

# PROFESSIONAL SERVICES AGREEMENT

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This **PROFESSIONAL SERVICES AGREEMENT** ("Agreement") is dated \_\_\_\_\_, 2011 by and between **J. Stowe & Co., LLC**, ("Consultant"), with offices at 1300 E. Lookout Dr., Ste. 100, Richardson, Texas 75082 and **LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT**, an urban county government of the Commonwealth of Kentucky pursuant to Chapter 67A of the Kentucky Revised Statutes, 200 East Main Street, Lexington, Kentucky 40507 (hereinafter "Lexington").

**WHEREAS**, Lexington solicited a Request for Proposal for the audit of utility franchise fees through RFP #5-2011; and

**WHEREAS**, Consultant was the highest ranked respondent to RFP #5-2011, and its ultimate proposal to perform the services was deemed to be reasonable and satisfactory to Lexington.

**NOW, THEREFORE** in consideration of the promises herein and for other good and valuable consideration, the parties agree as follows:

1. **Additional Documents; Order of Precedence.** This Agreement shall consist of the provisions herein as well as the following documents, all of which are attached hereto as exhibits and incorporated herein as if fully stated (hereinafter collectively referred to as the "Contract Documents"):

Exhibit "A" – Final Scope of Services (7 pages)

Exhibit "B" - RFP #5-2011 (38 pages)

Exhibit "C" - Consultant's Response to RFP (80 pages)

Unless otherwise stated herein, to the extent that there is a conflict between or among the provisions of the Agreement and the Contract documents, the terms and provisions of this Agreement shall take precedence over the Contract Documents, followed by Appendix A, Exhibit B, and Exhibit C.

2. **Scope of Services:** Consultant and Lexington agree Consultant will perform the Scope of Services attached hereto as Exhibit "A" and incorporated herein by reference.
3. **Fee for Services:** Consultant shall provide all of the services outlined in the Final Scope of Services (Exhibit A) at a cost not to exceed \$45,760. Any additional services shall be based upon the actual hours of services furnished multiplied by Consultant's Billing Rates as of the date of its monthly invoice plus all reasonable expenses directly related to the services furnished under this Agreement. Consultant shall not furnish services or incur expenses above the maximum amount without written authorization and additional funding from Lexington.
4. **Payment:** Lexington shall pay Consultant for services furnished under this Agreement upon submission of monthly invoices in an amount equal to actual hours of services furnished multiplied by the current billing rate of the respective consultant. Additionally,

# PROFESSIONAL SERVICES AGREEMENT

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Lexington shall reimburse Consultant monthly for reasonable expenses at cost, including the professional fees for the services of any subconsultant, which Lexington has previously authorized to provide services hereunder. Lexington shall pay Consultant in U.S. dollars within thirty (30) days of receipt of invoices less any disputed amounts. If Client disputes any portion of the invoice, the undisputed portion will be paid and Consultant will be notified in writing, within ten (10) days of receipt of the invoice of the exceptions taken. Consultant and Lexington will attempt to resolve the payment dispute within sixty (60) days or the matter may be submitted to arbitration as provided below. Additional charges for interest shall become due and payable at a rate of one and one-half percent (1-1/2%) per month (or the maximum percentage allowed by law, whichever is lower) on the unpaid, undisputed invoiced amounts. Any interest charges due from Lexington on past due invoices are outside any amounts otherwise due under this Agreement. If Lexington fails to pay undisputed invoiced amounts within sixty (60) days after delivery of invoice, Consultant, at its sole discretion, may suspend services hereunder or may initiate collections proceedings, including mandatory binding arbitration, without incurring any liability or waiving any right established hereunder or by law.

5. **Independent Contractor:** Consultant, its employees and/or agents are an independent contractor, and are not employees of Lexington. Services performed by Consultant under this Agreement are solely for the benefit of Lexington. Nothing contained in this Agreement creates any duties on the part of Consultant toward any person not a party to this Agreement.
6. **Standard of Care:** Consultant will perform services under this Agreement with the degree of skill and diligence normally practiced by professional engineers or consultants performing the same or similar services. No other warranty or guarantee, expressed or implied, is made with respect to the services furnished under this Agreement and all implied warranties are disclaimed.
7. **Changes/Amendments:** This Agreement and its exhibits constitute the entire agreement between the Parties and together with its exhibits supersede any prior written or oral agreements. This Agreement may not be changed except by written amendment signed by both Parties. The estimate of the level of effort, schedule and payment required to complete the Scope of Services, as Consultant understands it, is reflected herein. Services not expressly set forth in this Agreement or its exhibits are excluded. Consultant shall promptly notify Client if changes to the Scope of Services affect the schedule, level of effort or payment to Consultant and the schedule and payment shall be equitably adjusted. If Consultant is delayed in performing its services due to an event beyond its control, including but not limited to fire, flood, earthquake, explosion, strike, transportation or equipment delays, act of war, or act of God, then the schedule or payment under the Agreement shall be equitably adjusted, if necessary, to compensate Consultant for any additional costs due to the delay.
8. **Indemnity/Insurance.** Consultant agrees to fully comply with the indemnity and insurance provisions required in RFP #5-2011 (Exhibit B) which are incorporated herein by reference as if fully stated.

