

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement ("**Agreement**") is entered into as of _____, 2022 ("**Effective Date**"), by and between TBC – The Boring Company ("**TBC**"), and The City of Kyle ("**Client**").

1. SERVICES.

1.1 Performance of Services.

TBC agrees to use commercially reasonable efforts to perform (or cause to be performed) the services set forth in one or more statements of work (each and "**SOW**") executed by the parties ("**Services**"). The first SOW is attached as Exhibit A. Services will be provided in material accordance with any specifications set out in the SOW ("**Specifications**"). In the event an exhibit hereto or SOW conflicts with this Agreement – the exhibit or SOW shall control.

1.2 Personnel.

Client shall provide a suitable and safe work environment for TBC employees and subcontractors while such employees and subcontractors are on Client's premises. While on Client's premises, TBC's employees and subcontractors shall comply with all reasonable security practices and procedures generally prescribed by Client. TBC employees and subcontractors shall not be required to sign any waivers, releases or other documents to gain access to Client's premises in connection with the performance of the Services, and any such waivers, releases or other documents shall be invalid and shall have no effect. TBC may replace or change employees and subcontractors as it deems

1.3 Reasonable.

For the term of this Agreement and for twelve (12) months thereafter, Client agrees not to solicit or retain the services of any person who is an employee or contractor of TBC and who performed Services.

1.4 Client's Obligations.

Client acknowledges that Client's timely provision of (and TBC's access to) Client facilities, equipment, assistance, cooperation, and complete and accurate information and data from Client's officers, agents and employees ("**Cooperation**") may be essential to the performance of the Services, and that TBC shall not be liable for any delay or deficiency in performing the Services if such delay deficiency results from Client's failure to provide full Cooperation as required hereunder. Cooperation includes, but is not limited to, designating a project manager to interface with TBC during the course of the Services and allocating and engaging additional resources as may be reasonably required by TBC to assist it in performing the Services.

2. PAYMENTS.

2.1 Fees.

Client shall pay to TBC the fees set forth in an SOW in accordance with the terms and conditions set forth therein.

2.2 Expenses.

Client shall reimburse TBC for all reasonable travel, lodging, communications, shipping charges and out-of-pocket expenses incurred by TBC in connection with providing the Services.

2.3 Payment Terms.

All amounts payable by Client hereunder shall be in US Dollars, due and payable within thirty (30) days of TBC's electronic transmission of invoice to Client. Client agrees to pay interest at the rate of one and one-half percent (1.5%) per month (or the maximum rate permitted by applicable law, whichever is less) for all amounts not paid within thirty (30) days from the date of the invoice therefor. In addition, Client is responsible for all costs of collection (including attorneys' fees). If payments are more than five (5) days late, TBC may suspend the Services until such payment is made (and may charge a reinstatement fee). If Client disputes an invoice, it may withhold the disputed portion but shall pay the undisputed portion. No interest shall be incurred on any unpaid or adjusted invoice unless it is determined that TBC is due all or a portion of the disputed amount.

3. TERM; TERMINATION.

3.1 Term.

This Agreement will begin on the Effective Date and terminate as set forth below. Each SOW will have the term set forth therein.

3.2 Termination.

Client may terminate this agreement with ten (10) days prior written notice. In the event that Client materially breaches this Agreement (or, for clarity, any SOW) and such breach continues for a period of thirty (30) days following written notice from TBC, this Agreement may be terminated by TBC giving notice of termination (provided that the initial breach notice must provide sufficient detail regarding the breach and state the intent to terminate if not cured). Effect of Termination.

On termination of this Agreement for any reason, (i) all SOWs will terminate and (ii) Client will pay TBC for all services provided and all costs incurred up to the date of termination. All provisions of this Agreement which by their nature should survive termination, shall survive, including all outstanding payment obligations.

4. PROPRIETARY RIGHTS.

4.1 IP Assignment.

Client will own all deliverables specifically created for Client and described in an SOW ("**Deliverables**"). TBC shall and hereby does assign all such intellectual property rights in the Deliverables to Client. In addition, at Client's request and expense, TBC will help Client record and perfect such rights. Notwithstanding the foregoing, TBC does not assign any TBC IP. "**TBC IP**" means all intellectual property that is either (i) created by TBC (or any of its providers) prior to the effective date of the applicable SOW, or (ii) created by TBC (or any of its providers) separately from the applicable Deliverable (even if otherwise created in the course of performing the applicable SOW). To the extent any TBC IP is incorporated into any Deliverable by TBC, it grants Client a perpetual, royalty-free, license to use such TBC IP as necessary to use the applicable Deliverable. Except as set forth above in this Section 4.1, no intellectual property rights are assigned or transferred hereunder. Furthermore, notwithstanding the execution of this Agreement, TBC retains the right to pursue or develop any project contemplated herein if a subsequent construction contract is not executed with Client for such project.

