

AGREEMENT  
FOR  
PROFESSIONAL SERVICES

THIS AGREEMENT, made and entered into this 23<sup>rd</sup> day of October, 2014, by and between the **Town of Prescott Valley**, a municipal corporation of Arizona (hereinafter the "TOWN"), and **Lyon Engineering** an Arizona corporation (hereinafter the "CONSULTANT").

The TOWN engages the CONSULTANT to perform professional engineering services for a project known and described as **Viewpoint Drive Floodplain Stormwater Mitigation Study & Floodplain Revision, CIP # S168.4** (hereinafter the "PROJECT").

WITNESSETH:

WHEREAS, the TOWN has authority to construct and maintain a storm water drainage system of excavations, ditches, drains, conduits, channels, outlets, outfalls, crossings and catch basins of every character [ARS §§9-240(B)(5), 48-571(A)(16) and 48-572(A)(2),(4)&(5)]; and

WHEREAS, the TOWN has found the CONSULTANT to be competent and capable of providing professional services for such projects;

NOW, THEREFORE, for and in consideration of the mutual covenants and promises herein, the parties hereto agree as follows:

**ARTICLE 1. DESCRIPTION OF SERVICES**

The CONSULTANT shall perform all of the Professional Services tasks as described in the Scope of Services document attached hereto as Exhibit "A" and expressly made a part hereof (hereinafter "Services") as well as such other tasks as the parties may hereafter mutually agree upon in writing, to TOWN standards and in accordance with the degree of care and skill, which a Registered Professional in Arizona would exercise under similar conditions.

Nothing herein shall preclude the TOWN from using its own staff to carry out aspects of the Services, separately or in cooperation with the CONSULTANT, as mutually determined from time to time by the parties. Furthermore, nothing herein shall preclude the parties from entering into additional mutual agreements which add to the Services to be performed by the CONSULTANT (hereinafter "Amendments"). Any such Amendments shall be in writing, signed by the parties' representatives, attached hereto, and expressly made a part hereof.

The CONSULTANT shall, except as provided otherwise in this Agreement and any Amendment hereto, furnish all supervision, labor and materials, and obtain all licenses and permits required for performance of the Services.

## ARTICLE 2. SCHEDULE OF SERVICES

The CONSULTANT shall complete all Services within 240 calendar days of the “Notice to Proceed” date, in substantial conformance with the schedule(s) set forth in Exhibit “A” and any Amendments hereto, unless otherwise agreed to by the TOWN. In the event that delays are experienced beyond the control of the CONSULTANT, the schedule may be revised as mutually agreed upon by the TOWN and the CONSULTANT.

## ARTICLE 3. AGREEMENT TERM

Unless otherwise terminated as set forth in Articles 4 and 12 hereinafter, the Term of this Agreement shall be from the date first-above written through June 30, 2016, or until such time as the parties mutually determine in writing that all of the Services have been accomplished, whichever is sooner.

## ARTICLE 4. PAYMENT

The TOWN will pay the CONSULTANT for Services satisfactorily performed in accordance with the cost and fee schedule(s) set forth in Exhibit “A” and any Amendments hereto.

The TOWN shall pay the CONSULTANT in installments based upon monthly progress reports and detailed invoices submitted by the CONSULTANT. All invoices submitted to the TOWN for Services performed by the CONSULTANT shall refer, by date, to the Agreement under which the Services were performed. Invoices shall contain percent completion of each task detailed in this Agreement and any Amendments hereto. When required by the TOWN, invoices shall contain copies of supporting documents and proof of expenditures.

In the event a Notice to Proceed is not issued to the CONSULTANT by the TOWN within sixty (60) days after the date first-above written, this Agreement shall terminate and the TOWN's payment obligation hereunder shall also terminate.

## ARTICLE 5. NON-EXCLUSIVE AGREEMENT

Nothing in this Agreement is to be construed as granting to the CONSULTANT an exclusive right to perform any or all of the TOWN's requirements of the type contemplated hereunder.

