



## CONSULTING AGREEMENT for OWNER'S PROJECT MANAGER SERVICES

This Agreement is made effective for all purposes and in all respects as of the 1<sup>st</sup> of October 2015 between the **Town of Plaistow New Hampshire** ( the "Owner") with a principal place of business at 145 Main Street, Plaistow, New Hampshire 03865 and **Trident Building, LLC**, (the "OPM Consultant") with offices at 155 N Broadway, Salem, New Hampshire 03079.

WHEREAS, the Owner has undertaken the **Pre-Bond Vote effort phase for a contemplated Town Safety Complex Project** consisting of the Fire Department, Police Department, and associated common use spaces and site work ( the "Project") all to be located at 27 Elm Street, Plaistow, New Hampshire 03865 (the "Site"),

WHEREAS both parties have expressed the willingness of entering into a Consulting Agreement for services as provided in Article 1 below,

NOW THEREFORE, in consideration of the foregoing, the mutual agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending legally to be bound, hereby agree as follows:

### **ART. 1 SCOPE OF SERVICES**

The Owner hereby retains the OPM Consultant, and the OPM Consultant hereby agrees, to perform services as may be reasonably required of the OPM Consultant by the Owner on the terms and conditions set forth herein. During the period of services as detailed in Article 2 below, the OPM Consultant shall provide the following consulting services:

#### **1.1 Owner's Project Manager Consulting Services** as follows:

- Project delivery method recommendations;
- Project Team suggested participants and organizational structure recommendations;
- Currently Owner selected Design firm, Estimating firm, Surveyor/Site Civil Design firm, Wetlands/Environmental firm, Geotechnical Engineering firm, and Architectural Design firm fee and scope review, and contract negotiations assistance to the Owner's legal counsel;
- Currently Owner selected Design Firm, Estimating firm, Surveyor/Site Civil Design firm, Wetlands/Environmental firm, Geotechnical Engineering firm, and Architectural Design firm oversight for Owner decision making;
- RFQ/P for CM/Builder and Additional Project consultant(s) recommendations and RFQ/P selection process administration and oversight for Owner decision making. Contract negotiations assistance to the Owner's legal counsel;
- Master Project budget and milestone schedule review and recommendations;
- Assistance to Owner on strategy for pre-bond vote efforts and tasks, and
- Review of and recommendations on Project specific generated documents and reports as provided by the Owner.
- Weekly updates of OPM activities, project deliverables, and timelines.

Notwithstanding anything to the contrary contained in this Agreement, the OPM Consultant shall not make exhaustive or detailed reviews or analysis of the Owner's legal counsel or any other Owner's consultant's work product or work as presented or completed, the quality or quantity or completeness of the deliverables or scope of work, the compliance with any applicable codes, rules, regulations, laws, statutes, etc. of any party having jurisdiction. Moreover, the OPM Consultant shall neither have control over or charge of, nor be responsible for, the design, design coordination, engineering, construction means, methods, techniques, sequences, quality control / assessment, or procedures, required filings, certifications and/or inspections, or for the safety precautions and programs in connection with efforts on the Site, since these are solely the Owner's consultants rights, obligations, and responsibilities under each of their agreements with the Owner.

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## **ART. 2 PERIOD, FEES, EXPENSES and PAYMENTS**

2.1 The Owner acknowledges that the OPM Consulting fee is based on and the acceptance by the Owner that the OPM Consultant shall perform OPM Services as described herein for the entire duration of the pre-town vote and post positive town vote contemplated Project. Upon execution of this Agreement the Owner agrees to pay the OPM Consultant, for the Scope of Services indicated in Art. 1, and for the initial period for the pre-town vote of this Agreement ending with the March 2015 Town Vote the following OPM Consulting fees (the "Fee"):

### **2.1.1.1 BASE SERVICES- Pre-Bond Vote Phase**

Services are to be provided on a lump sum basis in the amount not to exceed in the Lump Sum Amount of Twenty One Thousand Five Hundred (\$21,500.00) and 00/100 Dollars as detailed below, due and payable by the Owner to the OPM Consultant within fifteen (15) days after presentation of monthly invoices.

