination.

C. For Fabricated Items. Previously unpaid cost of any items delivered to a Site which were fabricated for subsequent incorporation in the Work.

D. Profit Allowance. An allowance for profit calculated as four percent (4%) of the sum of the above items, provided Contractor can prove a likelihood that it would have made a profit if the Contract had not been terminated.

(ii) *Subcontractors*. The Contractor shall include provisions in all of its subcontracts, purchase orders and other contracts permitting termination for convenience by Contractor on terms that are consistent with this Contract and that afford no greater rights of recovery against Contractor than are afforded to Contractor against City under this Section.

(f) Loss of Federal or State Funding. In the event any federal or state funding used to pay for the Work under this Contract is reduced, withdrawn, frozen or otherwise cannot be made in full, this Contract shall automatically terminate, unless both Parties agree to a modification of the obligations under this Contract. The effective date of such termination shall be ninety (90) Days after the Contractor receives written notice of the reduction in payment, unless available funds are insufficient to continue payments in full during the ninety (90) Day period. A reduction in federal or state funding does not reduce monies due and owing to the Contractor on or before the effective date of the termination of the Agreement.

(g) Contractor's Duties Upon Termination. Upon receipt of a notice of termination pursuant to Section 8.02, the Contractor shall, unless the notice directs otherwise, do the following:

- (i) Immediately discontinue the Work to the extent specified in the notice;
- (ii) Place no further orders or subcontracts for materials, equipment, services or facilities, except as may be necessary for completion of such portion of the Work that is not discontinued;
- (iii) Provide to the Mayor and Council a description in writing, no later than fifteen (15) Days after receipt of the notice of termination, of all subcontracts, purchase orders and contracts that are outstanding, including, without limitation, the terms of the original price, any changes, payments, balance owing, the status of the portion of the Work covered and a copy of the subcontract, purchase order or contract and any written changes, amendments or modifications thereto, together with such other information as the Mayor and Council may determine necessary in order to decide whether to accept assignment of or request the Contractor to terminate the subcontract, purchase order or contract;
- (iv) Promptly assign to the Mayor and Council those subcontracts, purchase orders or contracts, or portions thereof, that the Mayor and Council elects to accept by assignment and cancel, on the most favorable terms reasonably possible, all subcontracts, purchase orders or contracts, or portions thereof, that the Mayor and Council does not elect to accept by assignment; and

(v) Thereafter do only such Work as may be necessary to preserve and protect Work already in progress and to protect materials, plants, and equipment on a Site or in transit thereto.

Upon termination, whether for cause or for convenience, the provisions of the Contract Documents remain in effect as to any claim, indemnity obligation, warranties, guarantees, submittals of as-built drawings, instructions, or manuals, or other such rights and obligations arising prior to the termination date.

Section 8.03. Contractor's Rights and Remedies.

(a) Contractor's Remedies. Contractor may terminate this Contract only upon the occurrence of one of the following:

1. *For Work Stoppage.* The Work is stopped for sixty (60) consecutive Days, through no act or fault of the Contractor, any subcontractor, or any employee or agent of the Contractor or any subcontractor, due to issuance of an order of a court or other public authority other than the Mayor and Council having jurisdiction or due to an act of government, such as a declaration of a national emergency making material unavailable. This provision shall not apply to any work stoppage resulting from the Mayor and Council's issuance of a suspension notice issued either for cause or for convenience.

2. *For Mayor and Council's Non-Payment.* If the Mayor and Council does not pay the Contractor undisputed sums within ninety (90) Days after receipt of notice from the Contractor, the Contractor may terminate this Contract (30) Days following a second notice to the Mayor and Council of the Contractor's intention to terminate the Contract.

(b) Damages to Contractor. In the event of termination for cause by the Contractor, the Mayor and Council shall pay the Contractor the sums provided for in Paragraph 8.02(e)1 above. Contractor agrees to accept such sums as its sole and exclusive compensation and agrees to waive any claim for other compensation or Losses, including, but not limited to, loss of anticipated profits, loss of revenue, lost opportunity, or other consequential, direct, indirect and incidental damages, of any kind.

