

## COUNCIL ACTION FORM

### **AGENDA ITEM: Discussion and Appropriate Follow up on MSA Professional Service Contract Renewal**

#### **HISTORY:**

Attached is a copy of the Master Services Agreement between the City of Windsor Heights and MSA Professional Services, Inc. The agreement was made on December 15, 2015 and expires on December 31, 2016.

On November 7, the Council Public Works Committee (Mayor Willits, Steve Peterson, Zac Bales-Henry, Public Works Director Stone, City Attorney Clanton and City Administrator Hansen) met to discuss a number of public works related items, including the Sunset Terrace Project, Capital Improvement Projects and contracts.

The Council Public Works Committee recommends providing sufficient notice per the contract with MSA exhibiting the City's intention not to renew the contract. If City Council agrees, please direct staff to begin the process to release a Request for Qualifications/Proposal (RFQ/P) for engineering services. Attached please find the draft letter from City Attorney Clanton providing notice.

#### **OPTIONS:**

1. Approval of providing a 30-day advance written notice to not renew the contract with MSA Professional Service, Inc.
2. Approve a one-year renewal contract.
3. Do nothing at this time to allow the contract to automatically renew for a successive period of one year and provide notice later in the year.

#### **STAFF RECOMMENDATION:**

For the past year, the City Council and staff relied on MSA to design and administer the Sunset Terrace Project, along with many other products for planning purposes.

The Council Public Works Committee determined that the design work did not include all necessary infrastructure elements; thus creating additional work for MSA and the contractors that should have been planned for. Additionally, the Committee determined that the City could not rely on MSA to fulfill the construction administration contract on the Sunset Terrace Project for phases 2, 3 and 4.

Therefore, it is the recommendation of the City Administrator that Council approves Option #1, approval of providing a 30-day advance written notice to not renew the contract with MSA Professional Service, Inc.

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**MASTER PROFESSIONAL SERVICES AGREEMENT BETWEEN THE  
CITY OF WINDSOR HEIGHTS AND MSA PROFESSIONAL SERVICES, INC.**

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This AGREEMENT ("Agreement") is made as of December 30, 2015 by and between CITY OF WINDSOR HEIGHTS (OWNER) and MSA PROFESSIONAL SERVICES, INC. (MSA), Des Moines, Iowa, which agree as follows:

**SECTION I - SERVICES TO BE PERFORMED**

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**1.1 Scope of Services**

MSA shall perform or furnish engineering, architectural, surveying, and planning services, and serve as a resource and liaison, pursuant to Task Orders issued by the OWNER to MSA.

**1.2 Authorization of Services**

**1.2.1** Written Task Orders shall define the task requested, including the specific scope of services to be performed, the schedule, and the basis for payment (if other than as defined in this Agreement). When requested by the OWNER, MSA shall prepare draft Task Orders and submit them to the OWNER for review and execution. Each Task Order shall be executed by the authorized representatives of MSA and the OWNER designated in this Agreement. Each Task Order shall be deemed to incorporate the terms of this Agreement.

**1.2.2** The OWNER's authorized representative may orally authorize MSA to begin furnishing services. Within five (5) business days thereafter, MSA shall submit to the OWNER a written Task Order, as described immediately above, which shall confirm the oral Task Order and provide for mutual execution by the parties. Such Task Order will be deemed executed if not returned with comments within two (2) business days thereafter.

**1.3 Limit of Cost for Professional Services**

Task orders shall not call for professional services whose cost would exceed \$35,000. Projects in excess of \$35,000 shall be performed by other written contract.

**1.4 MSA's Authorized Representative**

Jason Miller, P.E. shall act as MSA's representative with respect to the services to be performed or furnished. Said person will have complete authority to transmit instructions, receive information, and interpret and define MSA's policies and decisions with respect to services.