## ARTICLE 6. CHANGES

The TOWN may, at any time by written direction, require additional tasks as part of the Services, direct the omission of, or variation to, the Services, or alter the schedule for Services. If such direction results in a material change in the amount or character of the Services, an equitable adjustment to the price and to any other provisions in Exhibit “A” or any Amendments hereto that may be affected, shall be made in writing. All such material changes must first be approved by the TOWN.

## ARTICLE 7. PROFESSIONAL RESPONSIBILITY

The CONSULTANT shall perform the Services hereunder in accordance with the standards of care, skill, and diligence normally provided by a professional in the performance of such Services with respect to services similar to that contemplated hereunder. In the event of the CONSULTANT's failure to observe and adhere to such standards, the CONSULTANT shall, upon notice from authorized TOWN staff, promptly re-perform the Services at the CONSULTANT's sole expense.

## ARTICLE 8. INDEMNIFICATION

With respect to professional liability only, to the fullest extent permitted by law, the CONSULTANT shall defend, indemnify and hold harmless the TOWN, its agents, officers, officials and employees for, from and against all claims, damages, losses and expenses (including but not limited to attorney fees, court costs, and the cost of appellate proceedings), relating to, arising out of, or alleged to have resulted from the acts, errors, mistakes, omissions, work or services of the CONSULTANT, its agents, employees or any tier of the CONSULTANT's subcontractors in the performance of this Agreement. The CONSULTANT's duty to defend, hold harmless and indemnify the TOWN, its agents, officers, officials and employees shall arise in connection with any claim, damage, loss or expense that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of property including loss of use resulting therefrom caused by the CONSULTANT's acts, errors, mistakes, omissions, work or services in the performance of this Agreement including any employee of the CONSULTANT, any tier of the CONSULTANT's subcontractors or any other person for whose acts, errors, mistakes, omissions, work or services the CONSULTANT may be legally liable.

With respect to all liability other than professional liability, including (but not limited to) those acts or omissions normally covered by general and automobile liability insurance, to the fullest extent permitted by law the CONSULTANT shall defend, indemnify and hold harmless the TOWN, its agents, officers, officials and employees for, from, and against all claims, damages, losses and expenses (including but not limited to attorney fees, court costs, and the cost of appellate proceedings), relating to, arising out of, or alleged to have resulted from the acts, errors, mistakes, omissions, work or services of the CONSULTANT, its agents, employees or any tier of the CONSULTANT's subcontractors in the performance of this Agreement.

The CONSULTANT's duty to defend, hold harmless and indemnify the TOWN, its agents, officers, officials and employees shall arise in connection with any claim, damage, loss or expense that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of property including loss of use resulting therefrom caused IN WHOLE OR IN PART by the CONSULTANT's acts, errors, mistakes, omissions, work or services in the performance of this Agreement including any employee of the CONSULTANT, any tier of the CONSULTANT's subcontractors or any other person for whose services the CONSULTANT may be legally liable including the TOWN. Such indemnity does not extend to the TOWN's sole negligence.

#### ARTICLE 9. PRESCOTT VALLEY BUSINESS LICENSE

The CONSULTANT and any Subconsultants may be required to acquire and maintain a Prescott Valley Business License for the duration of the PROJECT in accordance with TOWN Code Article 8-02, as determined by the TOWN Clerk.

#### ARTICLE 10. INSURANCE REQUIREMENTS

Without limiting any of their liabilities or obligations hereunder, the CONSULTANT, at its own expense and prior to commencing with Services, shall secure and maintain the herein stipulated minimum insurance with companies duly licensed or otherwise approved by the State of Arizona, possessing a current A.M. Best Company, Inc. rating of not less than A-, with policies and forms satisfactory to the TOWN.

##### A. General Clauses

Additional Insured: The insurance coverage, except Workers' Compensation and in some cases Professional Liability, required by this contract, shall name the TOWN, its agents, representatives, directors, officials, employees, and officers, as additional insureds, and shall specify that insurance coverage carried by the TOWN or its employees shall be excess coverage, and not contributory coverage to that provided by the CONSULTANT.