## PROFESSIONAL SERVICES AGREEMENT

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9. **Re-performance of Services:** If Lexington believes any of the services provided under this Agreement do not comply with the terms of this Agreement, it will promptly notify Consultant to permit Consultant an opportunity to investigate. If the services do not meet the applicable standard of care, Consultant will promptly re-perform the services at no additional cost to Lexington, including assisting Client in selecting remedial actions. If Lexington fails to provide Consultant with prompt notice of non-compliance and an opportunity to investigate and re-perform its services, Consultant's total obligation to Lexington will be limited to the costs Consultant would have incurred to re-perform the services.
10. **Work Product:** Lexington shall have the unrestricted right to use the documents, analyses and other data prepared by Consultant under this Agreement ('Work Products'); provided, however Lexington shall not rely on or use the Work Products for any purpose other than the purposes under this Agreement and the Work Products shall not be changed without the prior written approval of Consultant. If Lexington releases the Work Products to a third party without Consultant's prior written consent, or changes or uses the Work Products other than as intended hereunder, (a) Lexington does so at its sole risk and discretion, and (b) Consultant shall not be liable for any claims or damages resulting from the change or use or connected with the release or any third party's use of the Work Products or for any claims or damages related to the release, change or reuse.
11. **No Consequential Damages:** In no event and under no circumstances shall Consultant be liable to Lexington for any principal, interest, loss of anticipated revenues, earnings, profits, increased expense of operation or construction, loss by reason of shutdown or non-operation due to late completion or otherwise or for any other economic, consequential, indirect or special damages.
12. **Information Provided by Others:** Lexington shall provide to Consultant in a timely manner any information Consultant indicates is needed to perform the services hereunder. Consultant may rely on the accuracy of information provided by Client and its representatives.
13. **Termination:** Either party may terminate this Agreement upon thirty (30) days prior written notice to the other party. Lexington shall pay Consultant for all services rendered to the date of termination plus reasonable expenses for winding down the services. If either party defaults in its obligations hereunder, the non-defaulting party, after giving seven (7) days written notice of its intention to terminate or suspend performance under this Agreement, may, if cure of the default is not commenced and diligently continued, terminate this Agreement or suspend performance under this Agreement.
14. **Dispute Resolution:** Consultant and Lexington will attempt to resolve any conflict or dispute under this Agreement in a fair and reasonable manner and agree that if resolution cannot be made to attempt to mediate the conflict by a professional mediator. If mediation does not settle any dispute or action which arises under this Agreement or which relates in any way to this Agreement or the subject matter of this Agreement within ninety (90) days after either requests mediation, the dispute or conflict shall be

# PROFESSIONAL SERVICES AGREEMENT

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subject to litigation.

## 15. Miscellaneous:

- a. This Agreement is binding upon and will inure to the benefit of Lexington and Consultant and their respective successors and assigns. Neither party may assign its rights or obligations hereunder without the prior written consent of the other party.
- b. Any notice required or permitted by this Agreement to be given shall be deemed to have been duly given if in writing and delivered personally or five (5) days after mailing by first-class, registered, or certified mail, return receipt requested, postage prepaid and addressed as follows:

Client: LFUCG  
Attention: James L. Bush  
Address: 200 East Main Street, Floor 9  
Lexington, KY 40507

Consultant: J. Stowe & Co., LLC.  
Attention: Jack E. Stowe, Jr., President  
Address: 1300 E Lookout Dr., Ste 100  
Richardson, TX 75082

- c. Client expressly agrees that all provisions of the Agreement, including the clause limiting the liability of Consultant, were mutually negotiated and that but for the inclusion of the limitation of liability clause in the Agreement, Consultant's compensation for services would otherwise be greater and/or Consultant would not have entered into the Agreement.
- d. If any provision of this Agreement is invalid or unenforceable, the remainder of this Agreement shall continue in full force and effect and the provision declared invalid or unenforceable shall continue as to other circumstances.
- e. This Agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Kentucky and venue shall lie in a court of competent jurisdiction in Fayette County, Kentucky.
- f. In any action to enforce or interpret this Agreement, the prevailing party shall be entitled to recover, as part of its judgment, reasonable attorneys' fees and costs from the other party.
- g. Notwithstanding any statute to the contrary, the Parties agree that any action to enforce or interpret this Agreement shall be initiated within two (2) years from the time the party knew or should have known of the fact giving rise to its action, and shall not in any case be initiated later than six (6) years after Consultant completes its Scope of Services under this Agreement.

# PROFESSIONAL SERVICES AGREEMENT

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- h. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original instrument, but all of which taken together shall constitute one instrument.

**IN WITNESS WHEREOF**, the Parties have signed this Agreement the date first written above.

## **LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT**

Signature _____	Signature _____
Name _____	Name _____
Title _____	Title _____
Date _____	Date _____

## **J. Stowe & Co. LLC**

Signature	
Name	<u>Christopher D Ekrut</u>
Title	<u>Manager</u>
Date	<u>October 11, 2011</u>