End of Article VIII

**ARTICLE IX.
MISCELLANEOUS PROVISIONS**

Section 9.01. Notices, Demands, and Communications Between the Parties. Formal notices, demands, and communications between the Contractor and Mayor and Council shall be given either by (a) personal service, (b) delivery by reputable overnight document delivery service such as Federal Express that provides a receipt showing date and time of delivery, or (c) mailing utilizing a certified or first class mail postage prepaid service of the United States Postal Service that provides a receipt showing date and time of delivery, addressed to:

To the Mayor and Council: Mayor and Council of Rockville
c/o Office of the City Clerk
111 Maryland Avenue
Rockville, Maryland 20850
Attn: Sara Taylor-Ferrell, City Clerk / Director of
Council Operations

With copies to:

Office of the City Attorney
111 Maryland Avenue
Rockville, Maryland 20850
Attn: Robert E. Dawson, City Attorney

Office of the City Manager
111 Maryland Avenue
Rockville, Maryland 20850
Attn: Jeff Mihelich, City Manager

Department of Public Works
111 Maryland Avenue
Rockville, Maryland 20850
Attn: James Woods, Interim Director

To the Contractor: Ferguson Enterprises, LLC dba Ferguson Waterworks
295 Interstate Circle
Frederick, MD 21704
Attn: Matt Lehan

With a copy to:

Ferguson Enterprises, LLC
751 Lakefront Commons
Newport News, Virginia 23606
Attn: Legal Department

Notices personally delivered shall be deemed effective upon receipt or refusal thereof. Notices given by a reputable overnight document delivery service shall be deemed effective one (1) Working Day after delivery by such service. Notices mailed shall be deemed effective on the

third (3rd) Working Day following deposit in the United States mail. Such written notices, demands, and communications shall be sent in the same manner to such other addresses as any Party may from time to time designate in writing.

The Parties' respective contacts for emergencies are as follows:

Dan Stevens – Chief of Construction Management
Department of Public Works
850 Avery Road
Rockville, MD 20851
Telephone 240-314-8552
Email: dstevens@rockvillemd.gov

Section 9.02. Relationship of Parties. The provisions of this Contract are intended solely for the purpose of defining the relative rights of the Parties and no relationship of partnership, joint venture or other joint enterprise shall be deemed to be created hereby by and among the Parties pursuant to the Contract.

Section 9.03. Interpretation. The terms of the Contract shall be construed in accordance with the meaning of the language used and as a whole according to its fair meaning, and shall not be construed for or against any Party by reason of the authorship of the Contract or any other rule of construction which might otherwise apply. The Section headings are for purposes of convenience only and shall not be construed to limit or extend the meaning of the Contract.

Section 9.04. Non-Liability of Officials, Employees and Agents. No member of the Mayor and Council or any of its respective officers, employees, successors, or agents shall be personally liable to the Contractor in the event of any default or breach by the Mayor and Council or for any amount which may become due to the Contractor or its respective successors or assigns or on any obligation under the terms of the Contract.

Section 9.05. No Third-Party Beneficiaries. No provision of the Contract shall be construed to confer any rights upon any person or entity who is not a Party hereto, whether a third-party beneficiary or otherwise.

Section 9.06. Parties Bound. Except as otherwise limited herein, the provisions of the Contract shall be binding upon and inure to the benefit of the Parties and their heirs, executors, administrators, legal representatives, successors, and assigns.

Section 9.07. Severability. If any term, provision, covenant, or condition of the Contract is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the Contract shall not be affected thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of the Contract. In the event that all or any portion of the Contract is found to be unenforceable, the Contract or that portion which is found to be unenforceable shall be deemed to be a statement of intention by the Parties; and the

Parties further agree that in such event, and to the maximum extent permitted by law, they shall take all steps necessary to comply with such procedures or requirements as may be necessary in order to make valid the Contract or that portion which is found to be unenforceable.

Section 9.08. Prohibition Against Transfers. The Mayor and Council is entering into this Contract in reliance upon the stated experience and qualifications of the Contractor and its subcontractors set forth in its Bid. Accordingly, Contractor shall not assign, hypothecate, or transfer this Contract or any interest therein directly or indirectly, by operation of law or otherwise without the prior written consent of the Mayor and Council. Any assignment, hypothecation, or transfer without said consent shall be null and void and shall be deemed a substantial breach of contract and grounds for default in addition to any other legal or equitable remedy available to the Mayor and Council.