Coverage Term: All insurance required herein shall be maintained in full force and effect until Services required to be performed under the terms of the Agreement are satisfactorily completed and formally accepted; failure to do so may constitute a material breach of this Agreement, at the sole discretion of the TOWN. In the event any insurance policy(ies) required by this contract is(are) written on a "claims made" basis, coverage shall extend for two(2) years past completion and acceptance of the CONSULTANT's work or services, as evidenced by annual Certificates of Insurance.

Primary Coverage: The CONSULTANT's insurance shall be primary insurance as respects TOWN and any insurance maintained by TOWN shall be excess of the CONSULTANT's insurance and shall not contribute to it.

Claim Reporting: Any failure to comply with the claim reporting provisions of the policies or any breach of a policy warranty shall not affect coverage afforded under the policy to protect the TOWN.

Waiver: The policies, except Workers' Compensation and Professional Liability, shall contain a waiver of transfer rights of recovery (subrogation) against the TOWN, its agents, representatives, directors, officers, and employees for any claims arising out of the work of the CONSULTANT.

Deductible/Retention: The policies may provide coverage which contains deductibles or self insured retentions. Such deductibles and/or self insured retentions shall not be applicable with respect to the coverage provided to the TOWN under such policies. The CONSULTANT shall be solely responsible for deductible and/or self insured retentions and the TOWN, at its option, may require the CONSULTANT to secure the payment of such deductible or self insured retentions by a surety bond or an irrevocable and unconditional letter of credit.

Certificates of Insurance: Prior to commencing with services under this Agreement, CONSULTANT shall furnish TOWN with Certificates of Insurance as required by the Agreement, issued by CONSULTANT's insurer(s), as evidence that policies providing the required coverages, conditions, and limits required by this Agreement are in full force and effect. Such certificates shall identify this Agreement by date, project name, and CIP number and shall provide for not less than thirty (30) days per certificate, advance Notice of Cancellation, Termination, or Material Alteration. Such certificates shall be sent directly to:

Town of Prescott Valley  
Capital Projects Coordinator  
7501 E. Civic Circle  
Prescott Valley, AZ 86314

If a policy expires during the life of the contract, a renewal certificate must be sent to the TOWN fifteen (15) days prior to the expiration date.

The TOWN shall not be obligated, to review or to advise CONSULTANT of any deficiencies in such policies and endorsements, and such receipt shall not relieve CONSULTANT from, or be deemed a waiver of, the TOWN's right to insist on strict fulfillment of CONSULTANT's obligations under this Agreement.

Cancellation and Expiration: Insurance required herein shall not expire, be canceled, or materially changed without fifteen (15) days prior written notice to the TOWN.

The CONSULTANT hereby agrees to indemnify and save harmless the TOWN and any jurisdiction or agency issuing permits for any work included in the project, their officers, employees, agents and representatives from all suits, actions, losses, damages, expenses, costs or claims of any character or any nature brought on account of any injuries or damages sustained by any person(s) or property arising out of the work done in fulfillment of the

construction or the improvement under the terms of these Contract Documents, or on account of any act or omission by the CONSULTANT or his/her agents, or from any claims or amounts arising or recovered under Worker's Compensation laws, or any other law, by-law, ordinance, order or decree.

B. WORKERS' COMPENSATION

The CONSULTANT shall carry Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of the CONSULTANT's employees engaged in the performance of the Services, and Employer's Liability insurance of not less than \$1,000,000 for each accident, \$1,000,000 disease for each employee, and \$1,000,000 disease policy limit.

In case any of the Services are subcontracted, the CONSULTANT will require the Subcontractor to provide Workers' Compensation and Employer's Liability to at least the same extent as required of the CONSULTANT.

C. AUTOMOBILE LIABILITY

The CONSULTANT shall carry Commercial/ Business Automobile Liability insurance with a combined single limit for bodily injury and property damage of not less than \$1,000,000 each occurrence and \$2,000,000 aggregate including bodily injury and property damage with respect to any of the CONSULTANT's owned, hired, and non-owned vehicles assigned to or used in performance of the Services. Coverage will be at least as broad as coverage Code 1, "any auto," (Insurance Service Office, Inc. policy form CA 0001 1/87, or any replacements thereof). Such insurance shall include coverage for loading and off loading hazards. If hazardous substances, materials or wastes are to be transported, MCS 90 endorsement shall be included and \$5,000,000 per accident limits for bodily injury and property damage shall apply.

