

**SERVICE AGREEMENT
FOR
PROFESSIONAL ENGINEERING SERVICES
LOCKETT ROAD IMPROVEMENT PROJECT**

**CITY OF FLAGSTAFF
and**

PEAK ENGINEERING, INC.

This Agreement for Professional Engineering Design Services ("Agreement") is made by and between the City of Flagstaff ("City"), an Arizona municipal corporation with offices at 211 W. Aspen Avenue, Flagstaff, Coconino County, Arizona, and Peak Engineering, Inc., an Arizona company with offices at 110 N. Agassiz Street, Flagstaff, Arizona 86001 ("Provider"), effective as of the date written below.

RECITALS

- A. The City desires to enter into this Agreement in order to obtain services of a consultant for the **Lockett Road Improvement Project** (the "Project"), as outlined in the Scope of Work/Specifications section of the RSOQ document; and
- B. Provider has available and offers to provide the personnel necessary to provide said services within the required time in accordance with the Scope of Services included in this Agreement;
- C. The following exhibit is incorporated by reference and is expressly made a part of this Agreement:

Scope of Work and Fee Schedule

Exhibit A

For the reasons recited above, and in consideration of the mutual covenants contained in this Agreement, the City and Provider agree as follows:

1. SERVICES TO BE PERFORMED BY PROVIDER

Provider agrees to perform the following services:

- 1.1 Provider agrees to provide the services as set forth in detail in Exhibit "A" attached hereto and is hereby made a part of this Agreement.
- 1.2 Provider warrants that all materials, services or construction delivered under the Agreement shall conform to the specifications of the Agreement. The City's receipt or inspection of the materials, services, or construction specified shall not alter or affect the obligations of Provider or the rights of the City under the foregoing warranty.
- 1.3 All services, information, computer program elements, reports and other deliverables which may be created under the Agreement are the sole property of the City and shall not be used or released by Provider or any other person except with prior written permission of the City.

2. COMPENSATION OF PROVIDER

Provider agrees to provide all of the services set forth in Exhibit "A" for prices not to exceed the amounts set forth in the fee/price schedule included in Exhibit "A".

3. RIGHTS AND OBLIGATIONS OF PROVIDER

3.1 Independent Contractor. The parties agree that Provider performs specialized services and that Provider enters into this Agreement with the City as an independent contractor. Nothing in this Agreement shall be construed to constitute Provider or any of Provider's agents or employees as an agent, employee or representative of the City. As an independent contractor, Provider is solely responsible for all labor and expenses in connection with this Agreement and for any and all damages arising out of Provider's performance under this Agreement.

3.2 Provider's Control of Work. All services to be provided by Provider shall be performed as determined by the City in accordance with the Scope of Services set forth in Exhibit "A." Provider shall furnish the qualified personnel, materials, equipment and other items necessary to carry out the terms of this Agreement. Provider shall be responsible for, and in full control of, the work of all such personnel.

3.3 Reports to the City. Although Provider is responsible for control and supervision of work performed under this Agreement, the services provided shall be acceptable to the City and shall be subject to a general right of inspection and supervision to ensure satisfactory completion. This right of inspection and supervision shall include, but not be limited to, all reports to be provided by Provider to the City and the right of the City, as set forth in the Scope of Services, to audit Provider's records.

3.4 Compliance with All Laws. Provider shall comply with all applicable laws, ordinances, rules, regulations and executive orders of the federal, state and local government, which may affect the performance of this Agreement. Any provision required by law, ordinances, rules, regulations, or executive orders to be inserted in this Agreement shall be deemed inserted, whether or not such provisions appear in this Agreement.

3.5 Completeness and Accuracy of Provider's Work. The Provider shall be responsible for the completeness and accuracy of his work, plans, supporting data, and Special Provisions prepared or compiled under his obligation for this Project and shall correct, at his expense, all errors or omissions therein.

3.5.1 All documents prepared by the design professional shall bear the stamp or seal of the design professional. All preparation of technical and related documents shall be completed in accordance with the prevailing Arizona law and services performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances..