**SECTION II - THE OWNER'S RESPONSIBILITIES**

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**2.1 OWNER'S Responsibilities**

The OWNER, at its expense, shall do the following in a timely manner so as not to delay or hinder MSA in its furnishing of services:

**2.1.1** Furnish MSA with reports, studies, site characterizations, regulatory orders, and similar information in its possession relating to each Task Order. Unless otherwise specified in the Task Order, MSA may rely upon OWNER-furnished information without independent verification.

**2.1.2** Provide all criteria and full information as to OWNER's requirements including objectives and constraints, performance requirements, and budgetary limitations.

**2.1.3** Assist MSA by furnishing all available information pertinent to the Task Order project.

**2.1.4** Arrange for access to and make all provisions for MSA to enter upon public and private lands as required for MSA to perform its work under the Task Order.

**2.1.5** Give prompt written notice to MSA whenever OWNER observes or otherwise becomes aware of any development that affects the scope or time of performance or furnishing of MSA's services, or any defect or nonconformance in MSA's services or in the work of any Contractor.

**2.1.6** Furnish to MSA data prepared by or services of others, including without limitation exploration and tests of subsurface conditions at or contiguous to the site, drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the site, land surveyors, laboratory material tests and other special items together with appropriate professional interpretations of the foregoing.

**2.1.7** Examine studies, reports, and construction contract documents presented by MSA, and render in writing decisions pertaining thereto.

**2.1.8** The OWNER shall be responsible for the accuracy and completeness of furnished data, including, but not limited to, computations, record drawings, and maps furnished by the OWNER.

**2.2 OWNER'S Representative**

The OWNER'S Authorized Representative under this Agreement shall be Diana Willits, or her designee, or duly appointed successor, who shall have complete authority to transmit instructions, receive information, interpret and define OWNER'S policies and decisions with respect to MSA's services under this Agreement.

**SECTION III - PERIOD OF SERVICES**

**3.1 Completion of Services**

The services called for in each Task Order shall be completed according to a schedule agreed upon by the OWNER and MSA.

**3.2 Term of Agreement**

The Initial term of this Agreement shall commence as of the date set forth above, and shall expire on December 31, 2016 and shall thereafter automatically renew itself for successive periods of one year each, unless either party gives written notice of its intention to terminate or amend the Agreement by giving at least thirty (30) days prior written notice to the other party. Attachment A, Rate Schedule, shall be updated April 1<sup>st</sup> on an annual basis.

All services shall be performed in accordance with the General Terms and Conditions of MSA, which is attached and made part of this Agreement. Any attachments or exhibits referenced in this Agreement are made part of this Agreement

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the date first above written.

**CITY OF WINDSOR HEIGHTS**

**MSA PROFESSIONAL SERVICES, INC.**



\_\_\_\_\_  
Gilbert A. Hantzsch, P.E.  
President / CEO

Diana Willits  
Mayor

Date: 11/2/16

Date: \_\_\_\_\_

\_\_\_\_\_  
Secondary Rep Title  
(WI Municipalities must have Clerk's Signature as the Secondary Signature)

\_\_\_\_\_  
Jason Miller, P.E.  
Team Leader

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**MSA PROFESSIONAL SERVICES, INC. (MSA) --  
GENERAL TERMS AND CONDITIONS OF SERVICES (PUBLIC - Iowa)**

1. **Scope and Fee.** The quoted fees and scope of services constitute the best estimate of the fees and tasks required to perform the services as defined. This agreement upon execution by both parties hereto, can be amended only by written instrument signed by both parties. For those projects involving conceptual or process development service, activities often cannot be fully defined during initial planning. As the project progresses, facts uncovered may reveal a change in direction which may alter the scope. MSA will promptly inform the OWNER in writing of such situations so that changes in this agreement can be made as required. The OWNER agrees to clarify and define project requirements and to provide such legal, accounting and insurance counseling services as may be required for the project

2. **Billing.** MSA will bill the OWNER monthly with net payment due upon receipt. Past due balances shall be subject to an interest charge at a rate of 12% per year from said thirtieth day. In addition, MSA may, after giving seven days written notice, suspend service under any agreement until the OWNER has paid in full all amounts due for services rendered and expenses incurred, including the interest charge on past due invoices.

