

**FIRST AMENDMENT TO THE  
PROFESSIONAL SERVICES AGREEMENT**

**BETWEEN THE CITY OF RIALTO  
AND  
KIMLEY-HORN AND ASSOCIATES, INC.**

**1. PARTIES AND DATE.**

This First Amendment to the Professional Services Agreement ("First Amendment") is made and entered into this *June 26, 2018*, by and between the City of Rialto ("City") and *Kimley-Horn and Associates, Inc.*, ("Consultant"). City and Consultant are sometimes individually referred to as "Party" and collectively as "Parties" in this First Amendment.

**2. RECITALS.**

2.1 Agreement. City and Consultant entered into that certain Professional Services Agreement dated *13<sup>th</sup> of February, 2018*, ("Agreement"), whereby Consultant agreed to provide professional services to the City related for the Construction Administration, Dry Utility Service, and Temporary designs for the Renaissance East Shopping Center Booster Pump Station, City *Project #180402*

2.2 Amendment. City and Consultant desire to amend the Agreement by this First Amendment to include additional tasks for the project as set forth in "Exhibit A", to extend the term of the Agreement, and to increase the total amount of compensation for the Agreement.

**3. TERMS.**

3.1 Description. The following paragraph is hereby added to Section 1 of the Agreement:

"The additional services to be provided pursuant to this First Amendment to the Agreement are more particularly described in "Exhibit A", attached hereto and incorporated herein by this reference."

3.2 Scope of Work. The following paragraph is hereby added to Section 2 of the Agreement:

"Consultant's scope of work for the additional services included in this First Amendment to the Agreement is described on "Exhibit A", attached hereto and incorporated herein by this reference."

3.3 Payment Terms. The following paragraph is hereby added to Section 3 of the Agreement:

“Consultant shall be compensated for the additional services included in the First Amendment to the Agreement as set for in “Exhibit A”, attached hereto and incorporated herein by this reference, which shall not exceed \$48,800.00 (*Forty-Eight Thousand, Eight Hundred Dollars and Zero Cents*). The total compensation to the amended Agreement shall not exceed \$150,300.00 (*One Hundred and Fifty Thousand, Three Hundred Dollars and Zero Cents*).”

3.4 Time for Performance. The following paragraph is hereby added to Section 4 of the Agreement:

“The additional services included in the First Amendment to the Agreement as set for in “Exhibit A”, attached hereto and incorporated herein by this reference, shall begin immediately upon the City Council’s approval of the First Amendment and shall be completed within thirty (30) days of its approval.”

3.5 Continuing Effect of Agreement. Except as amended by this First Amendment, all provisions of the Agreement shall remain unchanged and in full force and effect. From and after the date of this First Amendment, whenever the term “Agreement” appears in the Agreement, it shall mean the Agreement as amended by this First Amendment.

3.6 Adequate Consideration. The Parties hereto irrevocably stipulate and agree that they have each received adequate and independent consideration for the performance of the obligations they have undertaken pursuant to this First Amendment.

3.7 Counterparts. This First Amendment may be executed in duplicate originals, each of which is deemed to be an original, but when taken together shall constitute but one and the same instrument.

3.8 Conflict of Interest. Pursuant to Rialto Municipal Code section 2.48.145, Contractor represents that it has disclosed whether it or its officers or employees is related to any officer or employee of the City by blood or marriage within the third degree which would subject such officer or employee to the prohibition of California Government Sections 87100 et. seq., Fair Political Practices Commission Regulation Section 18702, or Government Code Section 1090. To this end, by approving this Agreement, Contractor attests under penalty of perjury, personally and on behalf of Contractor, as well its officers, representatives, that it/they have no relationship, as described above, or financial interests, as such term is defined in California Government Section 87100 et. seq., Fair Political Practices Commission Regulation Section 18702, or Government Code Section 1090, with any City of Rialto elected or appointed official or employee, except as specifically disclosed to the City in writing.

3.9 Corporate Authority. The persons executing this First Amendment on behalf of the parties hereto warrant that (i) such party is duly organized and existing, (ii) they are duly authorized to execute and deliver this First Amendment on behalf of said party, (iii) by so executing this First Amendment, such party is formally bound to the provisions of this First Amendment and (iv) the entering into this First Amendment does not violate any provision of any other agreement to which said party is bound.