3.5.2 Correction of errors or omissions disclosed and determined to exist by the City during the construction of the Project shall be accomplished by the Provider. The costs that become necessary to correct those errors attributable to the Provider and any expense incurred by the City as a result of additional construction costs caused by such errors shall be chargeable to the Provider. The fact that the City has accepted or approved the Provider's work shall in no way relieve the Provider of any of his responsibilities or professional liability. Should the Provider be contracted to perform construction inspection of the Project, he shall be responsible for errors and omissions in construction inspection disclosed and determined to exist by the City during and subsequent to the construction of the Project. Provider's duty in the construction inspection phase is to assure City that the Project is constructed in conformity with detailed plans and specifications and the cost of design necessary to correct errors and omissions in inspection attributable to the Provider and any expense incurred by City as a result of additional construction costs caused by such errors shall be chargeable to the Provider. Acceptance or approval by City of Provider's work shall not relieve Provider of inspection responsibilities or professional liability.

4. NOTICE PROVISIONS

Notice. Any notice concerning this Agreement shall be in writing and sent by certified or registered mail as follows:

To the City's Authorized Representative

Patrick Brown, C.P.M.
Senior Procurement Specialist
City of Flagstaff
211 W. Aspen
Flagstaff, Arizona 86001

To Provider:

Thomas E. Smith, P.E.
Principal
Peak Engineering, Inc.
110 N. Agassiz Street
Flagstaff, Arizona 86001

5. INDEMNIFICATION

To the fullest extent permitted by law, Provider shall indemnify, defend, save and hold harmless the City of Flagstaff and its officers, officials, agents, and employees ("Indemnitee") from and against any and all claims, actions, liabilities, damages, losses, or expenses (including court costs, attorneys' fees, and costs of claim processing, investigation and litigation) ("Claims") including claims for bodily injury or personal injury (including death), or loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Provider or any of its owners, officers, directors, agents, employees or subcontractors. This indemnity includes any claim or amount arising out of or recovered under the Workers' Compensation Law or arising out of the failure of such Provider to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. It is agreed that Provider shall be responsible for primary loss investigation, defense and judgment costs where this indemnification is applicable. Provider shall waive all rights of subrogation against the City, its officers, officials, agents and employees for losses arising from the work performed by Provider for the City.

6. INSURANCE

Provider and subcontractors shall procure and maintain insurance against claims for injury to persons or damage to property, which may arise from or in connection with this Agreement by the Provider, Provider's agents, representatives, employees or contractors until all of their obligations under this Agreement have been discharged, including any warranty periods. The insurance requirements are minimum requirements for this Agreement and in no way limit the indemnity covenants contained in this Agreement. The City does not represent or warrant that the minimum limits set forth in this Agreement are sufficient to protect the Provider from liabilities that might arise out of this Agreement, and Provider is free to purchase such additional insurance as Provider may determine is necessary.

6.1. Minimum Scope and Limits of Insurance. Provider shall provide coverage at least as broad and with limits not less than those stated below.

6.1.1. Commercial General Liability - Occurrence Form
(Form CG 0001, ed. 10/93 or any replacement thereof)

General Aggregate	\$2,000,000
Products/Completed Operations Aggregate	\$1,000,000
Personal and Advertising Injury	\$1,000,000
Each Occurrence	\$1,000,000
Fire Damage (any one fire)	\$500,000
Medical Expense (any one person)	Optional

6.1.2. Automobile Liability - Any Automobile or Owned, Hired and Non-owned Vehicles

(Form CA 0001, ed. 12/93 or any replacement thereof)

Combined Single Limit Per Accident for Bodily Injury and Property Damage	\$1,000,000
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6.1.3. Workers' Compensation and Employer's Liability

Workers' Compensation	Statutory
Employer's Liability: Each Accident	\$500,000
Disease - Each Employee	\$500,000
Disease - Policy Limit	\$500,000

6.1.4. Professional Liability (Per Claim)	\$1,000,000
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6.2 Self-insured Retention/Deductibles. Any self-insured retentions and deductibles must be declared to and approved by the City. If not approved, the City may require that the insurer reduce or eliminate such self-insured retentions with respect to the City, its officers, agents, employees, and volunteers.