D. PROFESSIONAL LIABILITY

Professional Liability insurance covering acts, errors, mistakes and omissions arising out of the Services performed by the CONSULTANT, or any person employed by the CONSULTANT, with an unimpaired limit of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate, or 10% of the construction budget, whichever is larger.

ARTICLE 11. SUSPENSION OF SERVICES

The TOWN may, by written notice, direct the CONSULTANT to suspend performance of any or all of the Services for a specified period of time. If such suspension is not occasioned by the fault or negligence of the CONSULTANT, this Agreement may be mutually modified to compensate CONSULTANT for extra costs incurred due to the

suspension, provided that any claim for adjustment is supported by appropriate cost documentation and asserted within twenty (20) calendar days after the date the TOWN issues an order for resumption of the Services. Upon receipt of notice to suspend Services, the CONSULTANT shall a) discontinue Services, b) place no further orders or subcontracts, c) suspend all orders and subcontracts, d) protect and maintain the Services, and e) otherwise mitigate the TOWN's costs and liabilities for that portion of the Services which have been suspended.

## ARTICLE 12. TERMINATION

The TOWN, at its sole discretion, may terminate this Agreement at any time without cause prior to its Term by sending to the CONSULTANT written notice dated fifteen (15) calendar days prior to the termination date. Upon such termination, the TOWN shall pay to the CONSULTANT full compensation for all Services satisfactorily performed by the CONSULTANT as of the termination date, excluding damages or anticipated profits for Services not yet performed.

The CONSULTANT may terminate this Agreement at any time without cause prior to its term by sending to the TOWN written notice dated thirty (30) calendar days prior to the termination date. Upon such termination, the TOWN shall pay to the CONSULTANT full compensation for all Services satisfactorily performed by the CONSULTANT as of the termination date, excluding damages or anticipated profits for Services not yet performed.

## ARTICLE 13. EXAMINATION OF SERVICES

All of the Services will be subject to examination at any reasonable time or times by appropriate TOWN staff, who shall also have the right to reject unsatisfactory Services in part or in whole. Neither examination of Services nor the lack of same, nor acceptance of Services by TOWN staff or payment therefore shall relieve the CONSULTANT from any of its obligations under this Agreement.

## ARTICLE 14. PROGRESS

The CONSULTANT shall submit monthly written progress reports to assist TOWN staff in determining whether the time requirements in Article 2 hereinabove are being substantially met. Authorized staff may visit the CONSULTANT's office at any reasonable time to determine the status of the Services required by this Agreement. In addition, any person may inspect the public records generated by the CONSULTANT's activities hereunder upon reasonable request, during normal business hours, in accordance with ARS §9-471(B).

## ARTICLE 15. OWNERSHIP OF DOCUMENTS

All work products (electronically or manually generated) including, but not limited to, plans, specifications, cost estimates, tracings, studies, design analyses, original mylar drawings, computer aided drafting and design (CADD) file diskettes which reflect final drawings, field notes, data, and other related products, which are prepared in the performance of this Agreement, are and remain the property of the TOWN, upon payment in full for all Services rendered. The CONSULTANT shall, at the conclusion of the Services or at the conclusion of this Agreement (whichever is earlier), deliver to the TOWN all documents (whether complete or partially complete) produced or collected by the CONSULTANT in its performance under this Agreement. The CONSULTANT shall, at its expense, reproduce and retain a copy of the drawings, estimates, specifications, field notes, or data collected or produced under this Agreement.

## ARTICLE 16. NONDISCLOSURE

Except as otherwise required by law or this Agreement, the CONSULTANT, its officers, employees, subcontractors, agents, and assigns shall not divulge to third parties (without the prior consent of the TOWN) any information obtained by it in connection with its performance under this Agreement.

