AGREEMENT

Agreement made this **19th day of August, 2011,** by and between the City of Glen Cove, 9 Glen Street, Glen Cove, NY 11542 ("City") and **Holzmacher, McLendon and Murrell, P.C., with offices located at 575 Broad Hollow Road, Melville, NY 11747,** ("Engineer"), and for **Holzmacher, McLendon and Murrell, P.C.,** to perform the hereinafter described services on behalf of the City:

1. Services to be Performed

   A. Services

   This Agreement covers professional services to the City **as specified in the City's Resolution 6C, approved by the Office of City Clerk on July 26, 2011, for the City to enter into "an on call service agreement with Holzmacher, McLendon and Murrell, P.C., for engineering services in the area of Architectural, Water Supply and Environmental, for a negotiated lump sum compensator or multiplier plus expense."**

   B. Fees

   A request for on call services will be initiated by the City, and Engineer will provide a Not-to-Exceed written estimate to the City. Unless provided otherwise in writing, Engineer's Not-to-Exceed estimate will be based upon Engineer's experience, qualifications, professional judgment and on data submitted by City. Engineer's Not-to-Exceed estimates shall be provided with the Engineer's hourly rate table, all of which shall be reviewed by the City for approval. Hourly rates will be invoiced based on the Engineer's approved rate table to be provided with proposals.

   If Engineer believes that its costs are likely to exceed the Not to Exceed estimate, Engineer will notify City in writing indicating why the estimate will be exceeded, and will provide a revised estimate for the City's review and approval. City shall not be liable for any additional cost(s) invoiced by Engineer in excess of Engineer's Not to Exceed or revised Not to Exceed estimate, as the case may be, unless approved by City in writing.

   C. Changes in Scope of Services

   If City or Engineer requests changes in the services to be performed in accordance with the Not to Exceed, or revised Not to Exceed estimate, Engineer and City, upon mutual agreement, shall execute a written change order describing the changes to the services and authorized budget. Engineer shall make no changes in the services unless approved by City in writing.

2. Time for Performance

A. If Engineer's services are interrupted, suspended, or delayed for any reason beyond the reasonable control of the City, the work schedule and any completion date shall be adjusted accordingly and Engineer shall be compensated for all its increased costs resulting from such interruption, suspension, or delay. In the event the duration of any delay in the services is longer than anticipated or if the costs of such delay are greater than anticipated, City may terminate this Agreement for its convenience.

B. If Engineer's services are interrupted, suspended, or delayed for any reason beyond its reasonable control, requiring the work schedule and any completion date to be adjusted, then in such event the City shall be compensated for all its reasonable increased costs and damages, including reasonable attorneys' fees, resulting from such interruption suspension or delay.

3. Compensation and Payment

A. Compensation

Engineer's invoice shall be due and payable thirty (30) days from its receipt by City. If City objects to all or any portion of the invoice, City shall notify Engineer in writing within ten (10) days from its receipt of the invoice, identify the cause of disagreement, and pay when due that portion of the invoice that is not in dispute provided no outstanding claim exists against Engineer on behalf of the City. City's failure to provide such notice shall be evidence that the City has accepted the invoice as written. In the event the Engineer and City cannot resolve a dispute regarding the invoiced amount within thirty (30) days after receipt by Engineer of City's notice of disagreement, the dispute shall be subject to the Dispute Resolution provision of this Agreement. Engineer shall provide documentation to substantiate all claims for payment and shall itemize all invoice(s) showing itemized hours spent, including employee name, title, base rate, fringe factor and multiplier, travel and per diem expenses. The City does not pay premium rates for any overtime worked unless specifically authorized in writing by the City in advance of such expenditure. All expenses approved by the City will be paid at direct cost, with no allowance for markup.

B. Taxes

All local or state taxes or fees related to the Services (except any Federal and State income taxes) will be paid by Engineer and invoiced to City.

4. Engineer Responsibilities

A. Standard of Care

Engineer will perform the services in a manner consistent with the level of care and skill generally exercised by firms providing the same or similar professional engineering and/or architectural services in the New York-Long Island area under similar conditions at the time the services are provided. Engineer shall, without additional compensation, correct or revise any of its reports and other deliverables, not consistent with this standard of care which are made known to Engineer by City within one (1) year after the deliverable is sent to City.