6.3. Other Insurance Requirements. The policies shall contain, or be endorsed to contain, the following provisions:

6.3.1 Commercial General Liability and Automobile Liability Coverages. The City of Flagstaff, its officers, officials, agents and employees shall be named as additional insureds with respect to liability arising out of the use and/or occupancy of the Premises subject to this Agreement and activities performed by or on behalf of the Provider, including products and completed operations of the Provider; and automobiles owned, leased, hired or borrowed by the Provider.

6.3.2 The Provider's insurance shall contain broad form contractual liability coverage.

6.3.3 The City of Flagstaff, its officers, officials, agents and employees volunteers shall be named as additional insureds to the full limits of liability purchased by the Provider even if those limits of liability are in excess of those required by this Agreement.

6.3.4. The Provider's insurance coverage shall be primary insurance with respect to the City, its officers, officials, agents, employees and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, agents and employees, shall be in excess of the coverage of the Provider's insurance and shall not contribute to it.

6.3.5 The Provider's insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

6.3.6 Coverage provided by the Provider shall not be limited to the liability assumed under the indemnification provisions of this Agreement.

6.3.7 The policies shall contain a waiver of subrogation against the City, its officers, officials, agents and employees for losses arising from work performed by Provider for the City.

6.4 Notice of Cancellation. Each insurance policy required by the insurance provisions of this Agreement shall provide the required coverage and shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City. When cancellation is for non-payment of premium, then at least ten (10) days' prior notice shall

be given to the City. Notices required by this section shall be sent directly to Patrick Brown, Senior Procurement Specialist, City of Flagstaff, 211 W. Aspen Avenue, Flagstaff, Arizona 86001.

6.5 Acceptability of Insurers. Provider shall place insurance hereunder with insurers duly licensed or approved unlicensed companies in the State of Arizona and with a “Best’s” rating of not less than A-: VII. The City does not represent or warrant that the above required minimum insurer rating is sufficient to protect the Provider from potential insurer insolvency.

6.6 Verification of Coverage. The Provider shall furnish the City with certificates of insurance (ACORD form) as required by this Agreement. The certificates for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. Any policy endorsements that restrict or limit coverage shall be clearly noted on the certificate of insurance.

6.6.1 The City must receive and approve all certificates of insurance before the Provider commences work. Each insurance policy required by this Agreement shall be in effect at, or before, commencement of work under this Agreement and shall remain in effect until all Provider’s and its subcontractors’ obligations under this Agreement have been met. The Provider’s failure to maintain the insurance policies as required by this Agreement or to provide timely evidence of renewal will be considered a material breach of this Agreement.

6.6.2 **All certificates of insurance shall be sent directly to Patrick Brown, Senior Procurement Specialist, 211 West Aspen Avenue, Flagstaff, Arizona 86001. The City Project/contract number and Project description shall be noted on the certificates of insurance.** The City reserves the right to require, and receive within ten (10) days, complete, certified copies of all insurance policies and endorsements required by this Agreement at any time. The City shall not be obligated, however, to review any insurance policies or to advise Provider of any deficiencies in such policies and endorsements. The City’s receipt of Provider’s policies or endorsements shall not relieve Provider from, or be deemed a waiver of, the City’s right to insist on strict fulfillment of Provider’s obligations under this Agreement.

6.7 Subcontractors. Provider’s certificate(s) shall include all subcontractors as additional insureds under its policies, or Provider shall furnish to the City Separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to the minimum requirements identified above.

6.8 Approval. Any modification or variation from the insurance requirements in this Agreement must have the prior approval of the City’s Attorney’s Office, whose decision shall be final. Such action will not require a formal Agreement amendment but may be made by administrative action.

