



## CONSULTANT AGREEMENT

This **AGREEMENT** is made this \_\_\_\_ day of \_\_\_\_\_, 2017 by and between Pennoni Associates Inc., located at 750 Holiday Dr., Bldg 9, Suite 700, Pittsburgh, PA 15220 (hereinafter called the "Engineer" or "Pennoni") and McCormick Taylor, 1000 Omega Drive, Suite 1550, Pittsburgh, PA 15205 (hereinafter called the "Consultant").

**WHEREAS**, the Engineer has been appointed by BFS Companies, 116 Shannon Drive, Morgantown, WV 26508 (hereinafter referred to as the "Client") to perform Engineering Design services for the Youngwood Commons Outparcel Development, HOP Cycle IV - Traffic Signal Re-Timing, Youngwood Borough, PA (hereinafter referred to as the "Project").

**WHEREAS**, the Engineer desires to retain the services of Consultant and Consultant desires to be so retained, to assist the Engineer in meeting all requirements of Pennoni's Agreement with the Client, dated October 2, 2017 (hereinafter called "Engineer's Agreement").

**NOW, THEREFORE**, in consideration of their mutual promises and other good and valuable consideration and intending to be legally bound, the parties agree as follows:

**1. Retainer of Consultant.** The Engineer hereby retains the Consultant to perform the services required for the completion of the Engineer's Agreement, as defined in EXHIBIT A, SCOPE OF SERVICES, which is attached hereto and incorporated herein. The Consultant is retained as an independent contractor and not as an employee of the Engineer or the Client.

**2. General Responsibilities of Engineer.** The Engineer shall be the general administrator of the professional services for the Project, and shall facilitate the coordination and exchange of information among the various consultants retained by the Engineer for the Project. Further, Engineer shall provide in a reasonably timely fashion, upon written request of the Consultant, such information identified by Consultant as needed for the timely completion of Consultant's services.

**3. General Responsibilities of Consultant.** The Consultant shall ascertain the requirements for the Consultant's part of the Project and shall confirm such requirements to the Engineer. The Consultant shall provide progress copies of drawings, reports, specifications and other necessary information to the Engineer and other Consultants. The Consultant shall become familiar with the Project services of the Engineer and other consultants so that the character,

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sequence and timing of the Consultant's services will be coordinated with those of the Engineer and all other consultants. The Consultant shall assist the Engineer, in conformity with EXHIBIT A, SCOPE OF SERVICES attached hereto, and if requested, attend necessary conferences, prepare necessary analysis, drawings, specifications and other documents, be available for general consultation, and make recommendations for the Consultant's portion of the Project. The Consultant shall also recommend to the Engineer the obtaining of such investigations, surveys, tests, analyses and reports as may be necessary for the proper execution of the Consultant's services. When necessary, the Consultant shall consult with public agencies and organizations concerning utility services and requirements. Except as authorized by the Engineer, all communications between the Consultant and the Client shall be conducted through the Engineer.

**4. Compensation and Costs.** The Consultant's compensation for basic services, any required additional services and reimbursement for costs, are described more fully in EXHIBIT B, COMPENSATION AND COSTS, which is attached hereto and incorporated herein. Consultant hereby agrees that conditions precedent to the Engineer's obligation to pay Consultant under this Consultant Agreement, or for any services supplementary, extra or additional hereto, shall be (a) strict compliance with the notice provisions of the Engineer's Agreement if the Consultant is seeking any increase in compensation due to any cause or circumstance, by giving to the Engineer the same form and time of prior notice that the Engineer is required to give to the Client; given to the Engineer sufficiently in advance so that the Engineer can comply with the notice provisions in the Engineer's Agreement; if no such procedure is set forth in the Engineer's Agreement, then the Consultant shall immediately give written notice to the Engineer's Project Manager or his designee setting forth in detail the circumstances giving rise to such request and the amount requested, (b) the acceptance of Consultant's services by the Engineer, the Client or other appropriate person or agency designated by the Engineer or the Client, (c) Engineer's receipt from Consultant of its invoice detailing services performed and compensation due for each Phase of the Project, and (d) the actual receipt of payment from the Client by the Engineer for the services performed by the Consultant. Unless approval is granted by the Client, as set forth above, in no event will the compensation of the consultant exceed the total fee set forth in EXHIBIT B.

