

JOHNSON COUNTY COMMISSIONERS COURT



COPY NOT COMPARED TO ORIGINAL

RICK BAILEY  
Commissioner Pct. #1

ROGER HARMON  
County Judge

JERRY D. STRINGER  
Commissioner Pct. #3

KENNY HOWELL  
Commissioner Pct. #2

Alison Hitchcock  
Assistant to Commissioner's Court

DON BEESON  
Commissioner Pct. #4

Filed For Record 1:18pm

JUL 15 2013

Becky Williams  
County Clerk, Johnson County Texas

BY [Signature] DEPUTY

THE STATE OF TEXAS

COUNTY OF JOHNSON

§  
§  
§

ORDER #2013-16

**TO GRANT A DISCRETIONARY EXEMPTION FROM THE COMPETITIVE BIDDING REQUIREMENTS OF SECTION 262.023 OF THE LOCAL GOVERNMENT CODE**

The Johnson County Commissioners Court met on July 12, 2013 in regular session for the purpose of granting a discretionary exemption from the competitive bidding requirements of *Section 262.023* of the Local Government Code pursuant to Local Government Code 262.024 (2) an item necessary to preserve or protect the public health or safety of the residents of the county; and (3) an item necessary because of unforeseen damage to public property.

A motion was made by Commissioner Don Beeson and seconded by Commissioner Kenny Howell to approve granting a discretionary exemption from the competitive bidding requirements of *Section 262.023* of the Local Government Code pursuant to Local Government Code 262.024 (2) an item necessary to preserve or protect the public health or safety of the residents of the county; and (3) an item necessary because of unforeseen damage to public property.

**NOW THEREFORE BE IT RESOLVED AND ORDERED:**

The Commissioners Court of Johnson County, Texas does hereby enter this order granting a discretionary exemption from the competitive bidding requirements of *Section 262.023* of the Local Government Code pursuant to Local Government Code 262.024 (2) an item necessary to preserve or protect the public health or safety of the residents of the county; and (3) an item necessary because of unforeseen damage to public property.


WITNESS OUR HAND THIS THE 12<sup>th</sup> DAY OF JULY, 2013.

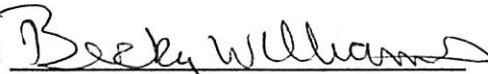
  
Roger Harmon, Johnson County Judge

  
Rick Bailey, Comm. Pct. #1

  
Kenny Howell, Comm. Pct. #2

  
Jerry D. Stringer, Comm. Pct. #3

  
Don Beeson, Comm. Pct. #4

ATTEST:   
Becky Williams, County Clerk



**CE** CHILDRESS ENGINEERS  
ENGINEERS & CONSULTANTS

TEXAS REGISTERED ENGINEERING FIRM F-702

ROBERT T. CHILDRESS, JR., P.E. • BENJAMIN S. SHANKLIN, P.E. • ROBERT T. CHILDRESS III, P.E.

**JOHNSON COUNTY**

June 27, 2013

JUL - 3 2013

**PUBLIC WORKS**

Johnson County  
Attn: Judge Roger Harmon  
One North Main Street  
Cleburne, Texas 76033

Re: County Jail  
Lift Station Improvements

Dear Judge Harmon:

We understand that the county intends to improve the sewage collection at the existing jail facility by abandoning the old grinder lift station and redirecting sewage to the newer lift station, and expanding the lift station capacity. The attached Engineer's Opinion of Probable Cost outlines the assumed scope of work. In response to your request, we have prepared the following proposal for the sanitary sewer improvements:

1) Subcontract Topographic Field Surveying

This task will include

- a. Locating existing building corners, pavement and above ground appurtenances in the construction area.
- b. A topographic survey between the southerly jail unit to the existing lift station

Total Not to Exceed Fee \$ 1,200.00 x 1.2 = \$1,440.00

2) Utility Plan Preparation

This task will include the following:

- a. A utility plan showing proposed wastewater collection and lift station modifications and pavement repair.
- b. Details for the new lift station wet well and pump replacement.
- c. Technical specification for the modifications to the sanitary sewer collection system.

