

AGREEMENT

THIS AGREEMENT (the "Agreement") is made and entered into effective the 26th day of March, 2003, by and between the City of Naples, Florida, a municipal corporation, (hereinafter referred to as the "CITY"), the address of which is 735 Eighth Street South, Naples, Florida, 34102, and The Mercer Group, Inc., a corporation authorized to do business in Florida, the business address of which is 48 Fourth Street S.W. Winter Haven, Florida 33880 (hereinafter referred to as the "CONSULTANT").

WITNESSETH:

WHEREAS, the CITY desires to obtain the professional services of CONSULTANT concerning recruiting for a City Manager (hereinafter referred to as the "Project"); and

WHEREAS, CONSULTANT has submitted a proposal for provision of those services; and

WHEREAS, CONSULTANT represents that it has expertise in the type of professional services that will be required for the Project.

NOW, THEREFORE, in consideration of the mutual covenants and provisions contained herein, the parties hereto agree as follows:

ARTICLE ONE CONSULTANT'S RESPONSIBILITY

1.1. The Basic Services to be performed by CONSULTANT under this Agreement are recruitment for a City Manager for the City of Naples through an executive search, such services being more fully described in Exhibit A, "Scope of Services", which is attached hereto and incorporated herein. If necessary to expedite the process, the Mayor is authorized to approve Additional Services related to and necessary for the Project.

1.2. CONSULTANT agrees to obtain and maintain throughout the period of this Agreement all such licenses as may be required to do business in the State of Florida, the City of Naples, and in Collier County, Florida, including, without limitation, all licenses required by the respective state boards and other governmental agencies responsible for regulating and licensing the professional services to be provided and performed by CONSULTANT pursuant to this Agreement.

1.3. CONSULTANT agrees that, when the services to be provided hereunder relate to a professional service which under Florida Statutes, requires a license, certificate of authorization or other form of legal entitlement to practice such services, it shall employ and/or retain only qualified personnel to provide such services.

1.4. CONSULTANT's project manager (hereinafter referred to as the "Project Manager") will be Tom D. Freijo, Ph.D. The Project Manager shall be authorized and responsible to act on behalf of CONSULTANT with respect to directing, coordinating and administering all aspects of the services to be provided and performed under this Agreement.

1.5. CONSULTANT has represented to the CITY that it has expertise in the type of professional services that will be required for the Project. CONSULTANT agrees that all services to be provided by CONSULTANT pursuant to this Agreement shall be subject to the CITY's review and approval and shall be in accordance with the generally accepted standards of professional practice in the State of Florida, as well as in accordance with all published laws, statutes, ordinances, codes, rules, regulations and requirements of any governmental agencies which regulate or have jurisdiction over the Project or the services to be provided and performed by CONSULTANT

hereunder. In the event of any conflicts in these requirements, CONSULTANT shall notify the CITY of such conflict and utilize its best professional judgment to advise CITY regarding resolution of the conflict.

1.6. CONSULTANT agrees not to divulge, furnish or make available to any third person, firm or organization, without CITY's prior written consent, or unless incident to the proper performance of CONSULTANT's obligations hereunder, or in the course of judicial or legislative proceedings where such information has been properly subpoenaed, any non-public information concerning the services to be rendered by CONSULTANT hereunder, and CONSULTANT shall require all of its employees, agents, subconsultants and sub-consultants to comply with the provisions of this paragraph.

1.7 CONSULTANT agrees not to employ or offer to employ any Elected Officer or City Managerial Employee of CITY who in any way deals with, coordinates on, or assists with, the professional services provided in this Agreement, for a period of two (2) years after termination of all provisions of this Agreement. For purposes of this paragraph, the term "Elected Officer" shall mean any member of the City Council. For purposes of this paragraph, the term "City Managerial Employee" shall mean the City Manager, the Assistant City Manager, the City Clerk, and any City department head or director. In the event CONSULTANT violates the provisions of this paragraph, CONSULTANT shall be required to pay damages to CITY in an amount equal to any and all compensation which is received by the former Elected Officer or City Managerial Employee of CITY from or on behalf of the contracting person or entity, or an amount equal to the former Elected Officer's or City Managerial Employee's last two (2) years of gross compensation from CITY, whichever is greater.