4.2 Feedback.

Notwithstanding anything else, Client grants TBC a perpetual, irrevocable, royalty free, paid-up, sub-licensable, right and license to use, display, reproduce, distribute and otherwise exploit Feedback for any purposes. "Feedback" means all suggestions for improvement or enhancement, recommendations, comments, opinions, input, or other feedback provided by Client (in any form) to TBC with respect to the Services. TBC agrees that all Feedback is provided "AS IS".

4.3 Reservation of Rights.

Nothing in this Agreement shall be deemed to grant, directly or by implication, estoppel or otherwise, any right or license with respect to any technology or other intellectual property rights, and each party retains all right, title and interest in and to their respective technologies and other intellectual property rights.

5. WARRANTIES; DISCLAIMER.

5.1 Warranties.

TBC represents and warrants that (i) it has the right and power to execute this Agreement and perform the Services, (ii) the Services will not conflict with any obligations TBC has to any third party, (iii) the Services will be provided in accordance with applicable laws and regulation, and (iv) the Services will be free of material defects (subject to the last sentence of this Section 5.1). Section 5.1(iv) will not apply to the extent any issues are caused by information, specifications, content, material, or instructions provided by Client or any third party acting on Client's behalf. In the event of a breach of Section 5.1(iv), TBC will use commercially reasonable efforts to fix the applicable issue free of charge. Client must notify TBC of such breach within thirty (30) days from performance of the applicable Services.

5.2 Disclaimer.

EXCEPT AS EXPRESSLY SET FORTH IN SECTION 5.1 ABOVE, TBC MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, AS TO ANY OTHER MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE CONDITION OF THE SERVICES, AND TBC HEREBY EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR NEED, ACCURACY, NON-INFRINGEMENT OF THIRD PARTY RIGHTS AND TITLE, AND ANY WARRANTIES THAT MAY ARISE FROM COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE.

6. LIMITATION OF LIABILITY.

EXCEPT FOR A BREACH OF CONFIDENTIALITY, NEITHER PARTY WILL BE LIABLE IN CONNECTION WITH ANY SUBJECT MATTER OF THIS AGREEMENT FOR ANY (I) INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES, EVEN IF NOT FORESEEABLE, OR (II) AMOUNTS IN THE AGGREGATE IN EXCESS OF THE FEES PAID TO TBC HEREUNDER DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRIOR TO THE DATE THE CAUSE OF ACTION ACCRUES. IN ADDITION, TBC WILL NOT BE LIABLE FOR ANY COST OR PROCUREMENT OF SUBSTITUTE SERVICES. WITH RESPECT TO INDEMNITY OBLIGATIONS, THE CAP IN SECTION 6(II) IS HEREBY INCREASED TO THIRTY-SIX (36) MONTHS.

Except for actions for nonpayment, no action, regardless of form, arising out of this Agreement may be brought by either party more than one (1) year after the cause of action has accrued.

7. CONFIDENTIALITY.

7.1 Confidential Information.

By virtue of this Agreement, the parties may have access to information that is confidential to one another ("**Confidential Information**"). For purposes of this Agreement, "Confidential Information" of a party means information, ideas, materials or other subject matter of such party, whether disclosed orally, in writing or otherwise, that is provided under circumstances reasonably indicating that it is confidential or proprietary. Confidential Information includes, without limitation, the terms and conditions of this Agreement; all business plans, technical information or data, product ideas, methodologies, calculation algorithms and analytical routines; and all personnel, Client, contracts and financial information or materials disclosed or otherwise provided by such party ("**Disclosing Party**") to the other party ("**Receiving Party**"). Confidential Information does not include that which (a) is already in the Receiving Party's possession at the time of disclosure to the Receiving Party, (b) is or becomes generally available to the public other than as a result of any action or inaction of the Receiving Party, (c) is obtained by the Receiving Party from an unrelated third party without a duty of confidentiality, or (d) is independently developed by the Receiving Party.