B. Cooperation of City

Engineer will regularly advise City of the status of any particular project, and will coordinate its activities with City and accommodate other City's activities at the project site. Engineer and City shall each designate an authorized representative to be available for consultation, assistance and coordination of activities.

C. Responsibility for Uncompleted Services

Engineer and City intend that Engineer complete the services described in Engineer's proposal. If any of the services are eliminated, or if Engineer is not retained to provide subsequent services, Engineer's responsibility to City shall extend only to services completed as of the termination date.

D. Utilities

Where the scope of work of any particular project may require utility mark out services etc., the Engineer shall make all necessary arrangements to complete the project.

5. <u>City's Responsibilities</u>

A. Information

City agrees to provide information in its possession including surveys, studies, available descriptive information regarding construction, prior site evaluations and current conditions.

B. Cooperation with Engineer

City will cooperate with Engineer to complete the Project in a timely, efficient, and cost-effective manner. City shall designate an authorized representative familiar with a project who shall be available to Engineer and who has the authority to make all decisions required to assure that Engineer can provide the services.

6. Permits, Certifications, and Other Approvals

Unless specified otherwise Engineer shall obtain in City's name, all permits and other approvals required for a project. Engineer's costs shall be invoiced to City.

7. Confidentiality

With the exception noted below, Engineer shall consider all City's information confidential and will not disclose City's information or its findings to any third party unless directed by a court order or by the City in writing. In the event Engineer is directed to provide information or findings by court order it will cooperate with City by providing as much notice as possible under the circumstances and by other lawful means as City may request.

City understands and agrees that applicable law may obligate Engineer to take action to protect public health, safety, or the environment, or to disclose to governmental regulatory agencies conditions that are discovered during the course of providing services under this Agreement. Engineer will notify City prior to taking such action or disclosing such conditions to any governmental regulatory agencies, except that Engineer shall not be required to provide prior notice to City if the time required to provide such notice may result in or increase the risk of imminent harm to persons, property, or the environment, or may render Engineer criminally or civilly liable under applicable law and Engineer disclosure under these circumstances shall not be a breach of this Agreement.

With City's prior written approval, Engineer may use City's name and a general description of a project as a reference for business development purposes.

8. Ownership of Documents and Materials

All documents, including reports, drawings and specifications prepared by Engineer pursuant to this Agreement are instruments of its services and Engineer will retain a true copy of all information provided to the City under this Agreement. All project related information is the City's property.

City may make copies of Engineer's reports available to other parties. However, City shall not intentionally disclose any portions or excerpts of any report in a way that may mislead others. Engineer shall have no obligation to any third party unless agreed to in writing and is not responsible for City's use of Engineer work product in any other project or by any other party.

9. Allocation of Risk

City understands that any required structural evaluation services will be done through visual inspection and entail uncertainty and the risk that certain structural problems will not be evident to a trained inspector. This statement shall hold true unless Engineer is directed to perform destructive or invasive investigations and testing which shall be

specifically stipulated in writing by the City and agreed upon by the Engineer.

A. Insurance

1) Unless other limits are specifically stipulated in writing for a specific project, Engineer will maintain the following insurance coverage over the duration of the project:

Insurance	Limits
Worker's Compensation Coverage A Employer's Liability/Coverage B	Statutory $1,000,000 each accident
Commercial General Liability (including Contractual Liability Bodily Injury and Property Damage Combined, and Personal Injury)	$1,000,000 each occurrence $2,000,000 in aggregate
Commercial Automobile Liability (Bodily Injury and Property Damage Limit Combined)	$1,000,000 combined single
Professional Liability	$1,000,000 each claim $1,000,000 in aggregate

2) Engineer will provide City with a certificate evidencing that this insurance is in place and that the City is named as an additional insured on applicable policies. Engineer's policy requires that the Insurer give City thirty (30) days prior written notice of cancellation or material alteration in the policies or any part thereof in a manner adverse to City.