### **2.1.1.1 BASE SERVICES- Post-Bond Vote Phase**

Services are to be provided on a monthly lump sum basis. To Be Determined as follows:

<u>Service Month</u>	<u>Fee Amount</u>	<u>Date Due</u>
September 2015	\$3,500.00	October 15, 2015
October 2015	\$8,500.00	November 15, 2015
November 2015	\$4,500.00	December 15, 2015
December 2015	\$1,000.00	January 15, 2016
January 2016	\$2,000.00	February 15, 2016
February 2016	\$2,000.00	March 15, 2016
March 2016	N/C Pre-Vote	
<u>Service Month</u>	<u>Fee Amount</u>	
<b>Total</b>	<b>\$21,500.00</b>	

### **2.1.2 ADDITIONAL SERVICES**

#### **2.1.2.2 Additional Services – NON Legal Matters**

Additional NON legal matter services include, but are not limited to, any services which are not within the scope of the Consultant Services described in Article 1.

#### **2.1.2.2 Additional Services – Legal Matters (All Efforts Involving Legal Counsel, or Mediation, Arbitration, Court, and associated discovery efforts):**

Additional legal matter services relating to the investigation and defense of claims, whether actual, potential or threatened, which could be asserted by third parties against the Owner; any services relating to the investigation and prosecution of claims, whether actual, potential or threatened, which could be asserted by the Owner against third parties; and any matters which involve preparation for claims defense, claims prosecution, witness preparation or any appearance, presentation or testimony in any mediation, arbitration, court or other legal proceedings relating to the Project.





For any additional services, the OPM Consultant and the Owner shall be required to agree upon lump sum fees for specific additional services and such agreed upon lump sum additional services and fee shall be added to this Agreement by written modification as amendments hereto when duly executed by each party. No additional services shall be performed by the OPM Consultant or directed by the Owner without a fully executed amendment to this Agreement.

## 2.2 RETAINER: WAIVED.

2.3 In addition to the Fee Stated above in 2.1 or 2.1.2, however, the OPM Consultant shall be entitled to reimbursement of other expenses incurred including, but not limited to, parking, mileage in excess of 10 miles round trip, photocopying, printing, Fed/Ex or other similar service provider, bulk printing or reproduction of data/plans/specifications, provided that each expense greater than \$100 is approved in advance by the Owner, such approval shall not be unreasonably withheld, conditioned or delayed. Additional third party services/expenses or air travel (approved by the Owner), during the performance of the above scope of services indicated in Art. 1, billed at cost plus ten (10%) percent of the incurred expenses. Expenses outlined in this section shall not exceed \$500 per each charge without the prior *written* consent of Owner.

2.4 Late payments by the Owner shall be subject to a late penalty fee of 1.5% per month on the total invoice amount. This late penalty fee shall be applied and charged every forty-five (45) days until the total invoice amount is paid.

## **ART. 3 INFORMATION EXCHANGE**

Both parties agree to share and exchange all reasonably necessary information to conduct business successfully and satisfactorily, as well as to facilitate access to information that might be important for either party in the process of business operation.

## **ART. 4 INDEPENDENT CONTRACTOR**

Nothing contained in this Agreement shall be construed to constitute either party as a partner, employee or agent of the other, nor shall either party have the authority to bind the other in any respect, it being intended that each shall remain responsible for its own actions.

## **ART. 5 LIABILITY**

5.1 The OPM Consultant shall not be personally, corporately or otherwise liable to Owner hereunder for the Owner's obligations to any or all firms, individuals, or other third-parties relating to this Project. To the maximum extent permitted by law, the Owner agrees to indemnify, save harmless, and pay for all reasonable legal expenses of the OPM Consultant including its owners, officers, directors, employees, managers, members, employees, agents and representatives ("OPM Indemnified Parties") from all suits, actions, claims, demands, damages or losses, and to pay expenses and/or costs of every kind and description to which the OPM Consultant may be subjected to or put by reason of the Owner's failure of its obligations to any or all firms, individuals, or other third-parties relating to this Project.

