

CONSULTING AGREEMENT

This **CONSULTING AGREEMENT** (the “*Agreement*”) is entered into and effective as of 11/29/2021, (the “*Effective Date*”) by and between the City of Reading, a Pennsylvania municipal corporation (the “*City*”), and McTish Kunkle & Associates, (the “*Consultant*”).

Background

The City desires to engage the Consultant for the delivery engineering Services for the Buttonwood Gateway – City of Reading Improvement Project (“*Project*”) in accordance with the Scope of Services attached hereto as Exhibit “A” (collectively, the “*Services*”).

Agreement

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. **Engagement; Scope of Services.** Subject to the terms and conditions set forth in this Agreement, the City hereby engages the Consultant to perform the Services for the Project on behalf of the City consistent with the terms of this Agreement.

2. **Performance of Services.**

(a) The Consultant shall perform the Services in accordance with the terms of this Agreement and in coordination and/or conjunction with those services rendered by the City and its authorized representatives, agents or other consultants. The Consultant shall fully cooperate with the City’s authorized representatives, employees and elected officials of the City, and the agents or other consultants of them in relation to the performance of their respective contractual obligations to the City. The City’s retention of other consultants shall not relieve the Consultant of its responsibilities under this Agreement or entitle the Consultant to an adjustment in the schedule, the Services, or the Consultant’s compensation.

(b) The Consultant shall submit the deliverables and reports required by this Agreement to the City and otherwise complete each Task in strict accordance with the Project Schedule. Time is of the essence in connection with each and every performance obligation of the Consultant under this Agreement.

(c) The Consultant shall perform its Services as expeditiously as is consistent with and limited by the professional skill and care ordinarily provided by firms practicing in the same or similar locality under similar circumstances (“Standard of Care”) and the orderly progress of the Services. Notwithstanding any clause in this Agreement to the contrary, Consultant expressly disclaims all express or implied warranties and guarantees, including any warranty of fitness for purpose or merchantability with respect to the performance of professional services.

(d) The Consultant shall utilize a secure and private electronic data, information and document storage database (e.g., Microsoft SharePoint) established by the City for all documents or data used or created in connection with the Services (“*Electronic Database*”). The Consultant shall, consistent with the City’s directions, promptly upload all documents or data used

or created in connection with the Services to such Electronic Database when such documents or data are gathered, generated or prepared.

3. **Compensation.**

(a) The City shall pay the Consultant for the Services performed by the Consultant or its Subconsultants the total amount of **\$225,508.00.**

(b) Payment shall be in compliance with the terms hereof in accordance with the schedule set forth on Exhibit "B", attached hereto and incorporated herein.

(c) Any services to be performed that are outside the scope of this Agreement shall be memorialized in a change order executed by the City and Consultant with a detailed description of the scope of work and identification of the change to the Consultant's compensation resulting therefrom. Consultant shall not be entitled to any compensation for preparing proposals, amendments or change orders associated with this Agreement.

(d) "Reimbursable Expenses" are set forth in Exhibit B and are in addition to compensation for Services. Reimbursable Expenses incurred by the Consultant or its Subconsultants shall be submitted to the City without markup and shall be directly related to the performance of Services for the Project.

4. **Payments to the Consultant.**

(a) Payments of undisputed amounts are due and payable within sixty (60) days after the City's receipt of an invoice from the Consultant. Undisputed amounts unpaid after sixty (60) days from the City's receipt of such invoice shall bear interest at the rate of three percent (3%) per annum.

(b) By the 15th of each month, the Consultant shall submit a detailed invoice to City by electronic mail, which identifies the specific tasks of the Services performed by the Consultant and/or its Subconsultants in the preceding month. Each invoice shall clearly set forth in single line items: a detailed description of each action performed by each person (with their corresponding billing rate) and the time required to perform such action to the nearest tenth of an hour. The invoice shall also generally describe the relative percentage of completion for each Task (as identified in Exhibit A), the total cumulative amount invoiced for each Task, the total remaining compensation for completing each Task, any supporting documentation and the overall percentage of the Project's Services completed as of the date of such invoice. Progress reports shall accompany each invoice in MS Word format.

