

NORTH CAROLINA
BRUNSWICK COUNTY

FACILITIES USE AGREEMENT

THIS FACILITIES USE AGREEMENT (hereinafter referred to as the “Agreement”) is made and entered into by and between Brunswick County, a body politic and corporate of the State of North Carolina (hereinafter referred to as “County”) and North Carolina 811 Inc., (hereinafter referred to as “Contractor”).

WITNESSETH:

1. PROGRAM; COMPENSATION.

Contractor shall perform the duties and services (hereinafter referred to as the “Program”) at various County facilities (hereinafter referred to as the “Facilities”) for the agreed upon compensation, all as more fully set forth on Exhibit “A” attached hereto.

Any exhibits or attachments referenced herein are hereby incorporated by reference and made a part of this Agreement. Any conflict between the language in an exhibit or attachment and the main body of this Agreement shall be resolved in favor of the main body of this Agreement.

2. TERM OF AGREEMENT. The initial term of this Agreement begins on 01/21/2020 (the “Effective Date”) and continues in effect until 01/21/2028, unless earlier terminated pursuant to any of the terms and conditions contained herein.

3. TERMINATION.

a. **For Cause.** Notwithstanding the foregoing, County may terminate this Agreement upon fifteen (15) calendar days’ written notice to Contractor if Contractor is in material breach of any provision herein and fails to cure the breach during the notice period.

b. **Without Cause.** County may terminate this Agreement at any time without cause by giving sixty (60) calendar days’ written notice to Contractor.

4. USE OF FACILITIES. Contractor shall only use the Facilities to operate the Program in accordance with Exhibit “A” and for no other purpose. Contractor shall not allow any public or private nuisance to exist or to continue at the Facilities and shall allow no unreasonable noise, odor, disturbance or sight to emanate from the Facilities.

5. INDEPENDENT CONTRACTOR. Both County and Contractor agree that Contractor shall act as an independent contractor and shall not represent itself as an agent or employee of the County for any purpose in the performance of its duties under this Agreement. Contractor represents that it has or will secure, at its own expense, all personnel required to operate the Program. Accordingly, Contractor shall be responsible for payment of all federal, state and local

taxes arising out of its activities in accordance with this Agreement, including, without limitation, federal and state income tax, social security tax, unemployment insurance taxes and any other taxes or business license fees as required. Contractor shall not be entitled to participate in any plans, arrangements or distributions by the County pertaining to or in connection with any pension, stock, bonus, profit sharing or other benefit extended to County employees.

6. CONTRACTOR REPRESENTATIONS.

- a. Contractor is a duly organized entity or corporation qualified to do business and in good standing under the laws of the State of North Carolina;
- b. Contractor has all requisite corporate power and authority to execute, deliver and perform its obligations under this Agreement;
- c. No approval, authorization or consent of any governmental or regulatory authority is required to be obtained or made by it in order for Contractor to enter into and perform its obligations under this Agreement;
- d. Contractor shall comply with all applicable federal, state and local laws and regulations and shall obtain all applicable permits and licenses, if any;
- e. Contractor shall not violate any agreement with any third party by entering into this Agreement;
- f. Contractor acknowledges that the Program nor any component thereof will violate, infringe or misappropriate any patent, copyright, trademark or trade secret rights of any third party, or any other third-party rights (including, without limitation, non-compete agreements);
- g. Contractor shall ensure that whenever its employees or agents are on County property, including the Facilities, such employees or agents will strictly abide by all instructions and directions issued by the County with respect to rules, regulations, policies and security procedures. Such rules, regulations, policies and security procedures shall include, but not be limited to: (i) not possessing any controlled substances; (ii) smoking only in designated smoking areas, if any; and (iii) not possessing weapons, except for weapons possessed by law enforcement officials; and
- h. Contractor shall keep the Facilities in a well-maintained condition and free of hazards for its personnel and the public.