Lump Sum Fee \$ 7,000.00

For the above fees, Childress Engineers will provide the supervision, direction, personnel and equipment to perform engineering work as follows:

1. To design the sanitary sewer improvements to conform to the county's intent and secure design approval from the City of Cleburne.
2. To submit all necessary plans and documentation to the county and to the City of Cleburne.
3. To provide six (6) copies of all plans, specifications, bid sheets, and contract documents related to the Project as a part of the basic service;
4. If requested, provide Civil Engineering general surveillance and inspection of Project construction to assure compliance with plans, specifications, and all other contract documents; (This does not include daily inspection services.)

If services beyond those defined in this scope are to be required, Childress Engineers will confer with the Client to receive further authorization before such additional services are performed.

Except for subcontract surveying, the fees established above, shall be considered lump sum fees unless otherwise stated, and will not be exceeded without prior approval from the Owner. Revisions by the Owner after design, will be considered as extra services to this contract. Prior to proceeding with extra services, Owner approval shall be obtained.

Reimbursable expenditures (printing, deliveries, CADD plots, travel, etc....) will be invoiced according to established prices or at 1.15 times the direct cost incurred.

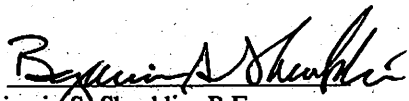
Attachment "A" includes items which are not included in this proposal, but can be provided by Childress Engineers, if needed. The fees quoted in this proposal will be honored for up to 90 days from the date of this proposal. Construction administration services are available at the request of the Client. Additional services not covered in this proposal will be billed according to Attachment I or by separate Agreement.

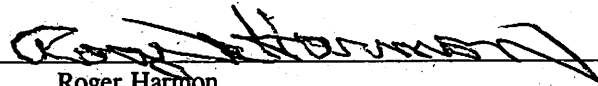
In addition to the matters set forth herein, our Agreement shall include and be subject to, and only to, the terms and conditions in the attached Standard Provisions, which are incorporated by reference. As used in the Standard Provisions, the term "the Consultant" shall refer to Childress Engineers, and the term "the Client" shall refer to Johnson County.

Childress Engineers appreciates the opportunity to submit this proposal. The return of an executed copy of this agreement will serve as your acceptance and our authorization to commence work. Please feel free to call if you have any questions or comments concerning this project.

Sincerely,

**CHILDRESS ENGINEERS**

By:   
Benjamin S Shanklin, P.E.  
President

Accepted:   
Printed Name: Roger Harmon  
Title: County Judge  
Name of Company: Johnson County  
Date: 7 | 12 | 13

Cc: Erik Dumas, Director of Public Works

## **ATTACHMENT A**

1. Structural Engineering.
2. Geotechnical consulting services.
3. Resident Project Inspection and material testing services during construction.
4. Additional Easements, Plats or Surveys not specifically included in the above proposal.
5. Flood plain studies, or reclamation plans.

ENGINEER'S OPINION OF PROBABLE COST  
 JOHNSON COUNTY  
 ABANDON OLD LIFT STATION AND DIVERT SEWAGE  
 JUNE 17, 2013

ITEM NO.	DESCRIPTION	QUANTITY	UNIT	ENGINEER'S ESTIMATE	
				UNIT PRICE	TOTAL PRICE
1	Bonding & Mobilization	1	LS	\$2,000.00	\$2,000.00
2	Project Video/Photos	1	LS	\$500.00	\$500.00
3	Concrete Pavement Repair	390	SF	\$9.00	\$3,510.00
4	6" SDR 35 PVC Sewer Main	290	LF	\$35.00	\$10,150.00
5	Concrete Sawcutting	140	LF	\$8.00	\$1,120.00
6	Standard 4' diam. Manholes	2	EA	\$3,600.00	\$7,200.00
7	Connect to Existing Sewer Lift Station	1	EA	\$1,500.00	\$1,500.00
8	Additional Wet Well Storage	1	LS	\$15,000.00	\$15,000.00
9	Replace Lift Station Pumps and Starters	1	LS	\$7,000.00	\$7,000.00
10	Trench Safety System	290	LF	\$4.00	\$1,160.00
<b>ESTIMATED CONSTRUCTION COST</b>					<b>\$47,140.00</b>

This document is released for the purpose of providing a preliminary budget construction cost estimate and agreement for engineering services under the authority of Benjamin S. Shanklin, P.E. 58726 on June 17, 2013. It is not to be used for construction, bidding or permitting purposes. An actual design was not performed to develop the costs contained herein.