***[SIGNATURES ON FOLLOWING PAGE]***

**IN WITNESS THEREOF**, the parties have caused their authorized representative to execute this agreement the day and year first above written.

**CITY OF RIALTO**

**NAME OF VENDOR**

By: \_\_\_\_\_  
Deborah Robertson  
Mayor

\_\_\_\_\_  
By: \_\_\_\_\_  
Signature  
\_\_\_\_\_  
Printed Name/Title

*Attest:*

By: \_\_\_\_\_  
Barbara McGee  
City Clerk

\_\_\_\_\_  
By: \_\_\_\_\_  
Signature  
\_\_\_\_\_  
Printed Name/Title

*Approved as to Form:*

**Two signatures are required if a corporation.**

By: \_\_\_\_\_  
Fred Galante, Esq.  
City Attorney



May 31, 2018

Mr. Thomas Crowley, P.E.  
City of Rialto, Utilities Manager  
150 S. Palm Avenue  
Rialto, CA 92376

Re: ***Professional Services Agreement for Renaissance Shopping Center Private Booster Pump Station***

Dear Mr. Crowley:

Kimley-Horn and Associates, Inc. ("Kimley-Horn" or "Consultant") is pleased to submit this letter agreement (the "Agreement") to the City of Rialto ("Client") for providing professional services for the Construction Administration, Dry Utility service, and Temporary designs for the Renaissance Shopping Center Booster Pump Station.

## **Scope of Services**

Kimley-Horn will provide the services specifically set forth below.

### **TASK 1 – CONSTRUCTION PHASE SERVICES**

Upon notice to proceed from the Client, Kimley-Horn will provide the following construction phase services:

- Bidding - Kimley-Horn will assist the County in preparing the bid package for advertisement. Kimley-Horn will respond to up to 10 questions (bidders' inquiries) and prepare up to one addendum to the plans and specifications. (Up to 12 hours are assumed.)
- Construction Phase Services (Up to 80 hours are assumed)
  - Kimley-Horn will attend the pre-construction meeting as requested. Kimley-Horn will also attend up to three (3) construction progress meetings at the construction site.
  - The Kimley-Horn team will respond to reasonable and appropriate construction RFIs. Kimley-Horn will review and approve shop drawings, samples and other submissions of the contractor only for conformance with the design concept of the project and for compliance with construction documents.
- Record Drawings - The Kimley-Horn team will revise the project plans in CAD based upon the Contractor's redline field changes. Revised sheets ("As-Builts") will be submitted to the City of Rialto. (Up to 12 hours are assumed.)

### **TASK 2 – TEMPORARY BOOSTER PUMPS PLAN AND DESIGN**

Kimley-Horn has completed a plan sheet and design for the temporary booster pumps for the Ayala Booster Station. This plan was required for fire water and domestic water to be available for the project prior to completion of the final booster station facility.

**TASK 3 – SOUTH COAST AQMD PERMIT**

Kimley-Horn will prepare a South Coast Air Quality Management District (SCAQMD) Permit for a IC Engine, Emergency, 51 – 500 HP, equipment for Application Type – New Construction (Permit to Construct), under the expedited process. It is assumed that the City of Rialto will pay for all applicable fees and expenses associated with the SCAQMD Permit. This Permit can be filed once the City of Rialto's Contractor provides the information for the selected generator.

Kimley-Horn will prepare the following forms for SCAQMD Permit:

- Form 400A, *Application Form for Permit or Plan Approval*
- Form 400-CEQA, *CEQA Applicability*
- Form 400-PS, *Plot Plan and Stack Information Form*
- Form 400-E-13a, *Emergency Internal Combustion Engine*

Kimley-Horn will coordinate with SCAQMD on permit tracking up to four (4) hours. It is assumed that the SCAQMD will not be denied or require revisions once submitted.

**TASK 4 – SCE RULE 16 SERVICE EXTENSION AND DESIGN**

Kimley-Horn will provide the following services for the Ayala Booster Station:

1. Submit required documents to Southern California Edison (SCE) representatives with project description to obtain Rule 15 utility work order, contract, and invoice.
2. Provide Client with final utility contracts and invoices for payment.