1.8 CONSULTANT agrees not to provide services for compensation to any other party other than CITY on the same subject matter, same project, or scope of services as set forth in this Agreement without approval from the City Council of CITY.

1.9 Except as otherwise provided herein, CONSULTANT agrees not to disclose or use any information not available to members of the general public and gained by reason of CONSULTANT'S contractual relationship with CITY for the special gain or benefit of CONSULTANT or for the special gain or benefit of any other person or entity.

1.10 CONSULTANT understands that the services provided hereunder may be governed by laws of the State of Florida that may be peculiar to governmental entities, including, without limitation, the Florida Government in the Sunshine laws and the Florida Public Records laws. CONSULTANT agrees to abide by such laws and to cooperate with the CITY ensuring compliance.

ARTICLE TWO CITY'S RESPONSIBILITIES

2.1. The Mayor shall act as CITY's representative with respect to the services to be rendered under this Agreement (hereinafter referred to as the "Project Coordinator"). The Project Coordinator shall have authority to transmit instructions, receive information, interpret and define CITY's policies and decisions with respect to CONSULTANT's services for the Project. However, the Project Coordinator is not authorized to issue any verbal or written orders or instructions to CONSULTANT that would have the effect, or be interpreted to have the effect, of modifying or changing in any substantial way:

- (a) The scope of services to be provided and performed by CONSULTANT hereunder;
- (b) The time CONSULTANT is obligated to commence and complete all such services; or
- (c) The amount of compensation the CITY is obligated or committed to pay CONSULTANT over that set forth in this Agreement.

2.2. The Project Coordinator shall:

(a) Review and make appropriate recommendations on all requests submitted by CONSULTANT for payment for services and work provided and performed in accordance with this Agreement;

(b) Arrange for access to and make all provisions for CONSULTANT to enter the Project site to perform the services to be provided by CONSULTANT under this Agreement; and

(c) Provide notice to CONSULTANT of any deficiencies or defects discovered by the CITY with respect to the services to be rendered by CONSULTANT hereunder.

(d) Provide logistical support for the project

These services may be provided through Project Coordinator's designee(s)

2.3. CONSULTANT acknowledges that access to the Project Site, to be arranged by CITY for CONSULTANT, may be provided during times that are not the normal business hours of CONSULTANT.

ARTICLE THREE TIME

3.1. Services to be rendered by CONSULTANT commenced on the date first written above and shall be performed and completed within 90 days after that date. Time is of the essence with respect to the performance of this Agreement.

3.2. Should CONSULTANT be obstructed or delayed in the prosecution or completion of its services as a result of unforeseeable causes beyond the control of CONSULTANT, and not due to its own fault or neglect, including but not restricted to acts of God or of public enemy, acts of government or of the CITY, fires, floods, epidemics, quarantine regulations, strikes or lock-outs, then CONSULTANT shall notify CITY in writing within five (5) working days after commencement of such delay, stating the cause or causes thereof, or be deemed to have waived any right which CONSULTANT may have had to request a time extension.

3.3. No interruption, interference, inefficiency, suspension or delay in the commencement or progress of CONSULTANT's services from any cause whatsoever, including those for which CITY may be responsible in whole or in part, shall relieve CONSULTANT of its duty to perform or give rise to any right to damages or additional compensation from CITY. CONSULTANT's sole remedy against CITY will be the right to seek an extension of time to its schedule. This paragraph shall expressly apply to claims for early completion, as well as claims based on late completion.