7. DAMAGE TO FACILITIES OR PROPERTY. Contractor shall be solely responsible for any damage to or loss of the County's equipment, facilities and/or property arising out of the negligent or willful act or omission of Contractor or its agents. In the event that Contractor causes damage to the County's equipment or facilities, Contractor shall, at its own

expense, promptly repair or replace such damaged items to restore them to the same level of functionality that they possessed prior to such damage.

8. INDEMNIFICATION. Contractor shall defend, indemnify and hold harmless County, its officers, officials, agents and employees from and against all actions, liability, claims, suits, damages, costs or expenses of any kind which may be brought or made against County or which County must pay and incur arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings or causes of action of every kind in connection with or arising out of this Agreement. Contractor further agrees to investigate, handle, respond to, defend and dispose of same at its sole cost and expense. Contractor shall be fully responsible to County for the acts and omissions of its agents and of persons either directly or indirectly employed by it. This Section shall survive any expiration or termination of this Agreement.

9. INSURANCE.

- a. Contractor shall procure and maintain in full force and effect at all times and at its sole cost and expense Workers' Compensation, Commercial General Liability, Commercial Automobile Liability and Professional Liability insurance and any additional insurance as may be required by County with limits acceptable to County. All insurance policies (with the exception of Worker's Compensation and Professional Liability) shall be endorsed, specifically or generally, to include County as an additional insured and as a certificate holder. Contractor shall furnish a Certificate of Insurance from a licensed insurance agent in North Carolina with a rating of A-VII or better by A.M. Best verifying the existence of any insurance coverage required by County. The Certificate will provide for thirty (30) days' advance notice in the event of termination or cancellation of coverage. Contractor shall have no right of recovery or subrogation against County (including its officers, agents and employees), it being the intention of the parties that the insurance policies so affected shall protect both parties and be primary coverage for any and all losses covered by the aforementioned insurance.
- b. Contractor shall insure, at its own expense, the assets, possessions and furnishings contained at the Facilities and make available to County copies of said insurance on an annual basis.

10. HEALTH AND SAFETY. Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Program. Contractor shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to all employees in connection with the Program and other persons who may be affected thereby.

11. DIVESTMENT FROM COMPANIES THAT BOYCOTT ISRAEL. Contractor hereby certifies that it has not been designated by the North Carolina State Treasurer as a company engaged in the boycott of Israel pursuant to N.C.G.S. § 147-86.81.

12. DEBARMENT. Contractor hereby certifies that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this Agreement by any governmental department or agency. Contractor must notify County within thirty (30) days if debarred by any governmental entity during this Agreement.

13. NOTICES.

- a. **Delivery of Notices.** Any notice required or permitted to be given in connection with this Agreement shall be in writing and shall be delivered in person, by U.S. mail, by overnight courier, by electronic mail or by facsimile to the intended recipient at the address set forth below.
- b. **Effective Date of Notices.** Any notice shall be effective upon the date of receipt by the intended recipient; provided that any notice which is sent by facsimile or electronic mail shall also be simultaneously sent by mail deposited with the U.S. Postal Service or by overnight courier.
- c. **Notice Address.** Communications that relate to any breach, default, termination, delay in performance, prevention of performance, modification, extension, amendment or waiver of any provision of this Agreement shall be sent to:

COUNTY: Brunswick County Manager
P.O. Box 249
Bolivia, NC 28422
Fax: 910-253-2022

CONTRACTOR: North Carolina 811 Inc.
PO Box 26000
Greensboro, NC 27420

14. NO ASSIGNMENT WITHOUT CONSENT. Neither party shall assign this Agreement (or assign any right or delegate any obligation contained herein whether such assignment is of service, of payment or otherwise) without the prior written consent of the other party hereto. Any such assignment without the prior written consent of the other party hereto shall be void. An assignee shall acquire no rights, and County shall not recognize any assignment in violation of this provision.