**5. Incorporation by Reference.** This Consultant Agreement is made subject to and is governed by the Engineer's Agreement, a copy of which has been provided to Consultant and which is incorporated herein by reference and made a part hereof. Consultant acknowledges that it has received and read the Engineer's Agreement and agrees to be bound by it in the performance of its services under this Consultant Agreement. Consultant understands and agrees that Engineer shall have all obligations, rights and remedies to and against Consultant which the Client has to and against the Engineer under the Engineer's Agreement. Consultant further understands and agrees that to the extent Consultant has undertaken to perform duties and assume obligations designated to be performed by Engineer in the Engineer's Agreement, Consultant will be fully responsible for the performance of those duties and obligations in

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accordance with the Engineer's Agreement including, but not limited to, adherence to time schedules and payment of any penalties, liquidated damages or other "late charges" which may be imposed for late submission of plans, drawings, specifications, materials and any other deliverable; or, by reason of Consultant's failure to produce proper and coordinated plans, specifications or drawings; or to fail to render any services relating to the Project in accordance with accepted professional standards and procedures. Additionally, Consultant also understands and agrees that among those duties and obligations that must be performed in accordance with the Engineer's Agreement include, but are not limited to, adherence to all Client, State, Federal, and any other governmental unit required contract terms and conditions pertaining to, inter alia, records retention, labor standards, equal opportunity, anti-apartheid, disabled persons and prohibitions against political contributions.

**6. Indemnification & Insurance.** Consultant shall indemnify the Engineer, Engineer's Client, and any other person or entity to the same extent the Engineer is required to do so under the Engineer's Agreement. Additionally, to the fullest extent permitted by Law and notwithstanding anything to the contrary contained herein, the Consultant shall release, indemnify, ~~defend~~ and hold harmless the Engineer, its officers and employees from and against claims, demands, damages, losses and expenses, including litigation and reasonable attorney's fees, ~~to the extent caused by arising out of, or, resulting from (a) the Consultant's performance of its obligations under this Consultant Agreement; or (b) through the negligence of the Consultant; or (c) caused in whole or in part by any negligent acts, errors or omissions of the Consultant, its officers and employees, anyone directly or indirectly employed by the Consultant or anyone for whose acts the Consultant may be liable.~~ Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation or indemnity which would otherwise exist as to any party or person described in this Article. This indemnification obligation is not limited by, but is in addition to, the insurance obligations contained in this Consultant Agreement.

**6.1. Extent of Coverage.** Unless higher limits, greater coverages, longer notice periods, fewer exclusions, limitations of coverage, lower deductibles; or, additional types of insurance, etc., are set forth in the Engineer's Agreement, the intent of this paragraph being that the Consultant provide Engineer with no less than the Coverages, etc., the Engineer is required to provide the Client pursuant to the Engineer's Agreement, for all the policies set forth below, the Consultant shall purchase and maintain, in full force and effect during the term of this Consultant Agreement and for a period of three (3) years thereafter, such insurance as will protect itself from the claims set forth below ~~to the extent caused by which may arise out of or result from~~ the Consultant's services under this Consultant Agreement, if and to the extent it is available. If coverage is written on a claims-made basis, Consultant may provide this continued coverage under an Extended Reporting Period or "tail" coverage for three (3) years following the completion of its services. For claims-made policies, any retroactive date or prior acts exclusion to which such coverage is subject shall predate both the date upon which any services hereunder are commenced and the date of this Consultant Agreement.

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**Commented [RM1]:** Note that the indemnification section is not fully insurable

**Commented [RM2]:** Review the Engineer's Agreement for any additional requirements being flowed down to MT

**Commented [RM3]:** PL will not pay to defend your client against unproven claims

**Commented [RM4]:** Confirm that the Engineers Agreement is no broader

**6.1.1.** Claims under worker's compensation that are applicable to the work to be performed.

**6.1.2.** Claims for damages because of bodily injury, personal injury, or death of third parties, and of its employees under any applicable employer's liability law.

**6.1.3.** Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property.

**6.1.4.** Claims for economic damages to the extent caused by arising out of Consultant's professional services.

**6.2. Workers Compensation.** Consultant shall provide Workers Compensation and Employers Liability as required by the state in which the work will be performed, including "other states" coverage, and USL&H and/or Jones Act coverage (if applicable).