**CHILDRESS ENGINEERS, INC.**  
**PROVISIONS FOR JOHNSON COUNTY**

**(1) Consultant's Scope of Services and Additional Services** The Consultant's undertaking to perform professional services extends only to the services specifically described in this Agreement. However, if requested by the Client and agreed to by the Consultant, the Consultant will perform additional services ("Additional Services"), and such Additional Services shall be governed by these provisions. Unless otherwise agreed to in writing, the Client shall pay the Consultant for the performance of any Additional Services an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including in-house duplicating, local mileage, telephone calls, postage, and word processing. Other direct expenses will be billed at 1.15 times cost. Technical use of computers for design, analysis, GIS, and graphics, etc., will be billed at \$25.00 per hour.

**(2) Client's Responsibilities** In addition to other responsibilities described herein or imposed by law, the Client shall:

- (a) Designate in writing a person to act as its representative with respect to this Agreement, such person having complete authority to transmit instructions, receive information, and make or interpret the Client's decisions.
- (b) Provide all information and criteria as to the Client's requirements, objectives, and expectations for the project including all numerical criteria that are to be met and all standards of development, design, or construction.
- (c) Provide to the Consultant all previous studies, plans, or other documents pertaining to the project and all new data reasonably necessary in the Consultant's opinion, such as site survey and engineering data, environmental impact assessments or statements, zoning or other land use regulations, etc., upon all of which the Consultant may rely.
- (d) Arrange for access to the site and other private or public property as required for the Consultant to provide its services.
- (e) Review all documents or oral reports presented by the Consultant and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of the Consultant.
- (f) Furnish approvals and permits from governmental authorities having jurisdiction over the project and approvals and consents from other parties as may be necessary for completion of the Consultant's services.
- (g) Cause to be provided such independent accounting, legal, insurance, cost estimating and overall feasibility services as the Client may require or the Consultant may reasonably request in furtherance of the project development.
- (h) Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the scope and timing of the Consultant's services or any defect or noncompliance in any aspect of the project.
- (i) Bear all costs incident to the responsibilities of the Client.

**(3) Period of Services** Unless otherwise stated herein, the Consultant will begin work timely after receipt of an executed copy of this Agreement and will complete the services in a reasonable time. This Agreement is made in anticipation of conditions permitting continuous and orderly progress through completion of the services. Times for performance shall be extended as necessary for delays or suspensions due to circumstances that the Consultant does not control. If such delay or suspension extends for more than six months (cumulatively), Consultant's compensation shall be renegotiated.

**(4) Method of Payment** Compensation shall be paid to the Consultant in accordance with the following provisions:

(a) Invoices will be submitted by the Consultant to the Client periodically for services performed and expenses incurred. Payment of each invoice will be due within 30 days of receipt. The Client shall also pay to the Consultant all transaction taxes, if any, whether state, local, or federal, levied with respect to amounts paid hereunder, including but not limited to sales tax. The Consultant shall be compensated in U.S. dollars. Pursuant to Texas Government Code Section 2251.021 and this Agreement, a payment by a governmental entity under a contract is overdue on the 31<sup>st</sup> day after the later of:

- a. the date the governmental entity receives the goods under the contract;
- b. the date the performance of the service under the contract is completed; or
- c. the date the governmental entity receives an invoice for the goods or service.

Pursuant to Texas Government Code Section 2251.021 and this Agreement, a payment begins to accrue interest on the date the payment becomes overdue. The rate of interest that accrues on an overdue payment is the rate in effect on September 1 of the fiscal year in which the payment becomes overdue. The rate in effect on September 1 is equal to the sum of: (1) one percent; and (2) the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or a Sunday. Interest on an overdue payment stops accruing on the date the governmental entity or vendor mailed or electronically transmits the payment. Therefore, all provisions to the contrary are hereby deleted.