15. GOVERNING LAW AND VENUE. This Agreement shall be governed by applicable federal law and by the laws of the State of North Carolina, without regard for its choice of law provisions. All actions relating in any way to this Agreement shall be brought in the General Court of Justice of the State of North Carolina in Brunswick County or in the Federal District Court for the Eastern District of North Carolina, Wilmington division.

16. DISPUTE RESOLUTION. Should a dispute arise as to the terms of this Agreement, both parties agree that neither may initiate binding arbitration. The parties may agree to non-binding mediation of any dispute prior to the bringing of any suit or action.

17. GOVERNMENTAL IMMUNITY. County, to the extent applicable, does not waive its governmental immunity by entering into this Agreement and fully retains all immunities and defenses provided by law with regard to any action based on this Agreement.

18. NON-WAIVER. Failure by County at any time to require the performance by Contractor of any of the provisions of this Agreement shall in no way affect County's right hereunder to enforce the same, nor shall any waiver by County of any breach be held to be a waiver of any succeeding breach or a waiver of this Section.

19. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties with respect to the subject matter herein. There are no other representations, understandings or agreements between the parties with respect to such subject matter. This Agreement supersedes all prior agreements, negotiations, representations and proposals, written or oral.

20. HEADINGS. The headings in this Agreement are for convenience of reference only and shall not define or limit any of the terms or provisions hereof.

21. SEVERABILITY. The invalidity of one or more of the phrases, sentences, clauses or sections contained in this Agreement shall not affect the validity of the remaining portion of the Agreement so long as the material purposes of this Agreement can be determined and effectuated. If a provision of this Agreement is held to be unenforceable, then both parties shall be relieved of all obligations arising under such provision, but only to the extent that such provision is unenforceable, and this Agreement shall be deemed amended by modifying such provision to the extent necessary to make it enforceable while preserving its intent.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

22. SIGNATURES. This Agreement, together with any amendments or modifications, may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be considered one and the same agreement. This Agreement may also be executed electronically. By signing electronically, the parties indicate their intent to comply with the Electronic Commerce in Government Act (N.C.G.S § 66-358.1 et seq.) and the Uniform Electronic Transactions Act (N.C.G.S § 66-311 et seq.). Delivery of an executed counterpart of this Agreement by either electronic means or by facsimile shall be as effective as a manually executed counterpart.

ATTEST:

BRUNSWICK COUNTY

Clerk to the Board

By: _____
Frank Williams
Chairman

[SEAL]

NORTH CAROLINA 811 INC.

DocuSigned by:
By: Ann Rushing
C76D860B3C2B400...

Printed Name: Ann Rushing

Title: Education Manager

Date: 2/3/2020

APPROVED AS TO FORM

DocuSigned by:
Bryan W. Batton
Robert W. Shaver, Jr., County Attorney /
Bryan W. Batton, Assistant County Attorney

EXHIBIT "A"
DESCRIPTION OF PROGRAM

Contractor desires to paint the North Carolina 811 Inc. Call Before You Dig logo on the Brunswick County Public Utilities Tank located on Highway 17 South, just south of Highway 87, in Winnabow, NC (known as the Bell Swamp Tank). The location, size, font, color and overall design of the logo must be approved by Brunswick County in advance. Contractor shall be responsible for choosing the company that will paint the logo on the tank, subject to approval by Brunswick County.

As of the date of this Agreement, Brunswick County has a tank maintenance contract with Southern Corrosion Inc. Before painting the logo on the tank, or prior to any re-painting or touch-ups of the logo, which must be approved by Brunswick County in advance, Contractor and the company selected by Contractor to paint the logo must meet with the appropriate representatives of Southern Corrosion Inc., or such other maintenance company that Brunswick County may designate from time to time, to gain approval for the type of paint to be used. Contractor shall be solely responsible for all costs and expenses in connection with painting or re-painting the logo and the repair of any damages which may result to the tank in connection therewith.