7.2 Restrictions on Use.

The Receiving Party shall not use Confidential Information of the Disclosing Party for any purpose other than in furtherance of this Agreement and the activities described herein. The Receiving Party shall not disclose Confidential Information of the Disclosing Party to any third parties except as otherwise permitted hereunder. The Receiving Party may disclose Confidential Information of the Disclosing Party only to those employees or contractors who have a need to know such Confidential Information and who are bound to retain the confidentiality thereof under provisions (including, without limitation, provisions relating to nonuse and nondisclosure) no less restrictive than those required by the Receiving Party for its own Confidential Information. The Receiving Party shall maintain Confidential Information of the Disclosing Party with at least the same degree of care it uses to protect its own proprietary information of a similar nature or sensitivity, but no less than reasonable care under the circumstances. Each party shall advise the other party in writing of any misappropriation or misuse of Confidential Information of the other party of which the notifying party becomes aware. The mention of TBC or the relationship between Client and TBC without prior consent in marketing materials or public statements, including in press releases, interviews, and advertisements, is prohibited. Each party agrees that it will not at any time do or cause to be done any act or thing in any way impairing any right, title, interest, or reputation in the copyright, trademark or service mark interests of the other party or its affiliated entities. Any publicity, press releases, advertising, printed materials, brochures or presentation or display materials of any kind or nature with respect to the Agreement or the Services shall be subject to mutual agreement.

7.3 Exclusions.

Notwithstanding the foregoing, this Agreement shall not prevent the Receiving Party from disclosing Confidential Information of the Disclosing Party to the extent required by a judicial order or other legal obligation, provided that, in such event, the Receiving Party shall promptly notify the Disclosing Party to allow intervention (and shall cooperate with the Disclosing Party) to contest or minimize the scope of the disclosure (including application for a protective order). Further, each party may disclose the terms and conditions of this Agreement: (a) as required by the applicable securities laws, including, without limitation, requirements to file a copy of this Agreement (redacted to the extent reasonably permitted by applicable law) or to disclose information regarding the provisions hereof or performance hereunder to applicable regulatory authorities; (b) in confidence, to legal counsel; (c) in confidence, to accountants, banks, and financing sources and their advisors; and (d) in connection with the enforcement of this Agreement or any rights hereunder.

7.4 Equitable Relief.

Each party (as Receiving Party) acknowledges that the Disclosing Party considers its Confidential Information to contain trade secrets of the Disclosing Party and that any unauthorized use or disclosure of such information would cause the Disclosing Party irreparable harm for which its remedies at law would be inadequate. Accordingly, each party (as Receiving Party) acknowledges and agrees that the Disclosing Party will be entitled, in addition to any other remedies available to it at law or in equity, to the issuance of injunctive relief, without bond, enjoining any breach or threatened breach of the Receiving Party's obligations hereunder with respect to the Confidential Information of the Disclosing Party, and such further relief as any court of competent jurisdiction may deem just and proper.

7.5 Return of Materials.

Upon termination of this Agreement, each party (as Receiving Party) will immediately return to the Disclosing Party all Confidential Information of the Disclosing Party embodied in tangible (including electronic) form or, at the Disclosing Party's discretion, destroy all such Confidential Information and certify in writing to the Disclosing Party that all such Confidential Information has been destroyed.

8. INDEMNITY.

TBC will indemnify and hold Client harmless from and against all third party claims (and all resulting, to the extent payable out of pocket: damages, liability, costs and expenses – including reasonable attorney's fees) arising from a breach of Section 5.1 or its gross negligence or willful misconduct; provided that, Client provides TBC with prompt written notice of all claims and threats thereof, sole control of all defense and settlement activities and all reasonably requested assistance with respect thereto. Client will not settle any claim without TBC's written consent.

Client shall release and indemnify TBC in connection with any unauthorized revision, alteration, or deviation to the Deliverables subsequent to TBC's completion of the Services, or any use of Deliverables beyond the scope contemplated under this Agreement without engagement of TBC.

9. GENERAL.

9.1 Integration and Severability.

This Agreement is the final, complete and exclusive agreement between the parties relating to the subject matter hereof, and supersedes all prior or contemporaneous proposals, understandings, representations, warranties, promises and other communications, whether oral or written, relating to such subject matter. If any provision of this Agreement is held by a court of competent jurisdiction to be unenforceable for any reason, the remaining provisions hereof shall be unaffected and remain in full force and effect.