## **ART. 6 TERMINATION OF AGREEMENT**

This Agreement may be terminated as follows:

6.1 For Cause: This Agreement may be terminated by either party upon fourteen (14) days written notice should the other party fail substantially to perform in accordance with its obligations hereunder through no fault of the party initiating such termination. The OPM Consultant shall be entitled to and the Owner shall pay the OPM Consultant in full for all outstanding invoices plus the fee for services performed in the month of termination, plus all incurred reimbursable expenses prior to the date of termination. Full payment of heretofore detailed amount shall be due and payable to the OPM Consultant by the Owner within fifteen (15) days of written notice of termination. Notwithstanding anything to the contrary stated in this Agreement, failure of the Owner to pay the OPM Consultant as required herein is a termination event for cause and this

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event shall require the Owner shall pay the entire OPM Consultant's Fee (the estimated total Fee value budget) amount as stated in subparagraph 2.1.1 as if the entire services period had been completed, plus any Additional Fee amount as stated in subparagraph 2.1.2 incurred prior to the date of termination, plus the balance of the not yet credited retainer amount stated in 2.2, plus all incurred reimbursable expenses prior to the date of termination. Full payment shall be due and payable to the OPM Consultant by the Owner within fifteen (15) days of written notice of termination.

6.2 For Convenience: NOT USED.

#### **ART. 7 CONFIDENTIAL INFORMATION and NON-SOLICITATION**

7.1 The parties agree that, during the Term of this Agreement, they shall not improperly use or disclose any proprietary or confidential information of any person or entity with which or whom they have an agreement or duty to keep information acquired by them in confidence.

7.2 The Owner acknowledges he will have contacts with employees and sub-consultants of the OPM Consultant. Accordingly, notwithstanding any other provision of this Agreement, the Owner covenants and agrees that during this Agreement and for a period of two (2) years after the termination of this Agreement, the Owner will not directly or indirectly:

7.2.1 divert or attempt to divert any business or sub-consultant from the OPM Consultant or engage in any act likely to cause any sub-consultant dealing with the OPM Consultant to discontinue or curtail its business with the OPM Consultant; or

7.2.2 solicit, cause or seek to cause any employee or sub-consultant of the OPM Consultant to terminate, curtail or otherwise modify his or her employment or consultancy relationship with the OPM Consultant for the purpose of entering into an employment or other relationship with the Owner or with any entity, form, business, activity or enterprise with which the Owner is directly or indirectly affiliated.

The covenants set forth in Section 7 shall survive the termination of this Agreement for the periods provided therein.

The Owner agrees and acknowledges that a violation of any of the covenants contained in the Section 7 will cause irreparable damage to the OPM Consultant, and that monetary damages alone will be insufficient to make the OPM Consultant whole. Therefore, the Owner agrees that in the event of any violation or threatened violation of such covenants, the OPM Consultant shall be entitled as a matter of course to an injunction from any court of competent jurisdiction restraining such violation or threatened violation by the Owner. The OPM Consultant's remedies under this Section 7 are not exclusive, and shall not prejudice or prohibit any other rights or remedies under this Agreement or otherwise.

#### **ART. 8 OWNERSHIP OF WORK PRODUCT**

8.1 Work Product: All reports, request for qualifications forms, request for proposal forms, project control forms and/or reports, specifications and other like documents and electronic data prepared by or furnished by OPM Consultant to the Owner for the Project under this Agreement ("Work Product") are deemed to be instruments of service and not work made for hire and, therefore, the OPM Consultant shall retain the full ownership and property interests therein, including the copyrights thereto.

8.2 Owner's License Upon Payment in Full: Upon the Owner's payment in full for all Work performed under this Agreement, the Owner shall have an irrevocable and nonexclusive license to use, reproduce or provide the Work Product to others for their use in this Project solely, conditioned on the Owner's express understanding that its use of the Work Product is at the Owner's sole risk and without liability or legal exposure to OPM Consultant or anyone working by or through OPM Consultant.