**Assumptions:**

1. Coordination and schedule for installation of dry utility service extension conduits from existing stub locations at property line to meter location at Ayala Booster Station.
2. Fees are based on each service order and one coordinate schedule per phase.
3. Client will provide all necessary work order information needed in directing SCE and creating the schedule.
4. Client will provide schedule for construction of Ayala Booster Station once the Client has issued a Notice to Proceed to their Contractor.
5. Client will provide all necessary requirements such as contracts, payments, and field conditions prior to requesting service extension and cabling.

**Exclusions:**

1. Site meetings, utility meetings and coordination with SCE to inspect existing conduit and infrastructure.
2. Planning & Coordination to replace, add, change or upgrade existing dry utility infrastructure.
3. Meter applications, scheduling utilities to energize, or setting meters.

**TASK 5 – SCE RULE 16 COORDINATION AND SCE MANAGEMENT**

Kimley-Horn will provide the following services for the Ayala Booster Station:

1. Coordination with the City of Rialto and SCE



2. Manage coordination of work orders and contracts through utility process and regular interface with utility representatives.
3. Coordination with site superintendent/construction manager to create schedule dates per phase.
4. Coordination with SCE representative to confirm schedule, and coordinate schedule with Client.

## Services Not Included

Any other services, including but not limited to the following, are not included in this Scope:

- Surveying
- Inspection services
- Construction Phasing
- SCADA System Integration

## Additional Services

Any services not specifically provided for in the above scope will be billed as additional services and performed at our then current hourly rates.

## Information Provided by Client

We shall be entitled to rely on the completeness and accuracy of all information provided by the Client or the Client's consultants or representatives. The Client shall provide all information requested by Kimley-Horn during the project.

## Schedule

We will provide our services as expeditiously as practicable to meet a mutually agreed upon schedule.

## Fee and Expenses

Kimley-Horn will perform the services in **Tasks 1 - 5** for the total lump sum labor fee below. Individual task amounts are informational only. In addition to the lump sum labor fee, direct reimbursable expenses such as express delivery services, fees, air travel, subconsultant costs, and other direct expenses will be billed at 1.15 times cost. All permitting, application, and similar project fees will be paid directly by the Client. Should the Client request Kimley-Horn to advance any such project fees on the Client's behalf, a separate invoice for such fees, with a fifteen percent (15%) markup, will be immediately issued to and paid by the Client.

Task	Description	Fee Type	Fee
1.0	Booster Pump Station Construction Phase Services	Lump Sum	\$19,400
2.0	Temporary Booster Pumps Plan and Design	Lump Sum	\$6,400
3.0	AQMD Permit – Backup generator	Lump Sum	\$3,800
4.0	SCE Rule 16 – Service Extension and Design	Lump Sum	\$13,800
5.0	SCE Rule 16 – Coordination and Agency Management	Lump Sum	\$5,400
<b>Total Lump Sum Fee</b>			<b>\$48,800</b>

Lump sum labor fees will be invoiced monthly based upon the overall percentage of services performed. Reimbursable expenses will be invoiced based upon expenses incurred. Payment will be due within 30 days of your receipt of the invoice and should include the invoice number and Kimley-Horn project number.

## Closure

In addition to the matters set forth herein, our Agreement shall include and be subject to, and only to, the attached Standard Provisions, which are incorporated by reference. As used in the Standard Provisions, "Consultant" shall refer to Kimley-Horn and Associates, Inc., and "Client" shall refer to **City of Rialto**.

Kimley-Horn, in an effort to expedite invoices and reduce paper waste, submits invoices via email in an Adobe PDF format. We can also provide a paper copy via regular mail if requested. Please include the invoice number and Kimley-Horn project number with all payments. Please provide the following information:

\_\_\_\_ Please email all invoices to \_\_\_\_\_

\_\_\_\_ Please copy \_\_\_\_\_

If you concur in all the foregoing and wish to direct us to proceed with the services, please have authorized persons execute both copies of this Agreement in the spaces provided below, retain one copy, and return the other to us. We will commence services only after we have received a fully-executed agreement. Fees and times stated in this Agreement are valid for sixty (60) days after the date of this letter.