**6.3. General Liability.** Consultant shall provide Commercial General Liability insurance, written on an occurrence basis, covering bodily injury, personal injury, and/or property damage to third parties, to the extent caused by which may arise from operations under the Agreement, whether such operations are performed by the Consultant or its subconsultants or contractors.

The General Liability policy shall include premises, operations, completed operations, and contractual liability covering liability assumed by the Consultant under the Indemnification and other provisions of the agreement. The policy shall not exclude or limit coverage for Cross Suits (Insured versus Insured claims); Explosion, Collapse, and Underground hazards; elevators; independent contractors; or contractual liability.

**6.4. Business Automobile Liability.** Consultant shall provide Business Automobile Liability coverage for bodily injury and property damage to the extent caused by arising out of the ownership, maintenance, or use of owned, non-owned, hired, and leased vehicles, including uninsured/underinsured motorists coverage.

**6.5. Professional Liability.** Consultant, and all subconsultants or contractors that it retains in performance of professional services in connection with the work, shall provide Professional Liability insurance covering negligent acts, errors, or omissions to the extent caused by arising out of the performance of their work. Any retroactive date or prior acts exclusion to which such coverage is subject shall predate both the date upon which any services hereunder are commenced and the date of this Consultant Agreement.

**Commented [RM5]:** Note that the subconsultants shall all maintain their own insurance

**Commented [RM6]:** This is a flow down requirement

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**6.6. Contractors Pollution Liability (CPL).** Consultant, and all subconsultants or contractors that it retains in performance of the work, shall provide CPL insurance if applicable to the work being performed (including, but not limited to, asbestos or lead abatement, testing, remediation, use of equipment that might emit fumes or contaminants, or work that might release or exacerbate in situ contaminants). Consultant's CPL policy shall be maintained in full force and effect for the term of this Consultant Agreement and for a period of three (3) years after the completion of any and all of the Consultant's services hereunder, if and to the extent it is available. In the alternative, Consultant may provide an Extended Reporting Period or "tail" coverage for claims-made policies, for three (3) years following the completion of its services. If coverage is written on a claims-made form, any retroactive date or prior acts exclusion to which such coverage is subject shall predate both the date upon which any services hereunder are commenced and the date of this Consultant Agreement.

**Commented [RM7]:** Is this coverage required or applicable?  
Note that McCormick Taylor has coverage for pollution incidents as a result of MT's professional services. This is NOT a separate policy but rather coverage is endorsed on the professional liability policy

**Commented [RM8]:** Note that this is a flow down requirement

**Commented [RM9]:** Note that subconsultants shall all maintain their own insurance

**6.7. Umbrella/Excess Liability.** Umbrella/Excess Liability insurance shall apply excess of Consultant's General Liability, Business Automobile Liability, and Employers Liability policies, on a following-form basis.

**6.8. Additional Insureds.** The Engineer, Client and their officers, directors, employees, ~~agents~~, subsidiaries, and affiliated companies shall be named as additional insureds on a primary and noncontributory basis on all of Consultant's liability insurance policies required herein, with the exception of Workers' Compensation/Employers Liability and Professional Liability, for losses ~~to the extent caused by arising from~~ the negligence of the Consultant or its subconsultants or contractors, or anyone for whom they may be liable. Additional Insured status shall apply to both ongoing operations and to completed operations for a period of not less than three (3) years following completion of Consultant's services. All policies except professional liability insurance shall provide a Waiver of subrogation in favor of Engineer and Client, where allowed by law and permitted by the insurer.

**6.9. Limits.** Unless higher limits; or, lower deductible amounts are set forth in the Engineers Agreement, the Consultant's insurance policies shall be written for not less than the following limits of liability:

**Commented [RM10]:** Confirm the requirements in the Engineer's Agreement are no broader

<u>Insurance Description</u>		<u>Required Coverage</u>	
a.	Worker's Compensation/ Employers Liability	Amount Required by Statute/	
		Bodily Injury, Each Employee	\$500,000
		Bodily Injury, Each Accident	\$500,000
		Disease, Each Employee	\$500,000