B. Indemnification

Engineer agrees to indemnify and hold City and its officers, directors, agents, servants and employees harmless from and against claims, suits, damages, or losses incurred by City, to the extent caused by the negligent acts or willful misconduct of Engineer or its officers, directors, agents, servants or employees. This Agreement to indemnify, and hold City harmless shall not extend to any suit, claims, damages, or losses caused by the acts, omissions, or willfull conduct of City.

No claim may be asserted by either party against the other, unless an action on the claim is commenced within two (2) years after the date of Engineer's final invoice to City for any particular project. This limitation shall not apply to any claim due to personal injury or death of a third party. Engineer shall not be liable for any special, incidental or consequential damages unless said damages are occasioned

by the negligence of Engineer, its officers, directors, agents, servants or employees.

10. Termination

A. Termination for Cause

Either party may terminate this Agreement for (1) failure of the other party to substantially perform its responsibilities under this Agreement, (2) substantial violation of any provision of the Agreement, or (3) discovery of conditions that differ materially from those ordinarily found to exist in, or generally recognized as inherent in any of the services contemplated under this Agreement. The terminating party shall provide: (a) no less than ten (10) days written notice of its intent to terminate, specifying the reasons; (b) an opportunity for the terminated party to cure the alleged failure or violation within ten (10) days; and (c) an opportunity to reasonably consult with the terminating party before the effective date of termination.

B. Termination for Convenience

City may terminate this Agreement for its convenience on written notice of its intent to terminate. Each party shall be subject to all provisions of this Agreement during the period after notice and prior to the effective date of termination, unless otherwise agreed in writing.

C. Procedures After Termination

1) Engineer shall submit a final invoice to City as soon as practical after the effective date of termination. The final invoice will reflect all services and charges up to the effective termination date, including the cost to demobilize and terminate the services.

2) City shall pay Engineer final invoice within thirty (30) days after receipt. Any dispute relating to the final invoice will be resolved according to the Dispute Resolution provisions of this Agreement.

11. Dispute Resolution

A. Any action to resolve a dispute arising out of this Agreement must be filed within one (1) year from the time the cause of action arose or it shall be time barred.

B. The parties shall attempt in good faith resolve any dispute, controversy or claim related to this Agreement within ten (10) business days after the date any such issue arises (the "Issue Date").

C. If the parties cannot resolve a dispute within this period, the parties agree to

submit the dispute to mediation within thirty (30) days after the Issue Date and may use any mediator upon which they mutually agree. If the parties cannot mutually agree on a mediator within forty (40) days after the Issue Date, the parties will each select a mediator. The two (2) mediators will then select the mediator. The cost of any mediation will be split equally between the parties.

D. If the parties are unsuccessful in their good faith attempt to mediate the dispute, the dispute may, on the agreement of the parties, be settled by arbitration in the County of Nassau, State of New York. The parties agree to waive any jury trial.

E. The laws of the State of New York will control. The parties agree that a judgment on an arbitration award may be obtained from and enforced in any court having appropriate jurisdiction.

12. Miscellaneous

A. Successors And Assigns

1) This Agreement shall be binding on Engineer and City and their successors, legal representatives and assigns.
2) In accordance with the provisions of section 109 of the General Municipal Law, the Consultant is hereby prohibited from assigning, transferring, conveying, subletting or otherwise disposing of this agreement, or of its right, title or interest in this agreement, or its power to execute this Agreement, to any other person or corporation without the previous consent in writing of the City. An assignment shall not relieve the assigning party from any responsibility, duty, or obligation under this Agreement, unless expressly agreed to in writing. Any attempt by either party to assign this Agreement in violation of the above provision shall be null and void.
3) Engineer may retain any subcontractors which, in Engineer's opinion, can assist in the performance of services under this Agreement. Engineer shall be responsible for all services provided by its subcontractor(s) as if the services were provided directly by Engineer.
4) All duties, responsibilities, rights, and interests created by this Agreement are for the sole and exclusive benefit of Engineer and City, and not for the benefit of any third party.

