

1100 H Street, NW
Suite 500
Washington, D.C. 20005
202.682.0110



STANDARD FORM OF AGREEMENT BETWEEN OWNER AND DESIGN-BUILDER

COST+ FEE WITH AN OPTION FOR A GMP



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Document No. 530



**STANDARD FORM OF AGREEMENT
BETWEEN OWNER AND DESIGN -
BUILDER - COST PLUS FEE
WITH AN OPTION FOR A
GUARANTEED MAXIMUM PRICE**

Document No. 530

Second Edition 2009
© Design-Build Institute of America
Washington, DC



Design Build Institute of America - Contract Documents

LICENSE AGREEMENT

By using the DBIA Contract Documents, you agree to and are bound by the terms of this License Agreement. If you do not agree, you should promptly return the documents to DBIA and your money will be refunded.

- 1. License.** The Design Build Institute of America ("DBIA") provides DBIA Contract Documents and licenses their use worldwide. You acknowledge that DBIA Construction Documents are protected by the copyright laws of the United States. You have a limited nonexclusive license to: (a) Use DBIA Contract Documents on any number of machines owned, leased or rented by your company or organization; (b) Use DBIA Contract Documents in printed form for bona fide contract purposes; and (c) Copy DBIA Contract Documents into any machine readable or printed form for backup or modification purposes in support of your permitted use.
- 2. User Responsibility.** You assume sole responsibility for the selection of specific documents or portions thereof to achieve your intended results, and for the installation, use, and results obtained from the DBIA Contract Documents. You acknowledge that you understand that the text of the DBIA Contract Documents has important legal consequences and that consultation with an attorney is recommended with respect to use or modification of the text. You will not represent that any of the contract documents you generate from DBIA Contract Documents are DBIA documents unless (a) the document text is used without alteration or (b) all additions and changes to, and deletions from, the text are clearly shown.
- 3. Copies.** You may not use, copy, modify, or transfer DBIA Contract Documents, or any copy, modification or merged portion, in whole or in part, except as expressly provided for in this license. Reproduction of DBIA Contract Documents in printed or machine-readable format for resale or educational purposes is expressly prohibited. You will reproduce and include DBIA's copyright notice on any printed or machine-readable copy, modification, or portion merged into another document or program.
- 4. Transfers.** You may not transfer possession of any copy, modification or merged portion of DBIA Contract Documents to another party, except that a party with whom you are contracting may receive and use such transferred material solely for purposes of its contract with you. You may not sublicense, assign, or transfer this license except as expressly provided in this Agreement, and any attempt to do so is void.
- 5. Term.** The license is effective for one year from the date of purchase. DBIA may elect to terminate it earlier, by written notice to you, if you fail to comply with any term or condition of this Agreement.
- 6. Limited Warranty.** DBIA warrants the electronic files or other media by which DBIA Contract Documents are furnished to be free from defects in materials and workmanship under normal use during the Term. There is no other warranty of any kind, either expressed or implied, including, but not limited to the implied warranties of merchantability and fitness for a particular purpose. Some states do not allow the exclusion of implied warranties, so the above exclusion may not apply to you. This warranty gives you specific legal rights and you may also have other rights which vary from state to state. DBIA does not warrant that the DBIA Contract Documents will meet your requirements or that the operation of DBIA Contract Documents will be uninterrupted or error free.
- 7. Limitations of Remedies.** DBIA's entire liability and your exclusive remedy shall be: the replacement of any document not meeting DBIA's "Limited Warranty" which is returned to DBIA with a copy of your receipt, or at DBIA's election, your money will be refunded. In no event will DBIA be liable to you for any damages, including any lost profits, lost savings or other incidental or consequential damages arising out of the use or inability to use DBIA Contract Documents even if DBIA has been advised of the possibility of such damages, or for any claim by any other party. Some states do not allow the limitation or exclusion of liability for incidental or consequential damages, so the above limitation or exclusion may not apply to you.
- 8. Acknowledgement.** You acknowledge that you have read this agreement, understand it and agree to be bound by its terms and conditions and that it will be governed by the laws of the District of Columbia. You further agree that it is the complete and exclusive statement of your agreement with DBIA which supersedes any proposal or prior agreement, oral or written, and any other communications between the parties relating to the subject matter of this agreement.

INSTRUCTIONS

For DBIA Document No. 530 Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price (2009 Edition)

Checklist

Use this Checklist to ensure that the Agreement is fully completed and all exhibits are attached.