The sale, assignment, transfer, or other disposition of any of the issued and outstanding capital stock of the Contractor that shall result in changing the control of Contractor, shall be construed as an assignment of this Contract. Control means more than fifty percent (50%) of the voting power of the corporation or other entity.

Section 9.09. Governing Law. The Contract and all other Contract Documents are entered into and shall be construed in accordance with and governed by the laws of the State of Maryland without regard to choice-of-law rules. The Parties consent to the jurisdiction and venue of the Circuit Court for Montgomery County, Maryland.

Section 9.10. Tax Exemption. The City is exempt from the payment of any federal excise or any Maryland sales tax.

Section 9.11. Local Government. Notwithstanding anything herein contained to the contrary, Contractor acknowledges the Mayor and Council is a political subdivision and its obligations hereunder are given only to the extent permitted by applicable law, contingent upon the appropriation and encumbrance of funding, and subject to the notice requirements and damages limitations stated in applicable law, including, but not limited to, the Local Government Tort Claims Act, Md. Code Ann., Ct & Jud. Proc. § 5-301, et seq. (2013 Repl. Vol.), as amended from time to time.

Section 9.12. Construction Documents. All Construction Documents referred to in the Contract are by such references fully incorporated herein.

Section 9.13. Entire Agreement, Waivers and Amendments. The Contract integrates all of the terms and conditions mentioned herein, or incidental hereto, and supersedes all negotiations and previous agreements between the Parties with respect to the Projects and the Work. All waivers of the provisions of the Contract must be in writing and signed by the appropriate authorities of the Party to be charged, and all amendments and modifications hereto must be in writing and signed by the appropriate authorities of the Parties.

Section 9.14. Counterparts. The Contract may be executed in counterparts, each of which shall be deemed to be original, and such counterparts shall constitute one and the same instrument.

Section 9.15. Electronic Signatures. This Contract may be executed by electronic signature, which will be construed as an original signature for all purposes and have the same force and effect as an original signature. For these purposes, “electronic signature” means electronically scanned and transmitted versions (e.g., via pdf file or facsimile transmission) of an original signature, or signatures electronically inserted via software such as DocuSign or Adobe Sign.

Section 9.16. No Waiver of Sovereign Immunity by Mayor and Council. Notwithstanding any other provisions of the Contract to the contrary, nothing in the Contract nor any action taken by the Mayor and Council pursuant to the Contract nor any document which arises out of the Contract shall constitute or be construed as a waiver of either the sovereign immunity or governmental immunity of the City of Rockville’s elected and appointed officials, officers, and employees.

Section 9.17. Contract Disputes. Any dispute concerning the interpretation of this Contract shall be resolved pursuant to Section 17-173 of the Rockville City Code. Pending final adjudication of such dispute, the Contractor shall proceed diligently with performance of the Work pursuant to this Contract.

End of Article IX

(Signature page to follow)

IN WITNESS WHEREOF, the Mayor and Council and the Contractor have each executed, or caused to be duly executed, this Contract, in the name and behalf of each of them (acting individually or by their respective officers or appropriate legal representatives thereunto duly authorized) as of the day and year first written above.

MAYOR AND COUNCIL

Approved as to form:

**THE MAYOR AND COUNCIL OF
ROCKVILLE**, a body corporate and municipal
corporation of the State of Maryland

Cynthia Walters, Acting City Attorney

By: _____
Jeff Mihelich, City Manager

FERGUSON ENTERPRISES, LLC
a Virginia limited liability company

By: _____

ATTACHMENT 1 – CLARIFICATIONS

DRAFT

ATTACHMENT 2 – NEGOTIATION LETTERS

DRAFT

ATTACHMENT 3 – PRICE SHEETS

DRAFT

ATTACHMENT 4 – MASTER METER WARRANTY

DRAFT

ATTACHMENT 5 – ADDITIONAL AGREEMENTS

DRAFT