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b.	Commercial General Liability	<b><u>Occurrence Form</u></b>	
		General Aggregate Per Project	\$2,000,000
		Products-Completed Operations	
		Aggregate:	\$2,000,000
		Personal and Advertising Injury:	\$2,000,000
		Each Occurrence:	\$1,000,000
c.	Business Automobile Liability	Combined Single Limit, Bodily Injury and Property Damage:	
		Each Occurrence:	\$1,000,000
d.	Professional Liability (aka Errors & Omissions or E & O)	Per Claim:	\$3,000,000
		Aggregate Limit:	\$3,000,000
		Deductible not to exceed:	\$50,000
e.	Contractors Pollution Liability	Each <del>Claim</del> <del>Occurrence</del> :	\$3,000,000
		Annual Aggregate:	\$3,000,000
f.	Umbrella / Excess Liability	Occurrence Limit:	\$5,000,000
		Aggregate Limit:	\$5,000,000

**6.10. Certificates of Insurance.** Before commencing its performance of this Consultant Agreement, the Consultant shall furnish to the Engineer Certificates of Insurance in the form satisfactory to the Client showing that the Consultant has procured the required insurance and that such insurance is in force. The Consultant shall furnish copies of all insurance policies to the Engineer upon request. The Consultant shall provide the Engineer with current insurance certificates confirming its maintenance of the required insurance coverage during the term of this Consultant Agreement and for a period of three (3) years thereafter.

**Commented [RM11]:** Lockton does not recommend providing client with copies of the insurance policies as they include proprietary information

Consultant shall be responsible for securing certificates of insurance from all subconsultants and contractors evidencing the insurance coverages required above.

**Commented [RM12]:** Note that this is a business decision to agree to secure these certificates

**6.11. Notification of Cancellation.** The Consultant's insurance policies shall contain a provision that the coverage afforded under the insurance policies will not be canceled, non-renewed, permitted to expire, or otherwise terminated until at least thirty (30) days' prior written notice has been given to the Engineer. The insurance coverages and limits required herein are designed to meet the minimum requirements of the Engineer and Client. They are not designed as a recommended insurance program for Consultant or its subconsultants/contractors. Meeting these minimum requirements shall in no way limit or relieve the Consultant's liability and obligations under any other provision of the Agreement.

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Consultant shall acquire, at its own expense, any other additional insurance coverage it deems necessary for the protection of its work under this Agreement.

**7. Retention of Records.** Unless a longer period is required by the Client, or is set forth in the Engineer's Agreement, the Consultant agrees that the Engineer or the Client shall, until the expiration of three (3) years after final payment under this Consultant Agreement, have access to and the right to examine and copy any books, documents, papers and records directly related to this Consultant Agreement which have not been previously delivered to the Engineer. The period of access and examination of records shall continue during litigation and until settlement of any claims arising out of the performance of this Consultant Agreement.

**8. Assignment.** This Consultant Agreement is for the professional services of the Consultant and its interest in this Consultant Agreement may not be assigned or transferred by Consultant without the prior written consent of the Engineer. Approval by Engineer of the assignment of any portion of the Consultant's duties under this agreement by Consultant to a Subconsultant shall not relieve the Consultant of any liability or responsibility for the proper performance of the work under this Agreement.

**9. Inspections.** All work performed by Consultant shall be subject to quality assurance inspections, audits and approval by Engineer. However, such quality assurance inspections, audits, or approval shall not relieve Consultant of responsibility for the proper performance of Consultant's work under this Agreement. Consultant shall provide sufficient, safe and appropriate facilities for such audits and inspections, and shall furnish all information concerning the work, and hereby grants Engineer's duly authorized representatives free access at all reasonable times to Consultant's facilities where the work under this agreement is to be performed.

**10. Changes.** At any time prior to the completion of work, Engineer shall have the right to direct changes in this Consulting Agreement, including but not limited to, changes in the Scope of Services. If the change causes an increase or decrease in the cost of, or the time required for Consultant's performance under this Consulting Agreement, then Consultant must submit to the Engineer, within the time required by Paragraph 4 above, but in any event no more than ten (10) calendar days after receipt of the written notice of change, a written request for any adjustment. If justified, and in those instances where the Client's approval is required upon approval by the Client, Engineer shall issue an addendum to this agreement for equitable adjustments, in conformity with the provisions of Paragraph 4 above.

**11. Termination for Convenience.** Engineer shall have the right at any time to terminate this Consulting Agreement in whole, or in part, by written notice to the Consultant. Upon receipt of this notice the Consultant shall discontinue performing any work, will not incur any further expenses and shall promptly cancel all orders for work, materials, or supplies relating to the project. In the event of termination for convenience, Engineer shall pay Consultant for all

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work performed and accepted pursuant to the provisions of Paragraph 4 above. However, in no event shall Engineer be obligated to pay more than the Agreement compensation less any previously paid funds.