To ensure proper set up of your projects so that we can get started, please complete and return with the signed copy of this Agreement the attached Request for Information. Failure to supply this information could result in delay in starting work on your project.

We appreciate the opportunity to provide these services to you. Please contact us if you have any questions.

Very truly yours,

KIMLEY-HORN AND ASSOCIATES, INC.



By: Jennifer Harry  
Senior Vice President  
P.E. C62918



By: Sam McWhorter  
Project Engineer  
P.E. C61788

Client's Federal Tax ID: \_\_\_\_\_

Client's Business License No.: \_\_\_\_\_

Client's Street Address: \_\_\_\_\_

Attachments: Request for Information & Standard Provisions



## Request for Information

Please return this information with your signed contract; failure to provide this information could result in delay in starting your project

### Client Identification

Full, Legal Name of Client					
Mailing Address for Invoices					
Contact for Billing Inquiries					
Contact's Phone and e-mail					
Client is (check one)	Owner	<input type="checkbox"/>	Agent for Owner	<input type="checkbox"/>	Unrelated to Owner

### Property Identification

	Parcel 1	Parcel 2	Parcel 3	Parcel 4
Street Address				
County in which Property is Located				
Tax Assessor's Number(s)				

### Property Owner Identification

	Owner 1	Owner 2	Owner 3	Owner 4
Owner(s) Name				
Owner(s) Mailing Address				
Owner's Phone No.				
Owner of Which Parcel #?				

### Project Funding Identification – List Funding Sources for the Project


Attach additional sheets if there are more than 4 parcels or more than 4 owners

**KIMLEY-HORN AND ASSOCIATES, INC.**  
**STANDARD PROVISIONS**

(1) **Consultant's Scope of Services and Additional Services.** The Consultant will perform only the services specifically described in this Agreement. If requested by the Client and agreed to by the Consultant, the Consultant will perform Additional Services, which shall be governed by these provisions. Unless otherwise agreed to in writing, the Client shall pay the Consultant for any Additional Services an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including telecommunications, in-house reproduction, postage, supplies, project related computer time, and local mileage. Other direct expenses will be billed at 1.15 times cost.

(2) **Client's Responsibilities.** In addition to other responsibilities herein or imposed by law, the Client shall:

- (a) Designate in writing a person to act as its representative, such person having complete authority to transmit instructions, receive information, and make or interpret the Client's decisions.
- (b) Provide all information and criteria as to the Client's requirements, objectives, and expectations for the project and all standards of development, design, or construction.
- (c) Provide the Consultant all available studies, plans, or other documents pertaining to the project, such as surveys, engineering data, environmental information, etc., all of which the Consultant may rely upon.
- (d) Arrange for access to the site and other property as required for the Consultant to provide its services.
- (e) Review all documents or reports presented by the Consultant and communicate decisions pertaining thereto within a reasonable time so as not to delay the Consultant.
- (f) Furnish approvals and permits from governmental authorities having jurisdiction over the project and approvals and consents from other parties as may be necessary.
- (g) Obtain any independent accounting, legal, insurance, cost estimating and feasibility services required by Client.
- (h) Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the Consultant's services or any defect or noncompliance in any aspect of the project.

(3) **Period of Services.** Unless otherwise stated herein, the Consultant will begin work after receipt of a properly executed copy of this Agreement. This Agreement assumes conditions permitting continuous and orderly progress through completion of the services. Times for performance shall be extended as necessary for delays or suspensions due to circumstances that the Consultant does not control. If such delay or suspension extends for more than six months, Consultant's compensation shall be renegotiated.

(4) **Method of Payment.** Client shall pay Consultant as follows:

- (a) Invoices will be submitted periodically for services performed and expenses incurred. Invoices are due and payable upon presentation. Client shall pay Consultant a time price differential of one and one-half percent (1.5%) of the outstanding amount of each invoice that is overdue for more than 30 days. The Client shall also pay any applicable sales tax. All retainers will be held by the Consultant and applied against the final invoice. If the Client fails to make any payment due under this or any other agreement within 30 days after presentation, the Consultant may, after giving notice to the Client, suspend services and withhold deliverables until all amounts due are paid, and may commence legal proceedings including filing liens to secure payment.
- (b) If the Client relies on payment or proceeds from a third party to pay Consultant and Client does not pay Consultant's invoice within 60 days of receipt, Consultant may communicate directly with such third party to secure payment.
- (c) If the Client objects to an invoice, it must advise the Consultant in writing giving its reasons within 14 days of receipt of the invoice or the Client's objections will be waived, and the invoice shall conclusively be deemed due and owing. If the Client objects to only a portion of the invoice, payment for all other portions remains due.
- (d) If the Consultant initiates legal proceedings to collect payment, it may recover, in addition to all amounts due, its reasonable attorneys' fees, reasonable experts' fees, and other expenses related to the proceedings. Such expenses shall include the cost, at the Consultant's normal hourly billing rates, of the time devoted to such proceedings by its employees.
- (e) The Client agrees that the payment to the Consultant is not subject to any contingency or condition. The Consultant may negotiate payment of any check tendered by the Client, even if the words "in full satisfaction" or words intended to have similar effect appear on the check without such negotiation being an accord and satisfaction of any disputed debt and without prejudicing any right of the Consultant to collect additional amounts from the Client.

(5) **Use of Documents.** All documents and data prepared by the Consultant are related exclusively to the services described in this Agreement, and may be used only if the Client has satisfied all of its obligations under this Agreement. They are not intended or represented to be suitable for use or reuse by the Client or others on extensions of this project or on any other project. Any modifications by the Client to any of the Consultant's documents, or any reuse of the documents without written authorization by the Consultant will be at the Client's sole risk and without liability to the Consultant, and the Client shall indemnify, defend and hold the Consultant harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, resulting therefrom. The Consultant's electronic files and source code remain the property of the Consultant and shall be provided to the Client only if expressly provided for in



this Agreement. Any electronic files not containing an electronic seal are provided only for the convenience of the Client, and use of them is at the Client's sole risk. In the case of any defects in the electronic files or any discrepancies between them and the hardcopy of the documents prepared by the Consultant, the hardcopy shall govern.

(6) **Opinions of Cost.** Because the Consultant does not control the cost of labor, materials, equipment or services furnished by others, methods of determining prices, or competitive bidding or market conditions, any opinions rendered as to costs, including but not limited to the costs of construction and materials, are made solely based on its judgment as a professional familiar with the industry. The Consultant cannot and does not guarantee that proposals, bids or actual costs will not vary from its opinions of cost. If the Client wishes greater assurance as to the amount of any cost, it shall employ an independent cost estimator. Consultant's services required to bring costs within any limitation established by the Client will be paid for as Additional Services.

(7) **Termination.** The obligation to provide further services under this Agreement may be terminated by either party upon seven days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof, or upon thirty days' written notice for the convenience of the terminating party. The Consultant shall be paid for all services rendered and expenses incurred to the effective date of termination, and other reasonable expenses incurred by the Consultant as a result of such termination.

(8) **Standard of Care.** The standard of care applicable to Consultant's services will be the degree of care and skill ordinarily exercised by consultants performing the same or similar services in the same locality at the time the services are provided. No warranty, express or implied, is made or intended by the Consultant's performance of services, and it is agreed that the Consultant is not a fiduciary with respect to the Client.

(9) **LIMITATION OF LIABILITY.** In recognition of the relative risks and benefits of the Project to the Client and the Consultant, the risks are allocated such that, to the fullest extent allowed by law, and notwithstanding any other provisions of this Agreement or the existence of applicable insurance coverage, that the total liability, in the aggregate, of the Consultant and the Consultant's officers, directors, employees, agents, and subconsultants to the Client or to anyone claiming by, through or under the Client, for any and all claims, losses, costs or damages whatsoever arising out of or in any way related to the services under this Agreement from any causes, including but not limited to, the negligence, professional errors or omissions, strict liability or breach of contract or any warranty, express or implied, of the Consultant or the Consultant's officers, directors, employees, agents, and subconsultants, shall not exceed twice the total compensation received by the Consultant under this Agreement or \$50,000, whichever is greater. Higher limits of liability may be negotiated for additional fee. This Section 9 is intended solely to limit the remedies available to the Client or those claiming by or through the Client, and nothing in this Section 9 shall require the Client to indemnify the Consultant.

(10) **Mutual Waiver of Consequential Damages.** In no event shall either party be liable to the other for any consequential, incidental, punitive, or indirect damages including but not limited to loss of income or loss of profits.