B. Notices

Any written notice required or authorized under this Agreement shall be personally delivered, sent by certified mail or overnight delivery to the other party at the address set forth for each party herein authorized representatives designated under this Agreement. The party providing notice must be able to document delivery to the other party by means of an affidavit of service or appropriate receipt.

C. Survival Of Sections

Articles 3, 7, 8, 9, 10 and 11 of this Agreement shall survive the completion of the services or termination of this Agreement.

D. Severability

If any provision of this Agreement is determined to be void or unenforceable by a court, all remaining provisions shall continue to be valid and enforceable. The parties when reasonably possible agree to reform or replace any void or unenforceable provision with a valid and enforceable provision that comes as close as possible to expressing the intention of the void or unenforceable provision.

E. Paragraph Headings

The paragraph headings in this Agreement are included solely for reference, and shall not define, limit, or affect the construction or interpretation of this Agreement.

F. Whole Agreement

The Agreement, as supplemented by any documented changes, constitutes the complete and final Agreement between Engineer and City. This Agreement supersedes all prior or contemporaneous Agreements, communications, representations, undertakings or understandings between the parties, whether oral or written, including but not limited to, purchase orders relating to any project, except as expressly incorporated into this Agreement. Modifications to this Agreement shall not be binding unless made in writing and signed by authorized representatives of Engineer and City.

1) All preprinted terms and conditions of any purchase order used to request or authorize services are void and of no effect unless otherwise agreed to in writing by the parties.

2) To the extent that they are inconsistent or contradictory, this Agreement shall take precedence over all other documents, except amendments expressly revising it.

3) Any term and/or condition set forth in a change order executed after the date of this Agreement shall take precedence over any inconsistent or contradictory term in this Agreement.

G. Independent Contractor

Engineer shall be fully independent in performing services under this Agreement

and shall not act as an agent or employee of City. Engineer shall be solely responsible for its employees, subcontractors, servants and agents and for their actions, compensation, benefits, contributions and taxes.

H. Rules

No rules, requirements or customs of any society or association of professional engineers or any similar association shall affect this Agreement in any way whatsoever or be binding upon the City.

I. Required Provisions of Law

Each and every provision of law and clause required by law to be inserted in this contract shall be deemed to have been inserted herein. If any such provision is not inserted through mistake or otherwise, then upon the application of either party, this contract shall be physically amended forthwith to make such insertion. In particular, the Consultant shall, among other things, fully comply with:

(a) Labor Law section 220-e and Executive Law sections 291-299 and the Civil Rights Law relating to prohibition against discrimination and equal opportunity.

(b) Affirmative action as required by the Labor Law.

(c) Prevention of dust hazard required by Labor Law section 222-a.

(d) Preference in employment of persons required by Labor Law section 222.

(e) Eight-hour workday as required by Labor Law section 220(2).

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

CITY OF GLEN COVE

By (Signature): _____
WILLIAM ARCHAMBAULT, DIRECTOR OF PUBLIC WORKS

Date: 8/25/11

ENGINEER/ARCHITECT

By (Signature): _____

By (Print Name of Signer): Dennis M. Kelleher

Title: Sr. Vice President

Firm: **Holzmacher, McLendon and Murrell, P.C.**

Date: 8-22-11

(CORPORATE SEAL):

ACKNOWLEDGMENT OF PRINCIPAL OF A CORPORATION

STATE OF NEW YORK)
:ss:
COUNTY OF ~~NASSAU~~ SUFFOLK)

On this 22 day of August, 2011, before me personally came Dennis M. Kelleher to me known, who, being by me duly sworn did depose and say that (s)he resides at in Centereach NY, that (s)he is the Senior Vice President of **Holzmacher, McLendon and Murrell, P.C.**, the Corporation described in and which executed the foregoing instrument; that (s)he knows the Seal of said Corporation; that one of the seals affixed to said instrument is such seal; that it was so affixed by order of the Board of Directors of said corporation and that (s)he signed his/her name thereto by like order.

(SEAL) _____
Notary Public

KATHLEEN F. CANTWELL
Notary Public, State of New York
No. 01CA4942555
Qualified in Suffolk County
Commission Expires September 26, 2014