## ARTICLE 17. LAWS AND REGULATIONS

The CONSULTANT shall at all times comply with applicable laws, statutes, rules, regulations, and ordinances in its performance under this Agreement, including (without limitation) those governing wages, hours, employment discrimination, and safety. The CONSULTANT shall also comply with equal opportunity laws and regulations to the extent they are applicable.

### A. CERTAIN FEDERAL LAWS

The CONSULTANT understands and acknowledges the applicability to it of the American with Disabilities Act, the Immigration Reform and Control Act of 1986 and the Drug Free Workplace Act of 1989. The CONSULTANT must also comply with A.R.S. § 34-301, "Employment of Aliens on Public Works Prohibited", and A.R.S. § 34-302, as amended, "Residence Requirements for Employees."

### B. STATE AND FEDERAL IMMIGRATION LAWS

Under provisions of A.R.S. § 41-4401, CONSULTANT hereby warrants to the TOWN that the CONSULTANT and each of its subconsultants ("Subconsultants") will comply with, and are contractually obligated to comply with, all Federal Immigration laws and regulations that relate to their employees and A.R.S. § 23-214(A) (hereinafter "CONSULTANT Immigration Warranty").

A breach of the CONSULTANT Immigration Warranty shall constitute a material breach of this Contract and shall subject the CONSULTANT to penalties up to and including termination of this Contract at the sole discretion of the TOWN.

The TOWN retains the legal right to inspect the papers of any CONSULTANT or Subconsultants employee who works on this Contract to ensure that the CONSULTANT or Subconsultant is complying with the CONSULTANT Immigration Warranty. CONSULTANT agrees to assist the TOWN in regard to any such inspections.

The TOWN may, at its sole discretion, conduct random verification of the employment records of the CONSULTANT and any subconsultants to ensure compliance with CONSULTANT's Immigration Warranty. CONSULTANT agrees to assist the TOWN in regard to any random verifications performed.

Neither the CONSULTANT nor any Subconsultant shall be deemed to have materially breached the CONSULTANT Immigration Warranty if the CONSULTANT or Subconsultant establishes that it has complied with the employment verification provisions prescribed by sections 274A and 274B of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. § 23-214, Subsection A.

The provisions of this Article must be included in any contract the CONSULTANT enters into with any and all of its subconsultants who provide services under this Contract or any subcontract. "Services" are defined as furnishing labor, time, or effort in the State of Arizona by a CONSULTANT or subconsultant. Services include construction or maintenance of any structure, building or transportation facility or improvement to real property.

#### ARTICLE 18. PATENT AND COPYRIGHT

The CONSULTANT shall indemnify, and hold harmless the TOWN, its officers, employees, agents and successors, against and from all claims, demands, losses, costs, expenses, suits, settlements, judgments, and damages (including attorneys' fees), of any kind or nature whatsoever on account of infringement of any patent, copyrighted work, secret process, trade secret, unpatented invention, article, or otherwise, including claims thereof pertaining to, or arising from the CONSULTANT's performance under this Agreement.

Should the CONSULTANT's officers, employees, agents, or assigns (or anyone of a like nature), in the performance of the Services or as a result of performing the Services, develop any trade secret, prepare any copyrighted material, make any improvement, originate any invention, develop any process, or otherwise, such trade secret, copyright, improvement, invention, or process shall be the property of the CONSULTANT.

However, the CONSULTANT shall grant or cause to be granted to the TOWN the right and/or license to permanently use, or cause to be used for the benefit of the TOWN any such trade secret, copyright, improvement, design, invention, or process in any manner for so long as the TOWN desires to use the same for the TOWN's own internal use.

#### ARTICLE 19. INDEPENDENT CONTRACTOR

The CONSULTANT shall perform the Services hereunder as an independent contractor, and all persons or entities employed by or under contract with the CONSULTANT in connection herewith shall be employees of the CONSULTANT and are not employees of the TOWN in any respect.

#### ARTICLE 20. ASSIGNMENT

The CONSULTANT shall not assign this Agreement, or any part hereof, without the prior written consent of the TOWN. Any attempted assignment in violation hereof shall be void.