3.4. Should CONSULTANT fail to commence, provide, perform or complete any of the services to be provided hereunder in a timely and reasonable manner, in addition to any other rights or remedies available to the CITY hereunder, the CITY at its sole discretion and option may withhold any and all payments due and owing to CONSULTANT until such time as CONSULTANT resumes performance of its obligations hereunder in such a manner so as to reasonably establish to the CITY's satisfaction that CONSULTANT's performance is or will shortly be back on schedule.

ARTICLE FOUR COMPENSATION

4.1. The total compensation to be paid CONSULTANT by the CITY for all Basic Services shall not exceed \$14,800.00, plus expenses not to exceed \$5,200.00, and shall be paid in the manner set forth in and Exhibit B, "Basis of Compensation", which is attached hereto and incorporated herein.

4.2. Compensation for Additional Services shall be at a time and expense rate, as set forth in Exhibit "B" Basis for Compensation and shall not exceed \$5,000.00.

**ARTICLE FIVE
MAINTENANCE OF RECORDS**

5.1. CONSULTANT will keep adequate records and supporting documentation which concern or reflect its services hereunder. The records and documentation will be retained by CONSULTANT for a minimum of five (5) years from the date of termination of this Agreement or the date the Project is completed, whichever is later. CITY, or any duly authorized agents or representatives of CITY, shall have the right to audit, inspect and copy all such records and documentation as often as they deem necessary during the period of this Agreement and during the five (5) year period noted above; provided, however, such activity shall be conducted only during normal business hours.

**ARTICLE SIX
INSURANCE**

6.1. CONSULTANT shall obtain and carry, at all times during its performance under the Contract Documents, insurance of the types and in the amounts set forth in Exhibit B to this Agreement.

**ARTICLE SEVEN
SERVICES BY CONSULTANT'S OWN STAFF**

7.1. The services to be performed hereunder shall be performed by CONSULTANT's own staff, unless otherwise authorized in writing by the CITY. The employment of, contract with, or use of the services of any other person or firm by CONSULTANT, as independent CONSULTANT or otherwise, shall be subject to the prior written approval of the CITY. No provision of this Agreement shall, however, be construed as constituting an agreement between the CITY and any such other person or firm. Nor shall anything contained herein be deemed to give any such party or any third party any claim or right of action against the CITY beyond such as may otherwise exist without regard to this Agreement.

**ARTICLE EIGHT
WAIVER OF CLAIMS**

8.1. CONSULTANT's acceptance of final payment shall constitute a full waiver of any and all claims, except for insurance company subrogation claims, by it against CITY arising out of this Agreement or otherwise related to the Project, except those previously made in writing and identified by CONSULTANT as unsettled at the time of the final payment. Neither the acceptance of CONSULTANT's services nor payment by CITY shall be deemed to be a waiver of any of CITY's rights against CONSULTANT.

**ARTICLE NINE
TERMINATION OR SUSPENSION**

9.1. CONSULTANT shall be considered in material default of this Agreement and such default will be considered cause for CITY to terminate this Agreement, in whole or in part, as further set forth in this section, for any of the following reasons: (a) failure to begin work under the Agreement within the times specified under the Notice(s) to Proceed, or (b) failure to properly and timely perform the services to be provided hereunder or as directed by CITY, or (c) the bankruptcy or insolvency or a general assignment for the benefit of creditors by CONSULTANT or by any of CONSULTANT's principals, officers or directors, or (d) failure to obey laws, ordinances, regulations or other codes of conduct, or (e) failure to perform or abide by the terms or spirit of this Agreement, or (f) for any other just cause. The CITY may so terminate this Agreement, in whole or in part, by

giving CONSULTANT seven (7) calendar day's written notice.

9.2. If, after notice of termination of this Agreement, it is determined for any reason that CONSULTANT was not in default, or that its default was excusable, or that CITY otherwise was not entitled to the remedy against CONSULTANT provided for in paragraph 9.1, then the notice of termination given pursuant to paragraph 9.1 shall be deemed to be the notice of termination provided for in paragraph 9.3 below and CONSULTANT's remedies against CITY shall be the same as and limited to those afforded CONSULTANT under paragraph 9.3 below.