(c) If the City determines that the Consultant's invoice lacks sufficient detail or inappropriately block bills, the City will notify the Consultant promptly. Consultant shall revise the invoice in accordance with the requirements of this Agreement and resubmit to the City.

(d) No payments made under this Agreement shall be evidence of the proper performance of this Agreement, either in whole or in part, and no payment, including the final payment, shall be construed to be an acceptance of defective or improper services or relieve the Consultant of its responsibility to perform its services in a professional manner and in accordance with the terms of this Agreement.

(e) In the event of any dispute between the City and the Consultant as to the percentage or quality of work completed or the absence of supporting documentation, the City shall not be obligated to pay the amount in dispute until a final resolution of the dispute. Unless the parties expressly agree otherwise in writing, in the event a dispute arises under this Agreement in connection with payments to be made on any invoice, or otherwise, the Consultant, shall continue to perform its duties and responsibilities under this Agreement, including, without limitation, the Services, during the pendency of such dispute.

5. **Equipment and Supplies.** The Consultant shall supply any equipment and supplies required to render the Services, except as otherwise provided herein, at no additional cost to City.

6. **Permits and Licenses.** The Consultant shall pay all fees and procure all necessary licenses and permits needed to conduct the Services, without any markup. The Consultant shall give any and all necessary formal notices required in conjunction with the lawful prosecution of the Services.

7. **Term.** This Agreement shall commence as of the Effective Date, and it shall continue in effect until (i) such time when the Services have been completed in their entirety, or (ii) this Agreement is terminated in accordance with the provisions of Sections 14 or 16(c) hereof, whichever is earlier (the “*Term*”).

8. **Independent Contractor.** The Consultant is an independent contractor and shall not be deemed an employee of the City. Neither party shall be responsible for the acts or omissions of the other party hereto nor the acts or omissions of the employees or agents of the other party hereto. Neither party shall have the authority to speak for, represent or obligate the other party hereto in any way without either the express prior written consent of or written ratification by the other party.

9. **Confidentiality and Non-Disclosure.**

(a) In connection with the provisions of the Services to the City, the Consultant will have access to certain “Confidential Information” (as defined herein). For purposes of this Agreement, “*Confidential Information*” means all information of the City, (or information of another party which the City has in its possession) transmitted to the Consultant in connection with the performance of Services, regardless of whether such information was or is transmitted orally, in writing, electronically or other form, or whether such information was or is tangible or intangible or observed.

(b) The Consultant may not release any Confidential Information, nor publish any report or documents relating to the City or the performance of the Services without prior written consent of the City. The Consultant shall indemnify and hold harmless the City and the City, including their officers, elected officials, agents, and employees from all liability which may be incurred by reason of the Consultant’s unapproved dissemination, publication and distribution, or circulation, in any manner whatsoever, of any Confidential Information by the Consultant or its agents or employees.

(c) Notwithstanding Sections 9(a) and 9(b), the Consultant shall not have any obligations under this Agreement with respect to information which (i) is already known to the

Consultant (as evidenced by the Consultant's prior written records) or is publicly available at the time of disclosure; (ii) is disclosed to the Consultant by a third party, unless the Consultant is aware that the third party is subject to an obligation of confidentiality with respect to such information; (iii) becomes publicly available after disclosure through no act of the Consultant; or (iv) is independently developed by the Consultant without breach of this Agreement.

Notwithstanding Sections 9(a) and 9(b), the Consultant may use and disclose any information (i) to the extent required by an order of any court or other governmental authority, or (ii) as necessary for the Consultant to protect its interest in this Agreement, but in each case only after the City has been so notified and had the opportunity to obtain reasonable protection for such information in connection with such disclosure.

(d) The Consultant understands that it is being retained to provide professional services to the City in connection with a matter that may be subject to litigation. The Consultant and its work product shall not be disclosed to any third parties without the City's prior consent or by an order of a court or governmental authority with jurisdiction.