(b) If the Client objects to an invoice, it must advise the Consultant in writing giving its reasons within 14 days of receipt of the invoice or the Client's objections will be waived, and the invoice shall conclusively be deemed due and owing.

(c) If the Consultant initiates legal proceedings to collect payment, it may recover, in addition to all amounts due, its reasonable attorneys' fees, reasonable experts' fees, and other expenses related to the proceedings. Such expenses shall include the cost, at the Consultant's normal hourly billing rates, of the time devoted to such proceedings by its employees.

(d) The Client agrees that the payment to the Consultant is not subject to any contingency or condition. The Consultant may negotiate payment of any check tendered by the Client, even if the words "in full satisfaction" or words intended to have similar effect appear on the check without such negotiation being an accord and satisfaction of any disputed debt and without prejudicing any right of the Consultant to collect additional amounts from the Client.

**(5) Use of Documents**

(a) All Documents are instruments of service. Johnson County shall retain ownership of all documents created for Johnson County work.

(b) Copies of Client-furnished data that may be relied upon by Consultant are limited to the printed copies (also known as hard copies) that are delivered to Consultant. Files in electronic media format of text, data, graphics, or of other types that are furnished by Client to Consultant are only for convenience of Consultant. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.

(c) Copies of Documents that may be relied upon by Client are limited to the printed copies (also known as hard copies) that are signed or sealed by Consultant. Files in electronic media format of text, data, graphics, or of other types that are furnished by Consultant to Client are only for convenience of Client. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.

(d) Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files. Consultant shall not be responsible to maintain documents stored in electronic media format after acceptance by Client.

(e) When transferring documents in electronic media format, Consultant makes no representations as to compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by Consultant at the beginning of a Specific Project.

(f) Client may make and retain copies of Documents for information and reference in connection with use on a Specific Project by Client. Such Documents are not intended or represented to be suitable for reuse by Client or others on extensions of the Specific Project for which they were prepared or on any other project. Any such reuse or modification without written verification or adaptation by Consultant, as appropriate for the specific purpose intended, will be at Client's sole risk and without liability or legal exposure to Consultant or to Consultant's subconsultants. The Client's indemnity is subject to the limitations of the Texas Constitution and the Texas Tort Claims Act.

(g) If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.

(h) Any verification or adaptation of the Documents for extensions of the Specific Project for which they were prepared or for any other project will entitle Consultant to further compensation at rates to be agreed upon by Client and Consultant.

**(6) Opinions of Cost** Because the Consultant does not control the cost of labor, materials, equipment or services furnished by others, methods of determining prices, or competitive bidding or market conditions, any opinions rendered as to costs, including but not limited to opinions as to the costs of construction and materials, shall be made on the basis of its experience and represent its judgment as an experienced and qualified professional, familiar with the industry. The Consultant cannot and does not guarantee that proposals, bids or actual costs will not vary from its opinions of cost. Consultant assumes no responsibility for the accuracy of opinions of Total Project Costs. If the Client wishes greater assurance as to the amount of any cost, it shall employ an independent cost estimator. Consultant's services required to bring costs within any limitation established by the Client will be paid for as Additional Services.

**(7) Termination** The obligation to provide further services under this Agreement may be terminated by either party upon seven days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party, or upon thirty days' written notice for the convenience of the terminating party. In the event of any termination, the Consultant shall be paid for all services rendered and expenses incurred to the effective date of termination, and other reasonable expenses incurred by the Consultant as a result of such termination. If the Consultant's compensation is a fixed fee, the amount payable for services will be a proportional amount of the total fee based on the ratio of the amount of the services performed, as reasonably determined by the Consultant, to the total amount of services which were to have been performed.

**(8) Insurance** The Consultant is protected by Workers' Compensation insurance, professional liability insurance and general liability insurance and will exchange certificates of insurance upon request. If the Client directs the Consultant to obtain increased insurance coverage, or if the nature of the Consultant's activities requires additional insurance coverage, the Consultant will take out such additional insurance, if obtainable, at the Client's expense.