7. DEFAULT AND TERMINATION

7.1 Events of Default Defined. The following shall be Events of Default under this Agreement:

7.1.1 Any material misrepresentation made by Provider to the City;

7.1.2 Any failure by Provider to perform its obligations under this Agreement including, but not limited to, the following:

7.1.2.1 Failure to commence work at the time(s) specified in this Agreement due to a reason or circumstance within Provider’s reasonable control;

7.1.2.2 Failure to perform the work with sufficient personnel and equipment or with sufficient equipment to ensure completion of the work within the specified time due to a reason or circumstance within Provider’s reasonable control;

- 7.1.2.3 Failure to perform the work in a manner reasonably satisfactory to the City;
- 7.1.2.4 Failure to promptly correct or re-perform within a reasonable time work that was rejected by the City as unsatisfactory or erroneous;
- 7.1.2.5 Discontinuance of the work for reasons not beyond Provider's reasonable control;
- 7.1.2.6 Unsatisfactory performance as judged by the Contract Administrator;
- 7.1.2.7 Failure to provide the City, upon request, with adequate assurance of future performance;
- 7.1.2.8 Failure to comply with a material term of this Agreement, including, but not limited to, the provision of insurance; and
- 7.1.2.9 Any other acts specifically stated in this Agreement as constituting a default or a breach of this Agreement.

7.2 Remedies.

7.2.1 Upon the occurrence of any Event of Default, the City may declare Provider in default under this Agreement. The City shall provide written notification of the Event of Default. If such Event of Default is not cured within seven (7) days of receipt of the notification, the City may invoke any or all of the following remedies:

- 7.2.1.1 The right to cancel this Agreement as to any or all of the services yet to be performed;
- 7.2.1.2 The right of specific performance, an injunction or any other appropriate equitable remedy;
- 7.2.1.3 The right to monetary damages;
- 7.2.1.4 The right to withhold all or any part of Provider's compensation under this Agreement;
- 7.2.1.5 The right to deem Provider non-responsive in future contracts to be awarded by the City; and
- 7.2.1.6 The right to seek recoupment of public funds spent for impermissible purposes.

7.2.2 The City may elect not to declare an Event of Default or default under this Agreement or to terminate this Agreement upon the occurrence of an Event of Default. The parties acknowledge that this provision is solely for the benefit of the City, and that if the City allows Provider to continue to provide the Services despite the occurrence of one or more Events of Default, Provider shall in no way be relieved of any of its responsibilities or obligations under this Agreement, nor shall the City be deemed to waive or relinquish any of its rights under this Agreement.

7.2.3 In the Event of Default by the Provider, the City shall not be liable to Provider for any amount, and Provider may be liable to the City for any and all damages sustained by reason of the default which gave rise to the termination.

7.3 Right to Offset. Any costs, including but not limited to attorney's fees, costs of remediation, and costs of delay, incurred by the City due to default of Provider, or due to the City's exercise any of the remedies available to it under this Agreement, may be offset by use of any payment due for services completed before the default or the exercise of any remedies. If the offset amount is insufficient to cover excess costs, Provider shall be liable for and shall remit promptly to the City the balance upon written demand from the City.

7.4 Termination for Convenience. The City reserves the right to terminate, with or without cause, this Agreement upon ninety (90) days written notice. The City shall be responsible only for those standard items or services which have been delivered and accepted. If any items being purchased are truly unique and therefore not saleable or useable for any other application, the City shall reimburse Provider for actual labor, material, and burden costs, plus a profit not to exceed 8%. Title to all materials, work in progress, and completed but undelivered goods, shall pass to the City after costs are claimed and allowed. Provider shall submit detailed cost claims in an acceptable manner and shall permit the City to examine such books and records as may be necessary in order to verify the reasonableness of any claims.

8. GENERAL PROVISIONS

8.1 Headings. The article and section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision of this Agreement.

8.2 Jurisdiction and Venue. This Agreement shall be administered and interpreted under the laws of the State of Arizona. Provider hereby submits itself to the original jurisdiction of those courts located within Coconino County, Arizona.