3. **Costs and Schedules.** Costs and schedule commitments shall be subject to change for delays caused by the OWNER's failure to provide specified facilities or information or for delays caused by unpredictable occurrences including, without limitation, fires, floods, riots, strikes, unavailability of labor or materials, delays or defaults, by suppliers of materials or services, process shutdowns, acts of God or the public enemy, or acts of regulations of any governmental agency. Temporary delays of services caused by any of the above which result in additional costs beyond those outlined may require renegotiation of this agreement.

4. **Access to Site.** Owner shall furnish right-of-entry on the project site for MSA and, if the site is not owned by Owner, warrants that permission has been granted to make planned explorations pursuant to the scope of services. MSA will take reasonable precautions to minimize damage to the site from use of equipment, but has not included costs for restoration of damage that may result and shall not be responsible for such costs.

5. **Location of Utilities.** Consultant shall use reasonable means to identify the location of buried utilities in the areas of subsurface exploration and shall take reasonable precautions to avoid any damage to the utilities noted. However, Owner agrees to indemnify and defend Consultant in the event of damage or injury arising from damage to or interference with subsurface structures or utilities which result from inaccuracies in information or instructions which have been furnished to Consultant by others.

6. **Professional Representative.** MSA intends to serve as the OWNER's professional representative for those services as defined in this agreement, and to provide advice and consultation to the OWNER as a professional. Any opinions of probable project costs, reviews and observations, and other decisions made by MSA for the OWNER are rendered on the basis of experience and qualifications and represents the professional judgment of MSA. However, MSA cannot and does not guarantee that proposals, bid or actual project or construction costs will not vary from the opinion of probable cost prepared by it.

7. **Construction.** This agreement shall not be construed as giving MSA, the responsibility or authority to direct or supervise construction means, methods, techniques, sequence, or procedures of construction selected by the contractors or subcontractors or the safety precautions and programs incident to the work of the contractors or subcontractors.

8. **Standard of Care.** In conducting the services, MSA will apply present professional, engineering and/or scientific judgment, and use a level of effort consistent with current professional standards in the same or similar locality under similar circumstances in performing the Services. The OWNER acknowledges that "current professional standards" shall mean the standard for professional services, measured as of the time those services are rendered, and not according to later standards, if such later standards purport to impose a higher degree of care upon MSA.

MSA does not make any warranty or guarantee, expressed or implied, nor have any agreement or contract for services subject to the provisions of any uniform commercial code. Similarly, MSA will not accept those terms and conditions offered by the OWNER in its purchase order, requisition, or notice of authorization to proceed, except as set forth herein or expressly agreed to in writing. Written acknowledgement of receipt, or the actual performance of services subsequent to receipt of such purchase order, requisition, or notice of authorization to proceed is specifically deemed not to constitute acceptance of any terms or conditions contrary to those set forth herein.

9. **Construction Site Visits.** MSA shall make visits to the site at intervals appropriate to the various stages of construction as MSA deems necessary in order to observe, as an experienced and qualified design professional, the progress and quality of the various aspects of Contractor's work.

The purpose of MSA's visits to, and representation at the site, will be to enable MSA to better carry out the duties and responsibilities assigned to and undertaken by MSA during the Construction Phase, and in addition, by the exercise of MSA's efforts as an experienced and qualified design professional, to provide for OWNER a greater degree of confidence that the completed work of Contractor will conform in general to the Contract Documents and that the integrity of the design concept of the completed Project as a functioning whole as indicated in the Contract Documents has been implemented and preserved by Contractor. On the other hand, MSA shall not, during such visits or as a result of such observations of Contractor's work in progress, supervise, direct or have control over Contractor's work nor shall MSA have authority over or responsibility for the means, methods, techniques, sequences or procedures of construction selected by Contractor, for safety precautions and programs incident to the work of Contractor or for any failure of Contractor to comply with laws, rules, regulations, ordinances, codes or orders applicable to Contractor's furnishing and performing the work. Accordingly, MSA neither guarantees the performance of any Contractor nor assumes responsibility for any Contractor's failure to furnish and perform its work in accordance with the Contract Documents.