#### ARTICLE 21. SUBCONTRACTS

The CONSULTANT shall neither subcontract nor permit any portion of the Services to be subcontracted without the prior written consent of appropriate TOWN staff. Furthermore, the CONSULTANT shall be fully responsible for the acts or omissions of any subcontractors of any tier and of all persons employed by them. Neither the consent of TOWN staff nor anything contained herein shall be deemed to create any contractual relationship between the CON's subcontractor of any tier and the TOWN.

#### ARTICLE 22. NOTICES

Any notice by either party to the other hereunder shall be considered duly served if delivered in person to the office of the authorized representative listed below, or if deposited in the mail, properly stamped with the required postage, and addressed to the authorized representative listed below. Either party may change its representative or the address thereof by giving the other party written notice.

Unless changed, notices shall be sent to the following:

TOWN: Town Manager  
Town of Prescott Valley  
7501 E. Civic Circle  
Prescott Valley, AZ 86314

CONSULTANT: Scott A. Lyon, PE, R.L.S.  
Lyon Engineering  
1650 Willow Creek Road  
Prescott, AZ 86301

### ARTICLE 23. DISPUTE RESOLUTION

Except as otherwise provided herein, any dispute arising out of the Services which is not otherwise disposed of by separate agreement shall be decided by authorized TOWN staff, who shall mail or otherwise furnish a written decision to the CONSULTANT's authorized representative. Such decision by the TOWN shall be final unless the CONSULTANT, within thirty (30) calendar days after notice of the TOWN's decision, files with the TOWN a written protest stating clearly and in detail the basis thereof. The CONSULTANT shall continue its performance under this Agreement during any such dispute resolution process.

### ARTICLE 24. ACCOUNTING AND AUDITING

The CONSULTANT shall keep accurate and complete records in support of all payments hereunder in accordance with generally recognized accounting principles and practices. The TOWN or its audit representatives shall have the right at any reasonable time to examine, audit, and reproduce all records pertaining to costs, including (but not limited to) payrolls, employees' time sheets, invoices, and all other evidence of expenditures for the Services. Such records shall be kept by the CONSULTANT and made available for one (1) year after completion of the Services or termination of this Agreement, whichever is earlier.

### ARTICLE 25. NON-WAIVER

The failure of the TOWN to insist upon or enforce strict performance by the CONSULTANT of any of the provisions of this Agreement, or to exercise any of its rights hereunder, shall not be construed as a waiver or relinquishment to any extent of the TOWN's right to assert or rely upon such terms or rights on any future occasion.

ARTICLE 26. SEVERABILITY

Any provisions of this Agreement prohibited or rendered unenforceable by local, state, or federal law, or by the ruling of any court of competent jurisdiction, shall be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement.

ARTICLE 27. VENUE AND GOVERNING LAW

This Agreement shall be deemed to have been made and entered into in Yavapai County, and shall be interpreted in accordance with the substantive and procedural laws of the State of Arizona.

ARTICLE 28. ATTORNEYS' FEES

In the event any action shall be instituted between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs, including reasonable attorneys' fees.

ARTICLE 29. SAVINGS CLAUSE

In the event any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in force and effect to the fullest extent permissible by law.

ARTICLE 30. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

ARTICLE 31. CONFLICT-OF-INTEREST

This Agreement may be canceled without penalty pursuant to ARS §38-511 in the event of a conflict of interest as described therein by any person significantly involved in negotiating this Agreement on behalf of the TOWN.

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IN WITNESS WHEREOF, the parties hereto have executed or caused to be executed this Agreement by their duly authorized representatives on the day and year first-above written.

TOWN:

Town of Prescott Valley,  
a municipal corporation of Arizona

CONSULTANT:

Lyon Engineering  
an Arizona Corporation

\_\_\_\_\_  
BY: Harvey Skoog, Mayor

\_\_\_\_\_  
BY: Signature

\_\_\_\_\_  
ATTEST:

\_\_\_\_\_  
Print Name & Title

\_\_\_\_\_  
BY: Diane Russell, Town Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
BY: Ivan Legler, Town Attorney