10. **Copyrights and Licenses.**

(a) Drawings, specifications, reports, data and other documents, including, without limitation, those in electronic form, prepared by the Consultant and/or its Subconsultants in connection with the Services are the property of the City who shall be vested with all common law, statutory and other reserved rights. At the City's request, the Consultant and/or its Subconsultants shall provide the City, the City and any third party designated by the City, a full and complete release, in a form and substance acceptable to the City, of any and all rights the Consultant and/or its Subconsultants may have to the drawings, specifications, reports, data and other documents prepared by the Consultant and/or its Subconsultants in connection with the Services. Such documents and/or electronic media are not intended or represented to be suitable for reuse by the City or others on extensions of the Project or on any other project. Any reuse or modification without written approval or adaptation by the Subconsultant will be at the Client's sole risk and without liability or legal exposure to the Subconsultant.

11. **Insurance & Indemnity.**

(a) During and throughout the entire Term of this Agreement, the Consultant and its Subconsultants shall maintain all such insurance products with the limits set forth in the Request for Proposals incorporated as part of Exhibit A and the exceptions set forth in Consultant's Proposal incorporated as part of Exhibit A.

(b) Except as set forth above with respect to the Products & Completed Operations Insurance policy, each insurance policy shall remain in full force and effect until the expiration or termination of the Agreement or until all duties to be performed hereunder by the Consultant have been performed to the satisfaction of the City, whichever shall occur later.

(c) All Subconsultants performing work under the Agreement must also carry, at its own expense, the same insurance products in the same coverage amounts that the Consultant is required to carry, as identified above, during the term of the Agreement. No Subconsultant shall perform any work associated with the Project unless and until the City reviews and approves the certificates of insurance provided by such Subconsultant.

(d) The Consultant shall indemnify and hold harmless City, its officials, officers, employees and/or agents, from and against any and all third party claims, losses, damages, expenses, costs or other liabilities, including reasonable attorney's fees, arising out of, or resulting from any breach of this Agreement and/or any negligent act or omission of the Consultant or its Subconsultants, or any of their officials, officers, employees and/or agents or anyone directly or indirectly employed by them or anyone whose acts or omissions they may be liable. The Consultant shall further indemnify and hold harmless the City, its officials, officers, employees and/or agents from and against any and all claims made for infringement of any copyright, trademark or patent arising out of the use of any plans, designs, drawings, reports, data or specifications furnished by the Consultant or its Subconsultants in the performance of the Services.

12. **Representations and Warranties.**

(a) The Consultant represents that the Consultant possesses the training, skills and expertise necessary to perform the Services in accordance with the Standard of Care.

(b) The Consultant represents that it may lawfully conduct its business in the Commonwealth of Pennsylvania.

(c) The Consultant represents and warrants that it possesses the necessary license or licenses to perform the Services in the Commonwealth of Pennsylvania, and if any part of such Services is to be subcontracted, the Subconsultants have the necessary license or licenses to perform such Services.

(d) Each party represents to the other party that such party has the power and authority to enter into this Agreement and that such party is not a party to any restrictions, agreements or understandings whatsoever which would prevent or make unlawful such party's acceptance of the terms set forth in this Agreement or such party's performance hereunder. Each party further represents that such party's acceptance of the terms of this Agreement and the performance of such party's obligations hereunder do not and will not (with the passage of time) conflict with or constitute a breach or default of any contract, agreement or understanding, oral or written, to which such party is a party or by which such party is bound.

13. **Correction of Services.** The Consultant shall promptly correct any Services rejected by the City as failing to conform with the requirements of this Agreement, industry standards, or applicable laws, as a result of the failure to exercise the Standard of Care whether discovered before or a period of two (2) years after the Term. Costs of correcting such rejected or nonconforming Services, including, but not limited, any additional labor or materials of the Consultant, its Subconsultants, the City or the City's agents, made necessary thereby, shall be at the Consultant's cost and expense. If the Consultant fails to correct such rejected or nonconforming Services within a reasonable time after receiving notice from the City, the City or its agents may correct such Services and the Consultant shall pay the City all costs, expenses, losses and damages incurred by the City to make such correction.