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8.3 Full Payment as a Condition Precedent to Owner's Right or License to Work Product: Notwithstanding anything to the contrary contained in this Agreement, payment in full by the Owner of all amounts due to the OPM Consultant shall be a condition precedent of the Owner's right to or license to or assertion of a right to or license to keep, use, reproduce, or provide the Work Product to others. The Owner agrees that all Work Product furnished to the Owner by the

OPM Consultant, which is not paid for by the Owner, shall be returned immediately upon demand and shall not be used, reproduced or provided to others by the Owner for any purpose whatsoever.

8.4 Owner's License Upon Owner's Termination for Convenience or OPM Consultant's Election to Terminate: If the Owner terminates for its convenience as set forth in 6.2 above, or if OPM Consultant terminates this Agreement for any reason allowed by this Agreement, then upon the Owner's payment in full of the amounts then due OPM Consultant under this Agreement, the Owner shall have an irrevocable and nonexclusive license to use, reproduce or provide the Work Product to others for their use this Project solely, conditioned on the full understanding and agreement by the Owner that the use of the Work Product is at Owner's sole risk without liability or legal exposure to the OPM Consultant or anyone working by or through OPM Consultant.

8.5 Owner's Indemnification for Use of Work Product. Notwithstanding anything to the contrary contained in this Agreement, if the Owner uses the Work Product under any circumstance, then to the maximum extent permitted by law, the Owner shall defend, indemnify, pay for legal defense, and hold harmless the OPM Consultant or anyone working by or through OPM Consultant from and against any and all claims, damages, liabilities, and expenses, including attorneys' fees, to the extent they arise out of or result from the Owner's use of the Work Product.

#### **ART. 9 DISPUTE RESOLUTION**

9.1 The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes or disagreements. If disputes or disagreements do arise, the Owner and OPM Consultants each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions.

9.2 If after meeting or meetings, it is determined that the dispute or disagreement cannot be resolved on terms satisfactory to both parties, the parties shall submit the dispute or disagreement to non-binding mediation. A mutually agreeable impartial mediator shall conduct the mediation, or if the parties cannot so agree, a mediator designated by the American Arbitration Association (the "AM") pursuant industry Mediation Rules. The mediation will be governed by and conducted pursuant to a mediation agreement negotiated by the parties or, if the parties cannot so agree, by procedures established by the mediator.

9.3 Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in 9.1 and 9.2 above may be taking to court by either party. The prevailing party in any such court proceeding shall be entitled to recover from the other party reasonable attorney's fees, cost and expenses incurred by the prevailing party. In any case it is understood that this Agreement is an Agreement for Consulting Services and, in case of court ruling in favor of the Owner or any related third party, under the scope of services of this Agreement, no court ruling compensation can be higher than One Hundred percent (100%) of the accrued and paid Consulting Fees as indicated in Art. 2.1.1 and 2.1.2. Request and assignment of punitive damages are expressly not allowed by both parties and shall be considered void and invalid at any time.

## **ART. 10 MISCELLANEOUS**

10.1.1 The Owner and the OPM Consultant agree to act in good faith and in a reasonable manner in all dealings with each other in connection with the Project. Whenever action, consent, or approval of a party is required, said party shall act timely and reasonably and shall not unreasonably delay any action, decision to give or withhold consent, or decision to grant or withhold approval.

10.1.2 Nothing herein shall be construed as creating any personal liability on the part of any officer, director, trustee, member, manager, employee, committee member or agent of either party hereto and it is agreed and acknowledged that each individual executing this document does so merely in his representative capacity and on behalf of the Owner or the OPM Consultant as the case may be.

10.1.3 Whenever provision is made in the Agreement for the approval, consent or agreement of the Owner, such approval, consent or agreement shall be in writing signed by an authorized representative from the Owner in order to be effective and binding.

10.1.4 The duties and obligations imposed upon the parties under this Agreement, and the rights and remedies available hereunder shall be in addition to, and not a limitation of, any duties imposed or available at law or in equity.

10.1.5 Nothing in this Agreement shall be construed or deemed to create a contractual relationship between the undersigned and a third party; a cause of action in favor of a third party against either the Owner or OPM Consultant; or create any third party beneficiary rights of any kind.

10.1.6 All adjustments, amendments, or modifications made to this Agreement and exhibits hereto shall be set forth in a writing signed by a duly authorized representative of each party in order to become effective and binding.