9.2 Modification; Waiver.

No amendment or modification to this Agreement shall be valid or binding upon the parties unless in writing and signed by an officer of each party. No failure or delay on the part of either party in the exercise of any right or privilege hereunder shall operate as a waiver thereof or of the exercise of any other right or privilege hereunder.

9.3 Assignment.

Neither party may assign or transfer this Agreement, or any rights or obligations hereunder, without the prior written consent of the other party; provided that, either party may transfer this Agreement to an affiliate or to a successor to all or substantially all of its business or assets (provided that, in the case of Client, assignment will not relieve Client of its payment obligations if the assignee defaults in its payment obligations hereunder).

9.4 Remedies.

All rights and remedies hereunder shall be cumulative, may be exercised singularly or concurrently and, unless otherwise stated herein, shall not be deemed exclusive. If any legal action is brought to enforce any obligations hereunder, the prevailing party shall be entitled to receive its attorneys' fees, court costs and other collection expenses, in addition to any other relief it may receive.

9.5 Notices.

Any notice or communication permitted or required hereunder shall be in writing and shall be delivered in person or by courier, sent by electronic facsimile (fax), delivered by overnight delivery service, or mailed by certified or registered mail, postage prepaid, return receipt requested, and addressed as set forth after the signatures of this Agreement or to such other address as shall be given in accordance with this Section 9.5. If notice is given in person, by courier or by fax, it shall be effective upon receipt; if notice is given by overnight delivery service, it shall be effective two (2) business days after deposit with the delivery service; and if notice is given by mail, it shall be effective five (5) business days after deposit in the mail. In addition, to be effective, legal notices to TBC (such as for breach) must also be provided in email to ashley@boringcompany.com (but, notwithstanding earlier receipt via email, legal notices will be deemed received when the physical notice is received as set forth in preceding sentence).

9.6 Force Majeure.

Except with respect to payment obligations, both parties shall be excused from performance under this Agreement for any period to the extent that a party is prevented from performing any obligation, in whole or in part, as a result of causes beyond its reasonable control and without its negligent or willful misconduct, including without limitation, acts of God, natural disasters, war or other hostilities, labor disputes, civil disturbances, governmental acts, orders or regulations, third party nonperformance or failures or fluctuations in electrical power, heat, light, air conditioning or telecommunications equipment.

9.7 Relationship of Parties.

This Agreement shall not be construed as creating an agency, partnership, joint venture or any other form of association, for tax purposes or otherwise, between the parties, and the parties shall at all times be and remain independent contractors. Except as expressly agreed by the parties in writing, neither party shall have any right or authority, express or implied, to assume or create any obligation of any kind, or to make any representation or warranty, on behalf of the other party or to bind the other party in any respect whatsoever. This Agreement is non-exclusive. Nothing prohibits either party from engaging any third party in the future.

9.8 Law; Disputes.

This Agreement may be executed in several counterparts, all of which shall constitute one agreement. No supplement, modification, or amendment of this Agreement shall be binding, unless executed in writing by a duly authorized representative of each party to this Agreement. No waiver by either party shall be effective unless agreed to by the parties in writing. This Agreement shall be governed by the laws of the State of Texas and the United States without regard to conflicts of laws provisions thereof, and without regard to the United Nations Convention on the International Sale of Goods. Except for claims for injunctive or equitable relief or claims regarding intellectual property rights (which may be brought in any competent court), any dispute arising under this Agreement shall be finally settled in accordance with the Rules of the Judicial Arbitration and Mediation Service, Inc. ("JAMS") in accordance with such Rules. To the extent the JAMS streamlined arbitration rules and procedures are available, they will be used. The arbitration shall take place in Texas, in the English language and the arbitral decision may be enforced in any court. To the extent a claim cannot legally be arbitrated (as determined by an arbitrator), all disputes arising in connection herewith will be subject to the sole and exclusive jurisdiction and venue of the state and Federal courts located in Austin, Texas (and the parties each hereby consent and submit to such jurisdiction and venue).



IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date:

THE CITY OF KYLE

TBC -- THE BORING COMPANY

BY: _____

BY: _____

NAME: _____

NAME: Brian Gettinger

TITLE: _____

TITLE: Business Development Lead

ADDRESS: _____

ADDRESS: 15709 Impact Way, Bldg 2, Suite 200,
Pflugerville, TX 78660