14. **Termination.**

(a) The City may immediately terminate this Agreement if the Consultant (i) refuses or fails to supply enough properly skilled workers to perform the Services, (ii) fails to make payment to its Subconsultants or suppliers for labor in accordance with the respective

agreements between the Consultant and its Subconsultants or suppliers, (iii) violates any laws, ordinances, rules, regulations or orders of a public authority having jurisdiction, (v) becomes insolvent, suffers or permits the appointment of the receiver for its business or assets, or becomes subject to any proceeding under any bankruptcy or insolvency law, or (vi) otherwise materially breaches a provision of this Agreement.

(b) In the event the City terminates this Agreement pursuant to Section 14(a), the City may assess any attorneys' fees, professional fees, costs and expenses, including, but not limited to employee time attributable to said event, to the Consultant. The Consultant shall immediately reimburse the City for the same. In the event the Consultant fails to adhere to a contractual provision or other requirement of this Agreement, whether the subject provision is material or not, to the extent the City incurs attorneys' fees, professional fees, costs or expenses of any kind in the City's attempt to enforce such provision, the Consultant shall be liable to the City for the same. In such event, the City may deduct such amounts from any fees required to be paid to the Consultant pursuant to this Agreement.

(c) The City may terminate this Agreement upon not less than seven (7) days written notice to the Consultant for the City's convenience and without cause. In the event of termination not the fault of the Consultant, the Consultant shall be compensated only for Services performed prior to termination. After the City has made such payment, the City shall have no further obligation or liability to the Consultant with respect to this Agreement.

(d) If the City fails to make payments to the Consultant of any undisputed amounts due in accordance with this Agreement without just cause relating to the Consultant's failure to perform in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Consultant's option, cause for suspension of performance of services under this Agreement. In the event of a suspension of services, the Consultant shall have no liability to the City for delay or damage caused the City because of such suspension of services. Before resuming services, the Consultant shall be paid all sums due prior to suspension. Prior to any suspension of services or termination of this Agreement, the Consultant shall give sixty (60) calendar days' written notice to the City during which period City may cure its nonperformance by making payment of all sums due to Consultant and not in dispute.

(e) Immediately upon expiration or termination of this Agreement, the Consultant shall return to the City, in both written and electronic format, all information and other property used or created in connection with the Services by the Consultant or its agents, along with such information and assistance as is reasonable and customary to enable the City to successfully transfer the Services to another service provider or other third-party. The Consultant shall maintain a copy of such information in electronic format for at least twelve (12) months after termination of the Services for the purpose of carrying out the intent of this provision.

15. **Claims for Consequential Damages and/or Incidental Damages.** The Consultant and Owner waive claims against one another for lost profits, lost expected profits, consequential damages and/or incidental damages arising out of or relating to this Agreement. This waiver is applicable, without limitation, to all consequential damages and/or incidental damages, due to either the Consultant and/or the Owner's termination in accordance with Sections 14 or 16(c).

16. **Equal Employment Opportunity.**

(a) During the performance of the Agreement, the Consultant shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, pregnancy, age, genetic information, disability, or any other status protected under local, state, or federal law. The Consultant will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to race, color, religion, sex, national origin, pregnancy, age, genetic information, disability, or any other status protected under local, state, or federal law. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

(b) The Consultant agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause. The City may elect to provide the Selected Consultant with the required form notice. The Consultant will, in all solicitations or advertisements for employees placed by or on behalf of the Consultant, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, pregnancy, age, genetic information, disability, or any other protected status under local, state, or federal law.

(c) In the event of the Consultant's noncompliance with Section 16(a), Section 16(b) or with any applicable laws, the Agreement may be canceled, terminated, or suspended in whole, or in part, by the City. In such event, the Consultant may be declared ineligible for further City contracts. The Consultant shall include the paragraphs set forth in this Section 15 in every subcontract or purchase order.

17. **Employment of Certain Persons Prohibited.** No person who, at the time, is serving sentence in a penal or correctional institution shall be employed on the work covered by the Agreement.

