

SERVICES AGREEMENT

**Magnolia River Services, Inc.
and
City of Duluth, Minnesota**

THIS SERVICES AGREEMENT (“Agreement”) is made and entered into as of the ____ day of _____, 2019 (“Effective Date”) by and between the **City of Duluth**, a Municipality organized and existing under the laws of the State of Minnesota (“Client”), whose address is 411 West First Street, Duluth, Minnesota 55802, and **Magnolia River Services, Inc.**, a corporation organized and existing under the laws of the State of Alabama (“Magnolia River”), whose address is 408 Bank Street, Decatur, AL 35601; Client and Magnolia River each may be individually referred to as a “Party” and be collectively referred to as the “Parties.”

For and in consideration of the promises, agreements, and representations contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Client Order. “Client Order” shall mean a written purchase order, proposal, work order, or task order issued by Client to Magnolia River under this Agreement and accepted or executed by Magnolia River. Client Orders mutually accepted in writing by the Parties shall be incorporated by reference into this Agreement. Each Client Order shall be governed by the specific terms of this Agreement. A Sample Client Order is attached hereto as Exhibit 1, but may also be issued in other formats.

2. Services. “Services” shall mean the services described in any Client Order. Magnolia River will perform the Services in accordance with this Agreement. Client agrees to provide working space and facilities, and any other services and materials Magnolia River or its personnel may reasonably request in order to perform the Services.

3. Source Materials. “Source Materials” shall mean the information necessary for Magnolia River to properly perform the Services and any other data provided by Client including softcopy and hardcopy materials. Client will provide Magnolia River with the “Source Materials” necessary for the Services to be performed. Magnolia River may rely on the accuracy of the Source Materials.

- (a) Should Magnolia River determine that relevant information is missing from the provided Source Materials and the missing information is essential for Magnolia River to be able to proceed with completion of the Services, Magnolia River will notify Client and request direction before proceeding further with the Services. Client may provide the missing information or authorize Magnolia River to perform additional work to obtain the missing information. Client shall not be liable for any additional costs associated with any missing data unless Client pre-approves such costs in writing.
- (b) Should Magnolia River discover that the Source Materials contain inaccuracies and the inaccuracies must be either corrected or new data obtained before Magnolia River can proceed with the completion of the Services, Magnolia River will notify Client in writing of the inaccuracies and the effect upon its performance of the Services before proceeding further with the Services and Client must do one of the following: (i) replace the defective Source Materials; or (ii) increase the amount to be paid to Magnolia River under the applicable Client Order(s) to cover the cost of correcting the inaccuracies; or (iii) waive or change the affected requirements and direct Magnolia River in writing to proceed based on the existing Source Materials. Client shall not be liable for any additional costs associated with any inaccurate Source Materials unless Client pre-approves such costs in writing.
- (c) Any delay in obtaining direction or authorization from Client will be deemed an excusable delay.

4. Change Order. At any time, Client may request a change in writing to the Services being provided by Magnolia River (“Change Order”). If Magnolia River determines that the Change Order, or any other instruction or decision made by Client, would affect the cost of the Services, Magnolia River will, within ten (10) days after receipt of the request, give written notice to Client of the proposed cost adjustment. Client will respond to Magnolia River within ten (10) days after receipt of the proposed cost adjustment on how to proceed with the Change Order. Any Change Order and any related cost adjustment must be approved by both Parties in writing to be binding, and shall be incorporated by reference into this Agreement.

5. Term. This Agreement shall commence on the Effective Date, and unless modified by mutual written agreement of the Parties or terminated earlier pursuant to the terms hereof, shall continue for a period of six (6) years. Upon termination of this Agreement, Magnolia River shall promptly return to Client all copies of any Client data, records, or materials of whatever nature or kind, including all materials incorporating any of Client's confidential or proprietary information.

6. Fees. Magnolia River will invoice Client as stated in the Client Order. If the payment schedule is not stated in the Client Order, Magnolia River will invoice Client through monthly progress billings during the performance of the Services, unless the Services are to be completed in less than one (1) month. If the Services are to be completed in less than one (1) month, Magnolia River will invoice Client upon completion of the Services. Mileage, per diem, and lodging, if any, will be invoiced separately. Client shall pay each invoice within thirty (30) days following receipt of such invoice and completion of the Services further-described in the invoice, either by electronic means to the account provided by Magnolia River or by check to the address shown on the invoice.