10. **Termination.** This Agreement shall commence upon execution and shall remain in effect until terminated by either party, at such party's discretion, on not less than thirty (30) days' advance written notice. The effective date of the termination is the thirtieth day after the non-terminating party's receipt of the notice of termination. If MSA terminates the Agreement, the OWNER may, at its option, extend the terms of this Agreement to the extent necessary for MSA to complete any services that were ordered

prior to the effective date of termination. If OWNER terminates this Agreement, OWNER shall pay MSA for all services performed prior to MSA's receipt of the notice of termination and for all work performed and/or expenses incurred by MSA in terminating Services begun after MSA's receipt of the termination notice. Termination hereunder shall operate to discharge only those obligations which are executory by either party on and after the effective date of termination. These General Terms and Conditions shall survive the completion of the services performed hereunder or the Termination of this Agreement for any cause.

This agreement cannot be changed or terminated orally. No waiver of compliance with any provision or condition hereof should be effective unless agreed in writing and duly executed by the parties hereto.

11. **Betterment.** If, due to MSA's error, any required or necessary item or component of the project is omitted from the construction documents, MSA's liability shall be limited to the reasonable costs of correction of the construction, less what OWNER'S cost of including the omitted item or component in the original construction would have been had the item or component not been omitted. It is intended by this provision that MSA will not be responsible for any cost or expense that provides betterment, upgrade, or enhancement of the project.

12. **Hazardous Substances.** OWNER acknowledges and agrees that MSA has had no role in generating, treating, storing, or disposing of hazardous substances or materials which may be present at the project site, and MSA has not benefited from the processes that produced such hazardous substances or materials. Any hazardous substances or materials encountered by or associated with Services provided by MSA on the project shall at no time be or become the property of MSA. MSA shall not be deemed to possess or control any hazardous substance or material at any time; arrangements for the treatment, storage, transport, or disposal of any hazardous substances or materials, which shall be made by MSA, are made solely and exclusively on OWNER's behalf for OWNER's benefit and at OWNER's direction. Nothing contained within this Agreement shall be construed or interpreted as requiring MSA to assume the status of a generator, storer, treater, or disposal facility as defined in any federal, state, or local statute, regulation, or rule governing treatment, storage, transport, and/or disposal of hazardous substances or materials.

All samples of hazardous substances, materials or contaminants are the property and responsibility of OWNER and shall be returned to OWNER at the end of a project for proper disposal. Alternate arrangements to ship such samples directly to a licensed disposal facility may be made at OWNER's request and expense and subject to this subparagraph.

13. **Insurance.** MSA will maintain insurance coverage for: Worker's Compensation, General Liability, and Professional Liability. MSA will provide information as to specific limits upon written request. If the OWNER requires coverages or limits in addition to those in effect as of the date of the agreement, premiums for additional insurance shall be paid by the OWNER. The liability of MSA to the OWNER for any indemnity commitments, or for any damages arising in any way out of performance of this contract is limited to such insurance coverages and amount which MSA has in effect.

14. **Reuse of Documents.** Reuse of any documents and/or services pertaining to this project by the OWNER or extensions of this project or on any other project shall be at the OWNER's sole risk. The OWNER agrees to defend, indemnify, and hold harmless MSA for all claims, damages, and expenses including attorneys' fees and costs arising out of such reuse of the documents and/or services by the OWNER or by others acting through the OWNER.