9.3. CITY shall have the right to terminate this Agreement, in whole or in part, without cause upon seven (7) calendar-day's written notice to CONSULTANT. In the event of such termination for convenience, CONSULTANT's recovery against CITY shall be limited to that portion of the fee earned through the date of termination, together with any retainage withheld and any costs reasonably incurred by CONSULTANT that are directly attributable to the termination, but CONSULTANT shall not be entitled to any other or further recovery against CITY, including, but not limited to, anticipated fees or profits on work not required to be performed.

ARTICLE TEN CONFLICT OF INTEREST

10.1 CONSULTANT represents that it presently has no interest and shall acquire no interest, either direct or indirect, which would conflict in any manner with the performance of services required hereunder. CONSULTANT further represents that no persons having any such interest shall be employed to perform those services.

ARTICLE ELEVEN MODIFICATION

11.1. No modification or change in this Agreement shall be valid or binding upon the parties unless in writing and executed by the party or parties intended to be bound by it.

ARTICLE TWELVE NOTICES AND ADDRESS OF RECORD

12.1. All notices required or made pursuant to this Agreement to be given by the parties shall be in writing and shall be delivered by hand or by United States Postal Service Department, first class mail service, postage prepaid, return receipt requested, addressed to the following addresses of record:

CITY OF NAPLES
735 Eighth Street South
Naples, Florida 34102-3796
Att: Bonnie R. MacKenzie, Mayor

THE MERCER GROUP, INC.
48 Fourth Street S.W.
Winter Haven, FL 33880
Att: Tom D. Freijo, Ph.D.

12.2. Either party may change its address of record by written notice to the other party given in accordance with requirements of this Article.

ARTICLE THIRTEEN MISCELLANEOUS

13.1. CONSULTANT, in representing CITY, shall promote the best interest of CITY and assume towards CITY a duty of the highest trust, confidence, and fair dealing.

13.2. No modification, waiver, suspension or termination of the Agreement or of any terms thereof shall impair the rights or liabilities of either party.

13.3. This Agreement is not assignable, in whole or in part, by CONSULTANT without the prior written consent of CITY.

13.4. Waiver by either party of a breach of any provision of this Agreement shall not be deemed to be a waiver of any other breach and shall not be construed to be a modification of the terms of this Agreement.

13.5. The headings of the Articles, Exhibits, Parts and Attachments as contained in this Agreement are for the purpose of convenience only and shall not be deemed to expand, limit or change the provisions in such Articles, Exhibits, Parts and Attachments.

13.6. This Agreement constitutes the entire agreement between the parties hereto and shall supersede, replace and nullify any and all prior agreements or understandings, written or oral, relating to the matter set forth herein, and any such prior agreements or understanding shall have no force or effect whatever on this Agreement.

13.7. CITY and CONSULTANT acknowledge that a successful executive search requires a high level of coordination and cooperation; and both parties agree to work in coordination and cooperation with each other.

13.8. CONSULTANT will:

- (a) Forward applications and related material to the CITY on a weekly basis;
- (b) At a City Council meeting, make recommendations to City Council as may be requested as to candidates that merit further consideration.
- (c) At a City Council meeting, make recommendations to City Council as may be requested as to a candidate that merits final consideration.

13. CONSULTANT's services are advisory to the City Council only. The City Council reserves to itself, and does not delegate to CONSULTANT or to any other person or entity, its authority to consider and select any candidate.

**ARTICLE FOURTEEN
APPLICABLE LAW**

14.1. Unless otherwise specified, this Agreement shall be governed by the laws, rules, and regulations of the State of Florida, and by the laws, rules and regulations of the United States when providing services funded by the United States government. Any suit or action brought by either party to this Agreement against the other party relating to or arising out of this Agreement must be brought in the appropriate Florida state court in Collier County, Florida.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement for the day and year first written above.