10.1.7 This Agreement shall constitute the only agreement between the parties relative to the subject matter contained herein and no oral statements or prior written matter not specifically incorporated within the Agreement shall be of any force or effect either in the interpretation or enforcement of the Agreement.

10.1.8 If any provision of this Agreement shall be to any extent invalid or unenforceable, the remainder of this Agreement shall not be affected thereby to the extent practicable and to the extent the remainder is not offensive to the original the original purposes and intent of the Agreement.

10.1.9 In executing this Agreement, Owner, and OPM Consultant each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary legal approvals to execute this Agreement and perform the services described herein and each shall indemnify the other from and against any and all damages, losses, costs and/or expenses which arise from a breach of this article.

### **10.2 Assignment**

This Agreement is specific in nature and none of the parties hereto shall, without the consent of the others, assign or transfer this Agreement or any rights or obligations hereunder, provided that, in the event of a merger, consolidation, transfer or sale of all or substantially all of the assets of the Owner with or any other individual or entity, this Agreement shall, subject to the provisions hereof, be binding upon and inure to the benefit of such successor and such successor shall discharge and perform all the promises, covenants, duties and obligations of the Owner hereunder, and all references herein to the Owner shall refer to such successor.





### 10.3 Governing Law

The Agreement shall be governed by, interpreted, and construed in all respects in accordance with the laws of the State of New Hampshire.

### 10.4 Notices

All notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by registered or certified mail, postage prepaid, return receipt requested, sent by overnight courier, or sent by facsimile (with US Post confirmation), addressed as follows:

If to the Owner:

Attention: Mr. Sean Fitzgerald, Town Manager  
**Town of Plaistow New Hampshire**  
145 Main Street  
Plaistow, New Hampshire 03865

Facsimile: \_\_\_\_\_

If to the OPM Consultant:

Attention: Mr. Gino J. Baroni, Owner and Managing Principal  
**Trident Building, LLC**  
155 N Broadway, 2<sup>nd</sup> Floor  
Salem, New Hampshire 03079

Facsimile: 603-890-1070

or at such other address as the party to whom notice is to be given may have furnished to the other party in writing in accordance herewith. For the purposes of this Agreement the "authorized representative" of the Owner shall be Mr. Ed Huminick.

### 10.5 Waiver, Amendment, and/or Modification

Failure to insist upon strict compliance with any of the terms, covenants, or conditions hereof shall not be deemed a waiver of such term, covenant, or condition, nor shall any waiver or relinquishment of, or failure to insist upon strict compliance with, any right or power hereunder at anyone or more times be deemed a waiver or relinquishment of such right or power at any other time or times. This Agreement may be amended and/or modified only in writing and signed by both parties.

### 10.6 Severability

If any provision or any part of a provision of this Agreement shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provisions or parts of a provision of the Agreement, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

### 10.7 Headings

The headings used in this Agreement are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

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#### 10.8 Counterparts

This Agreement may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts together shall constitute one Agreement.

#### 10.9 Complete Agreement

This Agreement contains the entire agreement among the parties with respect to the transactions contemplated by this Agreement and terminates and supersedes all other or prior written or oral agreements or understandings among the parties with respect to the OPM Consultant's performance of services for the Owner.

IN WITNESS WHEREOF, the parties hereto have affixed their signatures as of the last date of the Agreement hereinabove set forth

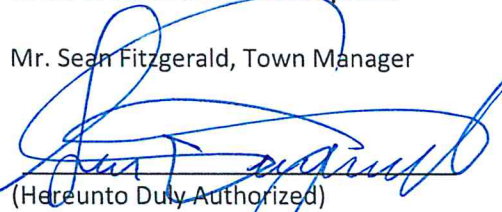
For the Owner

**Town of Plaistow New Hampshire**

Name and Title (printed)

Mr. Sean Fitzgerald, Town Manager

Signature

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(Hereunto Duly Authorized)

For the OPM Consultant

**Trident Building LLC**

Name and Title (printed)

Gino J. Baroni, President

Signature

A blue ink signature of Gino J. Baroni, President, written over a horizontal line.