7. Independent Contractor Status. Each Party is and shall be an Independent Contractor who has sole control of the manner and means of performing its obligations under this Agreement. Nothing herein shall be construed as creating any relationship between the Parties other than that of Independent Contractors. Neither Party is an employee, an agent, a partner, or joint venture of the other Party. Neither Party shall have, nor shall claim, suggest, or imply that it has any right, power, or authority to enter into any agreement or obligation on behalf of, or binding upon, the other Party or any of its representatives, nor shall either Party, or any of its owners, officers, employees, contractors, or agents, represent itself as having any employment position with the other Party. Neither Party shall provide any benefits, including, but not limited to, health insurance coverage, paid vacation, pension plan, workers' compensation coverage, or unemployment benefits to the other Party.

8. Indemnification. In relation to this Agreement, each Party shall defend, indemnify and hold the other Party harmless from and against any and all liabilities, losses, damages, fines, judgments, claims, suits, actions, and expenses (including, but not limited to, attorney's fees and costs) arising out of or relating to such Party's own willful misconduct, gross negligence, or negligence that results in, or relates to: (a) personal injury or death to persons, including employees, contractors, and agents; or (b) damage to personal or real property. Each Party agrees to give the other Party prompt notice of any such claim, demand, or action and shall, to the extent the other Party is not adversely affected, cooperate fully with such Party in defense and settlement of said claim, demand, or action.

9. Insurance. To the extent that Magnolia River's personnel may perform Services at Client's premises, Magnolia River shall maintain comprehensive general liability insurance, including broad form property damage coverage, with limits of at least two million dollars (\$2,000,000) combined, including single limit for personal injury and property injury and property damage for each occurrence. Magnolia River shall provide Client with evidence satisfactory to Client of such insurance.

10. LIMITATION OF LIABILITY. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, MAGNOLIA RIVER'S CUMULATIVE LIABILITY UNDER OR FOR ANY AND ALL BREACHES OF THIS AGREEMENT (WHETHER IN CONTRACT, TORT OR OTHERWISE) AND FOR ITS INDEMNIFICATION OBLIGATION HEREIN SHALL BE LIMITED TO TWO MILLION and 00/100 DOLLARS (\$2,000,000) FOR SERVICES UNDER THIS AGREEMENT. IN NO EVENT SHALL MAGNOLIA RIVER BE LIABLE FOR ANY LOSS OF PROFITS, ANY INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES, OR FOR ANY CLAIMS OR DEMANDS BROUGHT AGAINST CLIENT BY ANY THIRD PARTY EVEN IF MAGNOLIA RIVER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH CLAIMS OR DEMANDS. MAGNOLIA RIVER SHALL NOT BE LIABLE TO CLIENT FOR ANY FAILURE OR DELAY CAUSED BY EVENTS BEYOND MAGNOLIA RIVER'S CONTROL, INCLUDING, WITHOUT LIMITATION, CLIENT'S FAILURE TO FURNISH NECESSARY INFORMATION; SABOTAGE; FAILURE OR DELAYS IN TRANSPORTATION OR COMMUNICATION; FAILURES OR SUBSTITUTIONS OF EQUIPMENT; LABOR DISPUTES; ACCIDENTS; SHORTAGES OF LABOR, FUEL, RAW MATERIALS OR EQUIPMENT; OR TECHNICAL FAILURES. THIS LIMITATION UPON DAMAGES AND CLAIMS IS INTENDED TO APPLY WITHOUT REGARD TO WHETHER OTHER PROVISIONS OF THIS AGREEMENT HAVE BEEN BREACHED OR HAVE PROVEN INEFFECTIVE.