8.3 Attorney's Fees. If suit or action is initiated in connection with any controversy arising out of this Agreement, the prevailing party shall be entitled to recover, in addition to costs, such sum as the court, including an appellate court, may adjudge reasonable as attorney fees.

8.4 Severability. If any term or provision of this Agreement shall be found by a court of competent jurisdiction to be illegal or unenforceable, then notwithstanding such illegality or unenforceability, the remainder of this Agreement shall remain in full force and effect and such term or provision shall be deemed to be deleted.

8.5 Successors and Assigns. No right or interest in the Agreement shall be assigned by Provider without prior written permission of the City, and no delegation of any duty of Provider shall be made without prior written permission of the City. The City shall not unreasonably withhold approval and shall notify Provider of the City's position within fifteen (15) days of receipt of written notice by Provider. This Agreement shall extend to and be binding upon the Provider, its successors and assigns, including any individual, company, partnership, or other entity with or into which the Provider shall merge, consolidate, or be liquidated, or any person, corporation, partnership, or other entity to which the Provider shall sell its assets.

8.6 Subcontracts. No subcontract shall be entered into by Provider with any other party to furnish any service specified in this Agreement without the advance written approval of the City. All subcontracts shall comply with Federal, State and local laws and regulations that are applicable to the services covered by the subcontract and shall include all the terms and conditions set forth in the Agreement which shall apply with equal force to the subcontract, as if the subcontractor were the Provider. Provider is responsible for contract performance whether or not subcontractors are used. The City shall not unreasonably withhold approval and shall notify Provider of the City's position within fifteen (15) days of receipt of written notice by Provider. Provider shall be responsible for executing the agreement with subcontractor and obtaining Certificates of Insurance verifying the insurance requirements.

8.7 Conflict of Interest. Provider covenants that Provider presently has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of services required to be performed under this Agreement. Provider further covenants that in the performance of this Agreement, Provider shall not engage any employee or apprentice having any such interest. The parties agree that this Agreement may be cancelled for conflict of interest in accordance with Arizona Revised Statutes § 38-511.

8.8 Authority to Contract. Each party represents and warrants that it has full power and authority to enter into this Agreement and perform its obligations hereunder, and that it has taken all actions necessary to authorize entering into this Agreement.

8.9 Integration. This Agreement represents the entire understanding of City and Provider as to those matters contained in this Agreement, and no prior oral or written understanding shall be of any force or effect with respect to those matters, except for documents comprising the RFP Package that have been incorporated into this Agreement. This Agreement may not be modified or altered except in writing signed by duly authorized representatives of the parties.

8.10 Non Appropriation. If the City Council does not appropriate funds to continue this Agreement and pay for charges under this Agreement, the City may terminate this Agreement at the end of the current fiscal period, or at the time that funds are no longer available to meet the City's payment obligations. The City agrees to give written notice of termination to the Provider at least thirty (30) days prior to any termination for a lack of funds and will pay to the Provider all approved charges incurred prior to Provider's receipt of such notice, subject to the availability of funds appropriated and budgeted by the City to fund payments under this Agreement.

8.11 Non-Discrimination. Provider shall not discriminate against any employee, or applicant for employment in violation of Federal Executive Order 11246, State Executive Order 75-5 as modified by State Executive Order 99-4 or A.R.S. 41-1461 et. seq. The Provider shall be required to comply with all applicable provisions of the Americans with Disabilities Act (Public Law 101-336, 42 U.S.C. 12101-12213) and applicable federal regulations under the Act.

8.12 Compliance with Federal Immigration Laws and Regulations. Provider hereby warrants to the City that the Provider and each of its subcontractors ("Subcontractors") will comply with, and are contractually obligated to comply with, all Federal Immigration laws and regulations that relate to its employees and A.R.S. §23-214(A) (hereinafter "Provider Immigration Warranty").