**12. Default.** Should the Consultant breach any portion of this Agreement, Engineer shall have the rights and remedies provided by law and those provided under this Agreement. Further, Engineer shall have the right at any time to terminate this Consultant Agreement, in whole or in part, if the Consultant fails to perform any of its obligations: or, if the Consultant fails to give to Engineer adequate assurance of performance within seven (7) calendar days after receipt of Engineer's written request for such assurances. In the event of a breach of this Consultant Agreement, including Consultant's failure to provide adequate assurance of performance, Engineer may:

- (i) declare the Consultant to be in default; or,
- (ii) cancel this Consultant Agreement, in whole or in part; or,
- (iii) withhold payment of any further funds which may be due the Consultant until the default is corrected, and/or
- (iv) pursue any and all other remedies afforded by law.

**13. Ownership of Documents.** All drawings, specifications, information or data prepared by or furnished to Consultant in connection with any or all work to be performed under this agreement shall be the property of Engineer. All documents, including those stored on electronic or magnetic media of any form, shall be immediately forwarded to Engineer upon request.

**14. Confidentiality.** No publicity releases (including news releases and advertising) pertaining to this Consulting Agreement or the Work hereunder shall be issued by the Consultant without the prior written approval of Engineer.

**15. Non-waiver of rights.** The rights and remedies granted to Engineer are cumulative and the failure to enforce any right or remedy by Engineer does not operate as a waiver by Engineer to exercise any rights or remedies granted by law or under this Consulting Agreement.

**16. Miscellaneous Provisions.**

**16.1** All conditions under the Engineer's Agreement applying to the Engineer shall apply equally to the Consultant under this Consultant Agreement. The Consultant agrees that all sub-consulting agreements made pursuant to this Consultant Agreement shall be made expressly subject to all of the terms and conditions of this Consultant Agreement.

**16.2** Nothing contained in this Consultant Agreement shall be deemed to create any contractual relationship with, or to give a cause of action of any nature, whether sounding in

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contract, tort, or equity, in favor of, any third party against the Client, Engineer or the Consultant. Nothing contained in this Consultant Agreement is intended to benefit any third party. The Engineer does not intend the Consultant, their subcontractors and subconsultants to be intended or incidental third party beneficiaries of the Engineer's Agreement.

**16.3** This Consultant Agreement contains all the terms and conditions agreed upon by the parties hereto and no other agreements, oral or otherwise regarding the subject matter of this Consultant Agreement exist. Any change in, addition to or waiver of the terms and conditions of this Consultant Agreement shall be binding only if approved in writing by an authorized representative of the parties.

**16.4** This Consultant Agreement is made subject to laws of the Commonwealth of Pennsylvania.

**16.5** If any portion of this Consultant Agreement is found to be unenforceable by a Court of competent jurisdiction, all other portions shall remain in full force and effect.

**16.6** In construing this Consultant Agreement, the Engineer's Agreement and its order of precedence controls where there is any direct conflict between the terms of the Engineer's Agreement and this Consultant Agreement. This Consultant Agreement is to be construed to be complementary to the Engineer's Agreement; therefore, as to all other terms or conditions that are not in direct conflict with the Engineer's Agreement, this Consultant Agreement shall control despite any conflicting terms or conditions contained in the Exhibits attached hereto.

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**IN WITNESS WHEREOF**, this Consultant Agreement has been executed and delivered as of the date set forth in the caption hereof.

**Pennoni Associates Inc.**

By:

\_\_\_\_\_  
Printed Name of Pennoni Officer

\_\_\_\_\_  
Signature of Pennoni Officer

\_\_\_\_\_  
Title of Pennoni Officer

**McCormick Taylor**

By:

\_\_\_\_\_  
Printed Name of Consultant Officer

\_\_\_\_\_  
Signature of Consultant Officer

\_\_\_\_\_  
Title of Consultant Officer

**EXHIBIT A**

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**SCOPE OF SERVICES – Will be negotiated on a work order basis.**

**EXHIBIT B**

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**COMPENSATION AND COSTS – Will be negotiated on a work order basis.**