15. **Indemnification.** To the fullest extent permitted by law, MSA shall indemnify and hold harmless, OWNER, and OWNER's officers, directors, members, partners, agents, consultants, and employees (hereinafter "OWNER") from reasonable claims, costs, losses, and damages arising out of or relating to the PROJECT, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of MSA or MSA's officers, directors, members, partners, agents, employees, or Consultants (hereinafter "MSA"). In no event shall this indemnity agreement apply to claims between the OWNER and MSA. This indemnity agreement applies solely to claims of third parties. Furthermore, in no event shall this indemnity agreement apply to claims that MSA is responsible for attorneys' fees. This agreement does not give rise to any duty on the part of MSA to defend the OWNER on any claim arising under this agreement.

To the fullest extent permitted by law, OWNER shall indemnify and hold harmless, MSA, and MSA's officers, directors, members, partners, agents, consultants, and employees (hereinafter "MSA") from reasonable claims, costs, losses, and damages arising out of or relating to the PROJECT, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of the OWNER or the OWNER's officers, directors, members, partners, agents, employees, or Consultants (hereinafter "OWNER"). In no event shall this indemnity agreement apply to claims between MSA and the OWNER. This indemnity agreement applies solely to claims of third parties. Furthermore, in no event shall this indemnity agreement apply to claims that the OWNER is responsible for attorneys' fees. This agreement does not give rise to any duty on the part of the OWNER to defend MSA on any claim arising under this agreement.

To the fullest extent permitted by law, MSA's total liability to OWNER and anyone claiming by, through, or under OWNER for any cost, loss or damages caused in part or by the negligence of MSA and in part by the negligence of OWNER or any other negligent entity or individual, shall not exceed the percentage share that MSA's negligence bears to the total negligence of OWNER, MSA, and all other negligent entities and individuals.

16. **Dispute Resolution.** OWNER and MSA desire to resolve any disputes or areas of disagreement involving the subject matter of this Agreement by a mechanism that facilitates resolution of disputes by negotiation rather than by litigation. OWNER and MSA also acknowledge that issues and problems may arise after execution of this Agreement which were not anticipated or are not resolved by specific provisions in this Agreement. Accordingly, both OWNER and MSA will endeavor to settle all controversies, claims, counterclaims, disputes, and other matters in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect, unless OWNER and MSA mutually agree otherwise. Demand for mediation shall be filed in writing with the other party to this Agreement. A demand for mediation shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for mediation be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations. Neither demand for mediation nor any term of this Dispute Resolution clause shall prevent the filing of a legal action where failing to do so may bar the action because of the applicable statute of limitations. If despite the good faith efforts of OWNER and MSA any controversy, claim, counterclaim, dispute, or other matter is not resolved through negotiation or mediation, OWNER and MSA agree and consent that such matter may be resolved through legal action in any state or federal court having jurisdiction.

17. **Exclusion of Special, Indirect, Consequential and Liquidated Damages.** Consultant shall not be liable, in contract or tort or otherwise, for any special, indirect, consequential, or liquidated damages including specifically, but without limitation, loss of profit or revenue, loss of capital, delay damages, loss of goodwill, claim of third parties, or similar damages arising out of or connected in any way to the project or this contract.

18. **State Law.** This agreement shall be construed and interpreted in accordance with the laws of the State of Iowa.

19. **Jurisdiction.** OWNER hereby irrevocably submits to the jurisdiction of the state courts of the State of Iowa for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement. OWNER further consents that the venue for any legal proceedings related to this Agreement shall be, at MSA's option, Sauk County, Wisconsin, or any county in which MSA has an office.

20. **Understanding.** This agreement contains the entire understanding between the parties on the subject matter hereof and no representations, inducements, promises or agreements not embodied herein (unless agreed in writing duly executed) shall be of any force or effect, and this agreement supersedes any other prior understanding entered into between the parties on the subject matter hereto.