8.12.1 A breach of the Provider Immigration Warranty shall constitute a material breach of this Agreement and shall subject the Provider to penalties up to and including termination of this Agreement at the sole discretion of the City.

8.12.2 The City retains the legal right to inspect the papers of any Provider or Subcontractor employee who works on this Agreement to ensure that the Provider or Subcontractor is complying with the Provider Immigration Warranty. Provider agrees to assist the City in regard to any such inspections.

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

8.12.4 The provisions of this Article must be included in any contract the Provider enters into with any and all of its Subcontractors who provide services under this Agreement or any subcontract. "Services" are defined as furnishing labor, time or effort in the State of Arizona by

a contractor or subcontractor. Services include construction or maintenance of any structure, building or transportation facility or improvement to real property.

8.13 Anti-Trust Violations. The City maintains that, in actual practice, overcharges resulting from antitrust violations are borne by the Provider. Therefore, to the extent permitted by law, Provider hereby assigns to the City any and all claims for such overcharges as to the goods or services used to fulfill this Agreement.

8.14 Advertising. Provider shall not advertise or publish information concerning the Agreement, without the prior written consent of the City.

8.15 Inspection. All material, services or construction are subject to final inspection and acceptance by the City. The City may, at reasonable times and at its expense, inspect the plant or place of business of Provider or its subcontractor(s) which is related to the performance of this Agreement. This right of inspection and supervision shall include, but not be limited to the right of the City to audit Provider's records.

8.16 Force Majeure. Except for payment of sums due, neither party shall be liable to the other nor deemed in default under this Agreement if and to the extent that such party's performance of this Agreement is prevented by reason of force majeure.

8.16.1 The term "force majeure" means an occurrence that is unforeseeable and beyond the control of the party affected, which occurs without its fault or negligence, and which it is unable to prevent by exercising reasonable diligence. Without limiting the foregoing, force majeure includes acts of God, acts of the public enemy, war, riots, strikes, mobilization, labor disputes, civil disorders, fire, flood, lockouts, injunctions-intervention-acts, or unreasonable failures or refusal to act by government authority, and other similar occurrences. The force majeure shall be deemed to commence when the party declaring force majeure notifies the other party, in writing, of the existence of the force majeure and shall be deemed to continue as long as the results or effects of the force majeure prevent the party from resuming performance in accordance with this agreement.

8.16.2 Force majeure shall not include the following occurrences:

8.16.2.1 Late delivery of equipment or materials caused by congestion at a manufacturer's plant or elsewhere, or by an oversold condition of the market.

8.16.2.2 Late performance by a Subcontractor unless the delay arises directly out of a force majeure occurrence in accordance with this force majeure term and condition. Any delay or failure in performance by either party hereto shall not constitute default hereunder or give rise to any claim for damages or loss of anticipated profits if, and to the extent that, such delay or failure is caused by force majeure.

8.16.3 If either party is delayed at any time in the progress of the work by force majeure, the delayed party shall notify the other party in writing as soon as is practical, of the commencement of such delay and shall specify the causes of such delay in such notice. Such notice shall be hand delivered or mailed certified-return receipt and shall make a specific reference to this section, thereby invoking its provisions. The delayed party shall cause such delay to cease as soon as practicable and shall notify the other party in writing when it has done so. The time of completion shall be extended by Agreement modification for a period of time equal to the time that the results or effects of such delay prevent the delayed party from performing in accordance with this Agreement.

8. DURATION

This Agreement shall become effective on and from the date it is executed by the parties, and shall continue for a period of 545 calendar days or until construction of the Project is completed, whichever is sooner, unless sooner terminated as provided in this Agreement.

(Please sign in blue ink. Submit original signatures – photocopies not accepted)

City of Flagstaff

Peak Engineering, Inc.

Josh Copley, City Manager

Name

Attest:

Title

City Clerk

Approved as to form:

City Attorney

Date of Execution: _____

EXHIBIT A
SCOPE OF WORK
AND
FEE SCHEDULE