**(9) Standard of Care** In performing its professional services, the Consultant will use that degree of care and skill ordinarily exercised, under similar circumstances, by reputable members of its profession in the same locality at the time the services are provided. No warranty, express or implied, is made or intended by the Consultant's undertaking herein or its performance of services, and it is agreed that the Consultant is not a fiduciary with respect to the Client.

**(10) Limitation of Liability** In recognition of the relative risks and benefits of the Project to both the Client and the Consultant, the risks have been allocated such that the Client agrees, to the fullest extent of the law, and notwithstanding any other provisions of this Agreement, that the total liability, in the aggregate, of the Consultant and the Consultant's officers, directors, employees, agents, and sub consultants to the Client or to anyone claiming by, through or under the Client, for any and all claims, losses, costs or damages whatsoever arising out of resulting from or in any way related to the services under this Agreement from any cause or causes, including but not limited to, the negligence, professional errors or omissions, strict liability or breach of contract or any



warranty, express or implied, of the Consultant or the Consultant's officers, directors, employees, agents, and subconsultants, shall be subject to the limitations of the Texas Constitution and the Texas Tort Claims Act. Under no circumstances shall the Consultant be liable for lost profits or consequential damages, for extra costs or other consequences due to changed conditions, or for costs related to the failure of contractors to perform work in accordance with the plans and specifications. This Section 10 is intended solely to limit the remedies available to the Client, and nothing in this Section 10 shall require the Client to indemnify the Consultant.

**(11) Exclusion of Special, Incidental, Indirect and Consequential Damages** To the fullest extent permitted by law, and notwithstanding any other provision in the Agreement, Consultant and Consultant's officers, directors, partners, employees, agents, and Consultant's subconsultants shall not be liable to Client or anyone claiming by, through, or under Client for any special, incidental, indirect, or consequential damages whatsoever arising out of, resulting from, or in any way related to a Specific Project or the Agreement from any cause or causes, including but not limited to any such damages caused by the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied of Consultant or Consultant's officers, directors, partners, employees, agents, or Consultant's subconsultants, or any of them.

**(12) Parameters of Performance**

(a) Consultant shall be responsible for the technical accuracy of its services and documents resulting therefrom, and Client shall not be responsible for discovering deficiencies therein. Consultant shall correct such deficiencies without additional compensation except to the extent such action is directly attributable to deficiencies in Client-furnished information.

(b) Consultant and Client shall comply with applicable Laws or Regulations and Client-mandated standards. This Agreement is based on these requirements as of the Effective Date of each Task Order. Changes to these requirements after the Effective Date of each Task Order may be the basis for modifications to Client's responsibilities or to Consultant's scope of services, times of performance, or compensation.

(c) Client shall be responsible for, and Consultant may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by Client to Consultant pursuant to this Agreement. Consultant may use such requirements, reports, data, and information in performing or furnishing services under this Agreement.

**(13) Certifications**

(a) The Consultant shall not be required to execute any certifications or other documents that might, in the judgment of the Consultant, increase the Consultant's risk or affect the availability, applicability, or cost of its insurance.

(b) Prior to the commencement of the Construction Phase on a Specific Project, Client shall notify Consultant of any notice or certification that Consultant will be requested to provide to Client or third parties in connection with a Specific Project. Client and Consultant shall reach agreement on the terms of any such requested notice or certification, and Client shall authorize such Additional Services as are necessary to enable Consultant to provide the notices or certifications requested.

(c) Consultant shall not be required to sign any documents, no matter by whom requested, that would result in Consultant having to certify, guarantee or warrant the existence of conditions whose existence Consultant cannot ascertain within its services for that Specific Project. Client agrees not to make resolution of any dispute with Consultant or payment of any amount due to the Consultant in any way contingent upon Consultant signing any such certification.

**(14) Dispute Resolution** All claims by the Client arising out of this Agreement or its breach shall be submitted first to mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association as a condition precedent to litigation. Any mediation or civil action by Client must be commenced within one year of the accrual of the cause of action asserted but in no event later than allowed by applicable statutes.