(11) **Construction Costs.** Under no circumstances shall the Consultant be liable for extra costs or other consequences due to unknown conditions, or related to the failure of contractors to perform work in accordance with the plans and specifications. Consultant shall have no liability whatsoever for any costs arising out of the Client's decision to obtain bids or proceed with construction before the Consultant has issued final, fully-approved plans and specifications. The Client acknowledges that all preliminary plans are subject to substantial revision until plans are fully approved and all permits obtained.

(12) **Certifications.** The Consultant shall not be required to execute certifications or third-party reliance letters that are inaccurate, that relate to facts of which the Consultant does not have actual knowledge, or that would cause the Consultant to violate applicable rules of professional responsibility.

(13) **Dispute Resolution.** All claims by the Client arising out of this Agreement or its breach shall be submitted first to mediation in accordance with the American Arbitration Association as a condition precedent to litigation. Any mediation or civil action by Client must be commenced within one year of the accrual of the cause of action asserted but in no event later than allowed by applicable statutes.

(14) **Hazardous Substances and Conditions.** Consultant shall not be a custodian, transporter, handler, arranger, contractor, or remediator with respect to hazardous substances and conditions. Consultant's services will be limited to analysis, recommendations, and reporting, including, when agreed to, plans and specifications for isolation, removal, or remediation. The Consultant will notify the Client of unanticipated hazardous substances or conditions of which the Consultant actually becomes aware. The Consultant may stop affected portions of its services until the hazardous substance or condition is eliminated.

**(15) Construction Phase Services.**

(a) If the Consultant prepares construction documents and the Consultant is not retained to make periodic site visits, the Client assumes all responsibility for interpretation of the documents and for construction observation, and the Client waives any claims against the Consultant in any way connected thereto.

(b) The Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, sequence, schedule, safety programs, or safety practices, nor shall Consultant have any authority or responsibility to stop or direct the work of any contractor. The Consultant's visits will be for the purpose of endeavoring to provide the Client a greater degree of confidence that the completed work of its contractors will generally conform to the construction documents prepared by the Consultant. Consultant neither guarantees the performance of contractors, nor assumes responsibility for any contractor's failure to perform its work in accordance with the contract documents.

(c) The Consultant is not responsible for any duties assigned to it in the construction contract that are not expressly provided for in this Agreement. The Client agrees that each contract with any contractor shall state that the contractor shall be solely responsible for job site safety and its means and methods; that the contractor shall indemnify the Client and the Consultant for all claims and liability arising out of job site accidents; and that the Client and the Consultant shall be made additional insureds under the contractor's general liability insurance policy.

**(16) No Third-Party Beneficiaries; Assignment and Subcontracting.** This Agreement gives no rights or benefits to anyone other than the Client and the Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole benefit of the Client and the Consultant. The Client shall not assign or transfer any rights under or interest in this Agreement, or any claim arising out of the performance of services by Consultant, without the written consent of the Consultant. The Consultant reserves the right to augment its staff with subconsultants as it deems appropriate due to project logistics, schedules, or market conditions. If the Consultant exercises this right, the Consultant will maintain the agreed-upon billing rates for services identified in the contract, regardless of whether the services are provided by in-house employees, contract employees, or independent subconsultants.

**(17) Confidentiality.** The Client consents to the use and dissemination by the Consultant of photographs of the project and to the use by the Consultant of facts, data and information obtained by the Consultant in the performance of its services. If, however, any facts, data or information are specifically identified in writing by the Client as confidential, the Consultant shall use reasonable care to maintain the confidentiality of that material.

**(18) Miscellaneous Provisions.** This Agreement is to be governed by the law of California. This Agreement contains the entire and fully integrated agreement between the parties and supersedes all prior and contemporaneous negotiations, representations, agreements or understandings, whether written or oral. Except as provided in Section 1, this Agreement can be supplemented or amended only by a written document executed by both parties. Any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. Any provision in this Agreement that is unenforceable shall be ineffective to the extent of such unenforceability without invalidating the remaining provisions. The non-enforcement of any provision by either party shall not constitute a waiver of that provision nor shall it affect the enforceability of that provision or of the remainder of this Agreement.