ATTEST:

CITY:

CITY OF NAPLES, FLORIDA,
A Municipal Corporation

By: _____
Tara A. Norman, City Clerk

By: _____
Bonnie R. MacKenzie, Mayor

Approved as to form
and legal sufficiency:

By: _____
Robert D. Pritt, City Attorney

CONSULTANT:
THE MERCER GROUP, INC.
A Corporation Authorized to do Business in Florida

Witness

By: _____
Tom D. Freijo, Ph.D.
Senior Vice President

R: Professional Services Agreement

EXHIBIT A
SCOPE OF SERVICES

The Scope of Services is contained in the Proposal submitted by the Mercer Group, a copy of which (without Appendix) is attached hereto and incorporated herein.

The Scope of Services is modified and superseded by the provisions of the Agreement to which the Proposal is attached. In case of conflict, the Agreement governs.

EXHIBIT B
BASIS OF COMPENSATION

B.1.1. As consideration for providing Basic Services as set forth herein in Article I, Section 1.1 of the Agreement, CITY agrees to pay, and CONSULTANT agrees to accept payment, in accordance with the Cost Proposal, contained in Article IV, page 17 of the Proposal, but not to exceed \$14,800.00; plus actual and necessary expenses not to exceed \$5200.00.

B.1.2. As consideration for providing Additional Services as Set forth in Article I, Section 1.1 of the Agreement, CITY agrees to pay, and CONSULTANT agrees to accept payment, as follows:

Time expended at the following hourly rates:

Hourly Rates: \$150.00, plus actual and necessary expenses; not to exceed \$5000.00 for both.

EXHIBIT C
GENERAL INSURANCE REQUIREMENTS

CONSULTANT shall not commence work until he has obtained all the insurance required under this heading, and until such insurance has been approved by the CITY, nor shall CONSULTANT allow any subCONSULTANT to commence work until all similar insurance required of the subCONSULTANT has also been obtained and approved by the CITY.

Certificates of insurance must be issued by an authorized representative of the insurance company at the request and direction of the policyholder and must include sufficient information so as to identify the coverage and the contract for CITY's improvements for which they are issued. Certificates of insurance must be issued by a nationally recognized insurance company with a Best's Rating of no less than B+VII, satisfactory to the CITY, and duly licensed to do business in the state of said Contract.

CONSULTANT shall procure and maintain, during the life of this Contract, Workmen's Compensation Insurance for all of his employees to be engaged in work under this Contract, and he shall require any subCONSULTANT similarly to provide Workmen's Compensation Insurance for all of the latter's employees to be engaged in such work, unless such employees are covered by the protection afforded by CONSULTANT's insurance. In case any employees are to be engaged in hazardous work under this Contract, and are not protected under this Workmen's Compensation statute, CONSULTANT shall provide, and shall cause each subCONSULTANT to provide, adequate coverage for the protection of such employees. It is acceptable to use a State-approved Workmen's Compensation Self-Insurance fund.

CONSULTANT shall take out and maintain during the life of this Contract, Public Liability and Property Damage and shall include Contractual Liability, Personal Injury, Libel, Slander, False Arrest, Malicious Prosecution, Wrongful Entry or Eviction, Broad Form Property Damage, Products, Completed Operations and XCU Coverage to be included on an occurrence basis, and to the full extent of the Contract to protect him, the CITY, and any subCONSULTANT performing work covered by this Contract from damages for personal injury, including accidental death, as well as from claims for property damage, which may arise from operations under this contract, whether such operations be by himself or by a subCONSULTANT, or by anyone directly or indirectly employed by either of them. CONSULTANT shall also maintain automobile liability insurance including "non-owned and hired" coverage. The entire cost of this insurance shall be borne by CONSULTANT.

The amount of such insurance shall be no less than \$1,000,000 annual aggregate for bodily injury and property damage combined per occurrence.

Thirty (30) days cancellation notice required.

The Certificate must state the bid number and title.

When using the "Accord" form of insurance certificate, please note that under the cancellation clause, the following must be deleted: "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company"

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