**(15) Hazardous Substances and Conditions**

(a) Services related to determinations involving hazardous substances or conditions, as defined by federal or state law, are limited to those tasks expressly stated in the scope of services. In any event, Consultant shall not be a custodian, transporter, handler, arranger, contractor, or remediator with respect to hazardous substances and conditions. Consultant's services will be limited to professional analysis, recommendations, and reporting, including, when agreed to, plans and specifications for isolation, removal, or remediation.

(b) The Consultant shall notify the Client of hazardous substances or conditions not contemplated in the scope of services of which the Consultant actually becomes aware. Upon such notice by the Consultant, the Consultant may stop affected portions of its services until the hazardous substance or condition is eliminated. The parties shall decide if Consultant is to proceed with its services and if Consultant is to conduct testing and evaluations, and the parties may enter into further agreements as to the additional scope, fee, and terms for such services.

(c) Except to the extent of negligence, if any, on the part of the Consultant in performing services expressly undertaken in connection with hazardous substances and conditions, the Client's indemnity is subject to the limitations of the Texas Constitution and the Texas Tort Claims Act.

**(16) Construction Phase Services**

(a) If the Consultant's services include the preparation of documents to be used for construction and the Consultant is not retained to make periodic site visits, the Client assumes all responsibility for interpretation of the documents and for construction

(a) If the Consultant's services include the preparation of documents to be used for construction and the Consultant is not retained to make periodic site visits, the Client assumes all responsibility for interpretation of the documents and for construction observation, and the Client waives any claims against the Consultant in any way connected thereto. Consultant shall not be responsible for the acts or omissions of any Contractor(s), subcontractor or supplier, or of any of a Contractor's agents or employees or any other persons (except Consultant's own employees) at a Site or otherwise furnishing or performing any of a Contractor's work; or for any decision made on interpretations or clarifications of the Contract Documents given by Client without consultation and advice of Consultant.

(b) If the Consultant provides construction phase services, the Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, sequence, schedule, safety programs, or safety practices, nor shall Consultant have any authority or responsibility to stop or direct the work of any contractor. The Consultant's visits will be for the purpose of endeavoring to provide the Client a greater degree of confidence that the completed work of its contractors will generally conform to the construction documents prepared by the Consultant. Consultant neither guarantees the performance of contractors, nor assumes responsibility for any contractor's failure to perform its work in accordance with the contract documents.

(c) The Consultant is not responsible for any duties assigned to the design professional in the construction contract that are not expressly provided for in this Agreement. The Client agrees that each contract with any contractor shall state that the contractor shall be solely responsible for job site safety and for its means and methods; that the contractor shall indemnify the Client and the Consultant for all claims and liability arising out of job site accidents; and that the Client and the Consultant shall be made additional insureds under the contractor's general liability insurance policy.

**(17) Assignment and Subcontracting** This Agreement gives no rights or benefits to anyone other than the Client and the Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole benefit of the Client and the Consultant. The Client shall not assign or transfer any rights under or interest in this Agreement without the written consent of the Consultant. The Consultant reserves the right to augment its staff with subconsultants as it deems appropriate due to project logistics, schedules, or market conditions. If the Consultant exercises this right, the Consultant will maintain the agreed-upon billing rates for services identified in the contract, regardless of whether the services are provided by in-house employees, contract employees, or independent subconsultants.

**(18) Confidentiality** The Client consents to the use and dissemination by the Consultant of photographs of the project and to the use by the Consultant of facts, data and information obtained by the Consultant in the performance of its services. If, however, any facts, data or information are specifically identified in writing by the Client as confidential, the Consultant shall use reasonable care to maintain the confidentiality of that material.

**(19) Miscellaneous Provisions** This Agreement is to be governed by the law of the State of Texas. This Agreement contains the entire and fully integrated agreement between the parties and supersedes all prior and contemporaneous negotiations, representations, agreements or understandings, whether written or oral. Except as provided in Section 1, this Agreement can be supplemented or amended only by a written document executed by both parties. Provided, however, that any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. Any provision in this Agreement that is unenforceable shall be ineffective to the extent of such unenforceability without invalidating the remaining provisions. The non-enforcement of any provision by either party shall not constitute a waiver of that provision nor shall it affect the enforceability of that provision or of the remainder of this Agreement.