18. **Subcontracts.** The Consultant shall not subcontract work under the Agreement unless prior written approval is granted by the City. Each person or entity which the Consultant subcontracts with to perform Services, as approved in writing by the City (each a "***Subconsultant***"), shall be bound by the conditions of the Agreement.

19. **Right to Audit Records.** The City shall be entitled to audit the books and records of the Consultant or any of its Subconsultants to the extent that such books and records relate to the Agreement or the performance of Services. The Consultant and its Subconsultants shall retain such books and records for a period of three (3) years from the date of final payment under the Agreement unless the City otherwise authorizes in writing a shorter period.

20. **Compliance with Applicable Laws and Standards.** The Consultant shall strictly comply with all applicable federal, state, and local laws, ordinances, decrees, orders, published governmental guidance documents, and industrial statutes, regulations, codes and standards in its performance of Services.

21. **Communicating with Governmental Agencies.** Notwithstanding anything to the contrary in this Agreement, the Consultant shall provide the City with notice before communicating with any governmental agencies about any information related to the Services.

The City shall be provided with the opportunity to direct all communications with governmental agencies.

22. **Governing Law; Jurisdiction.** This Agreement shall be governed and construed by the laws of the Commonwealth of Pennsylvania without regard to its principles of conflicts of law. EACH PARTY IRREVOCABLY CONSENTS TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE STATE COURTS LOCATED IN THE COUNTY OF BERKS, COMMONWEALTH OF PENNSYLVANIA, AND IRREVOCABLY AGREES THAT ALL ACTIONS OR PROCEEDINGS BETWEEN THE PARTIES, INCLUDING, BUT NOT LIMITED TO, THOSE ACTIONS OR PROCEEDINGS RELATING TO THIS AGREEMENT, SHALL BE LITIGATED IN SUCH COURT.

23. **Entire Agreement.** This Agreement (including its exhibits) constitutes the entire agreement of the parties pertaining to the subject matter hereof and merges all prior negotiations and drafts of the parties with regard to the transactions contemplated herein. Any and all other written or oral agreements existing between the parties hereto regarding such transactions are expressly canceled. In the event of any conflict between this Agreement and any of the exhibits attached hereto, the terms of this Agreement shall govern.

24. **Alterations, Modifications or Additions of the Services.**

(a) The Services will be under the supervision of the City or its authorized representatives, agents or other consultants. In the event the Consultant determines that any alteration, modification or addition to the Services is warranted (“***Additional Services***”), the Consultant shall submit a proposal to the City setting forth in reasonable detail the scope of such Additional Services, the estimated time and price of performing the Additional Services and any potential impact on the then-existing Services and any fees related thereto. The Consultant shall obtain the prior written approval from the City before performing any Additional Services. The Consultant shall not be entitled to additional compensation for any work or materials associated with Additional Services unless it received such approved. If approved by the City, the Consultant shall perform or cause to be performed such Additional Services in accordance with the terms of this Agreement.

(b) The City shall pay the Consultant all compensation earned in the performance of Additional Services in accordance with Paragraph 4.

25. **Waiver.** No provisions hereof may be waived except by an agreement in writing signed by the parties. A waiver of any term or provision hereof shall not be construed as a waiver of any other term or provision hereof.

26. **Binding Effect.** This Agreement shall bind and inure to the benefit of the parties hereto and their respective successors, heirs and permitted assigns.

27. **Assignment.** This Agreement is a personal service contract and may not be assigned by the Consultant without the prior written consent of the City.

28. **Third Party Beneficiaries.** The parties acknowledge and agree that the City shall be named as a third party beneficiary of any and all agreements by and between the Consultant and any of its Subconsultants and the City shall have the rights of enforcement and remedies against

the Consultant's Subconsultants as are available to the City hereunder. Furthermore, the parties acknowledge and agree that none of the City's obligations and duties under this Agreement shall in any way or manner be deemed or construed to create any obligation of the City to any person or entity other than the Consultant. The parties also acknowledge that the City shall be deemed a third party beneficiary of this Agreement and shall be entitled to rely on the quality of the Services rendered by the Consultant.