11. Entire Agreement; Governing Law. This Agreement is the sole and complete agreement between the Parties relating to the subject matter hereof and supersedes all prior understandings, writings, proposals, or communications, oral or written, of either Party. Notwithstanding the foregoing, the Parties may enter into other agreements relating to other subject matters and each agreement shall stand on its own. The Parties acknowledge and agree that this Agreement does not apply to and does not grant Client any rights related to Magnolia River’s packaged software, FlowGIS, or any elements thereof, or any tailored version thereof, or any other packaged software offered by Magnolia River, the use of which shall be governed by the applicable End User License Agreement (“EULA”) and/or Software-as-a-Service Agreement (“SaaS”) whether such EULA and/or SaaS is in writing or in electronic form. This Agreement may only be amended in writing, and any Amendment to this Agreement must be signed by the authorized representatives of both Parties. This Agreement, and any Amendment to this Agreement, may be executed and delivered in counterparts all of which taken together constitute one single agreement between the Parties. The section and article headings used herein are for reference only, and shall not limit or control any term or provision of this Agreement or the interpretation or construction hereof. If any of the provisions of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

12. Non-Solicitation. During the term of this Agreement and for a period of one (1) year after the expiration or termination of this Agreement for any reason whatsoever, Client covenants and agrees that, unless it receives written permission from the Magnolia River, it will not directly or indirectly, either individually, in partnership, jointly or in conjunction with any person, firm, partnership, corporation, or unincorporated association of any kind, whether as principal, agent, employee, contractor, shareholder, or in any other capacity whatsoever,

- (i) Solicit, divert or appropriate or attempt to solicit, divert or appropriate any employee of Magnolia River who was an employee of Magnolia River during the term of this Agreement with whom it had any direct or indirect contact during the term of this Agreement, or
- (ii) hire or attempt to hire any employee of Magnolia River who was an employee of Magnolia River during the term of this Agreement with whom it had any direct or indirect contact during the term of this Agreement. The Parties hereto acknowledge and agree that the period of time for such non-solicitation is reasonable and necessary for the protection of Magnolia River’s business interests.

13. Publicity and Use of Logo. Client grants permission for Magnolia River to publish and/or use its company logo or registered mark and name for purposes of this project, to add to project deliverables, paper and softcopy files. Client grants to Magnolia River a Trademark License for the use of Client’s logo. Client further agrees to serve as a project reference for Magnolia River and grants permission for Magnolia River to use project particulars and contact information in marketing materials and on Magnolia River’s website.

14. Notices. By giving to the other Party hereto at least ten (10) Days’ notice thereof, each Party hereto shall have the right from time to time and at any time while this Agreement is in effect to change its respective address, email address or fax number and each shall have the right to specify as its new address, email address or fax number any other address, email address or fax number. Each notice to Magnolia River and Client shall be addressed, until notice of change as aforesaid has been made, as follows:

If intended for Magnolia River, to:

Magnolia River Services, Inc.
408 Bank Street
Decatur, Alabama 35601
Attention: Mr. Ronald S. Hoff, Jr.
Telephone Number: (256) 773-9420
Facsimile Number: (775) 383-4345
Email address: Ronnie.Hoff@Magnolia-River.com

If intended for Client, to:

City of Duluth
Information Technology Office
Attention: Mr. Troy P. Kubes
411 West 1st Street, room 210A
Duluth, Minnesota
Email address: tcubes@duluthmn.gov

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

“Client”

CITY OF DULUTH

By _____
Mayor

Attest _____
City Clerk

By _____
Chief Administrative Officer

Countersigned:

City Auditor

Approved as to form:

City Attorney

“Magnolia River”

Magnolia River Services, Inc.

By: _____

Print Name: _____

Its: _____

Exhibit 1 to Services Agreement

Sample Client Order

**Client Order Number _____ issued under
Services Agreement dated _____**

Date Issued:

Work to be performed by Magnolia River:

Delivery date(s):

Compensation to be paid to Magnolia River:

Invoicing and Payment Terms:

Other Pertinent Information:

“Client”

“Magnolia River”

Magnolia River Services, Inc.

By: _____SAMPLE – DO NOT SIGN_____

By: _____SAMPLE – DO NOT SIGN_____

Print Name: _____

Print Name: _____

Its: _____

Its: _____