29. **Notice.** Any notice required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes when presented personally to such party or sent by certified or registered mail, return receipt requested, or by facsimile transmission with confirmation, to such party at its address set forth below:

If to the City: Stan Rugis, Deputy Director
815 Washington Street
Reading, PA 19601
Email: Stan.Rugis@readingpa.gov

If to the Consultant: Timothy Benner, PE
Vice President
Email: tbenner@mctish.com

30. **Severability.** The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of the remaining provisions (including any remaining provisions within the same numbered paragraph), unless the absence of such invalid or unenforceable provision materially and adversely affects the right or obligations of either party hereto.

31. **Survival.** In the event of any termination of this Agreement, Sections 9, 10, 11, 13, 14, 31 hereof shall survive and continue in effect and shall inure to the benefit of and be binding upon the parties and their legal representatives, heirs, successors, and assigns.

32. **Background.** The Background Section of this Agreement is expressly incorporated into the substantive provisions of this Agreement and shall be binding upon the parties as if expressly contained in the body of the Agreement.

33. **Drafting of Agreement.** The parties hereto acknowledge that each has participated in the drafting of this Agreement and the parties hereto expressly waive the defense of contra proferentum, i.e., that this Agreement or any portion of this Agreement may be construed against any party as the drafter thereof.

34. **Exhibits.** Unless otherwise indicated, references to this Agreement shall be interpreted to include the main body of this Agreement and the Exhibits. In interpreting this Agreement and resolving any conflicts, inconsistencies, discrepancies or ambiguities between and/or within this Agreement and the Exhibits attached hereto, the main body of this Agreement takes precedence over the Exhibits. Any conflict, inconsistency, discrepancy or ambiguity of the

scope of services shall be resolved in favor of the performance of the greater degree, quantity or quality of services (as determined by the City).

[THIS SPACE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the date first written above.

Attest:

DocuSigned by:
Linda A. Kelleher CMC, City Clerk
73DE031C240D481...
Linda A. Kelleher CMC, City Clerk

City of Reading:

DocuSigned by:
Mayor Eddie Moran
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By: _____
Name: Eddie Moran
Title: Mayor

McTish Kunkle & Associates

DocuSigned by:
Timothy S. Brenner, PE
4DEE8C56EBBF48A...
By: _____
Name: Timothy S. Brenner, PE
Title: Vice President

DocuSigned by:
Joseph Gillott
872D6C2AAA264D6...

Exhibit A

Scope of Services

See the City's Request for Proposals and McTish Kunkle Associates Proposal which are incorporated together as Exhibit "C"

Exhibit B**Service Compensation Schedule****I. COST/PRICE OF CONTRACT****Design Fee**

MKA's fee for providing the above referenced services is outlined below:

Survey	\$20,600.
Collection Systems Evaluation	\$44,500.
Preliminary Design Report	\$17,700.
Engineering Design	\$49,900.
Bid and Construction Services	\$48,700.
<u>Direct Costs</u>	<u>\$3,788.</u>
Total	\$185,188
Add Alternate for Inspection (24 hours @ 24 weeks)	\$40,320

Permit Fees

The estimated fees associated with the project permits consist of the E&S application fee for Berks County Conservation District, which is \$900. Note this fee does not include any resubmission fees for changes or plan revisions.

Reimbursable Expenses

The following direct project expenses will be invoiced to you based on the actual cost (e.g., no markups): prints, reproduction expenses, copies, postage, mileage, and tolls.

Invoicing

MKA typically invoices our clients on a regular monthly basis. Our invoices typically include progress reports and status notes, including a listing of percentage of work completed as applicable for design projects. MKA can work with the City to provide the information they want included on an invoice. MKA's current hourly rate schedule is attached in the event that additional services are required.

EXCLUDED SERVICES

The following services are not included in this proposal:

1. Boundary Surveys
2. Traffic Signal Permit Plans, Reports or Applications
3. Transportation Impact Studies
4. Flashing Warning Device Permit Plans, Reports or Applications
5. Preparation of Right of Way or Easement Acquisition Plans
6. Subsurface Utility Engineering Services for water, gas, telecommunications or electric.

Exhibit "C"