| | | |
|-------|-----------------|--|
| _____ | Page 1 | Owner's name, address and form of business |
| _____ | Page 1 | Design-Builder's name, address and form of business |
| _____ | Page 1 | Project name and address |
| _____ | Section 2.1.3 | Identify other exhibits to the Agreement |
| _____ | Section 4.2 | Note the optional provisions that are provided |
| _____ | Section 4.3.2 | Complete blanks for additional sum for use of Work Product |
| _____ | Section 5.2.1 | Complete blanks for calendar days and note the optional language that is provided |
| _____ | Section 5.2.2 | Insert any interim milestones (optional) |
| _____ | Section 5.4 | Complete blanks for liquidated damages and note the optional provisions that are provided |
| _____ | Section 5.5 | If the parties select the option provided they have to insert an amount |
| _____ | Section 5.6 | Complete blanks for early completion bonus and note the optional provision that is provided |
| _____ | Section 5.7 | Note the optional provisions that are provided |
| _____ | Section 6.1.2 | Insert basis for pricing preliminary services (optional) |
| _____ | Section 6.2.1 | Choose basis for Fee and complete blanks |
| _____ | Section 6.2.2 | Insert financial arrangements for adjustments and note optional provisions |
| _____ | Section 6.3.3 | Complete blanks for markup; insert or attach personnel names, etc. |
| _____ | Section 6.3.4 | Note optional language that is provided |
| _____ | Section 6.3.2.4 | Note the optional provision that is provided |
| _____ | Section 6.4.4 | Note the optional provision that is provided |
| _____ | Section 6.651.1 | Complete blanks for GMP, and note the optional provision that is provided |
| _____ | Section 6.651.2 | Complete blanks for Design-Builder's Contingency |
| _____ | Section 6.653.1 | Choose method for sharing savings; complete blanks |
| _____ | Section 6.7.1 | Note optional provision |
| _____ | Section 7.1.1 | Complete blanks for day of month |
| _____ | Section 7.2.1 | Complete blanks for retention percentage and note optional provision |
| _____ | Section 7.2.2 | Note optional provision |
| _____ | Section 7.4 | Complete blanks for interest rate |
| _____ | Section 8.1.3 | Choose overhead/profit method for termination for convenience |
| _____ | Section 8.2.1 | Complete blanks for percentages |
| _____ | Section 8.2.2 | Complete blanks for percentages |
| _____ | Section 9.1.1 | Insert Owner's Senior Representative's name, etc. (optional) |
| _____ | Section 9.1.2 | Insert Owner's Representative's name, etc. (optional) |
| _____ | Section 9.2.1 | Insert Design-Builder's Senior Representative's name, etc. (optional) |
| _____ | Section 9.2.2 | Insert Design-Builder's Representative's name, etc. (optional) |
| _____ | Section 10.1 | Attach Insurance Exhibit |
| _____ | Section 10.2 | Insert amount and conditions of bonds or other security and note the options that are provided |
| _____ | Section 11.1 | Insert any other provisions (optional) |
| _____ | Page 18 | Owner's and Design-Builder's execution of the Agreement |

General Instructions

| No. | Subject | Instruction |
|-----|---------------------------------------|---|
| 1. | Standard Forms | Standard form contracts have long served an important function in the United States and international construction markets. The common purpose of these forms is to provide an economical and convenient way for parties to contract for design and construction services. As standard forms gain acceptance and are used with increased frequency, parties are able to enter into contracts with greater certainty as to their rights and responsibilities. |
| 2. | DBIA Standard Form Contract Documents | Since its formation in 1993, the Design-Build Institute of America (“DBIA”) has regularly evaluated the needs of owners, design-builders, and other parties to the design-build process in preparation for developing its own contract forms. Consistent with DBIA’s mission of promulgating best design-build practices, DBIA believes that the design-build contract should reflect a balanced approach to risk that considers the legitimate interests of all parties to the design-build process. DBIA’s Standard Form Contract Documents reflect a modern risk allocation approach, allocating each risk to the party best equipped to manage and minimize that risk, with the goal of promoting best design-build practices. |
| 3. | Use of Non-DBIA Documents | To avoid inconsistencies among documents used for the same project, DBIA’s Standard Form Contract Documents should not be used in conjunction with non-DBIA documents unless the non-DBIA documents are appropriately modified on the advice of legal counsel. Moreover, care should also be taken when using different editions of the DBIA Standard Form Documents on the same project to ensure consistency. |
| 4. | Legal Consequences | DBIA Standard Form Contract Documents are legally binding contracts with important legal consequences. Contracting parties are advised and encouraged to seek legal counsel in completing or modifying these Documents. |
| 5. | Reproduction | DBIA hereby grants to purchasers a limited license to reproduce its Documents consistent with the License Agreement accompanying these Documents. At least two original versions of the Agreement should be signed by the parties. Any other reproduction of DBIA Documents is strictly prohibited. |
| 6. | Modifications | <p>Effective contracting is accomplished when the parties give specific thought to their contracting goals and then tailor the contract to meet the unique needs of the project and the design-build team. For that reason, these Documents may require modification for various purposes including, for example, to comply with local codes and laws, or to add special terms. DBIA’s latest revisions to its Documents provide the parties an opportunity to customize their contractual relationship by selecting various optional contract clauses that may better reflect the unique needs and risks associated with the project.</p> <p>Any modifications to these Documents should be initialed by the parties. At no time should a document be re-typed in its entirety. Re-creating the document violates copyright laws and destroys one of the advantages of standard forms-familiarity with the terms.</p> <p>Additions to DBIA Document No. 535, <i>Standard Form of General Conditions of Contract Between Owner and Design-Builder</i>, 2009 Edition, (“General Conditions of Contract”) shall be in the form of written Supplementary Conditions. These are referenced in Section 2.1.4 of DBIA Document No. 525, <i>Standard Form of Agreement Between Owner and Design-Builder - Lump Sum</i>, 2009 Edition, (“DBIA Document No. 525”) and Section 2.1.4 of DBIA Document No. 530, <i>Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price</i>, 2009 Edition, (“DBIA Document No. 530”).</p> |
| 7. | Execution | It is good practice to execute two original copies of the Agreement. Only persons authorized to sign for the contracting parties may execute the Agreement. |

Specific Instructions

| Section | Title | Instruction |
|---------|------------------------------------|--|
| General | Purpose of This Agreement | <p>DBIA Document No. 530 (“Agreement”) should be used when the parties intend that Owner pay Design-Builder the Cost of the Work plus a Fee, with or without a Guaranteed Maximum Price (“GMP”). If there is uncertainty about Owner’s Project Criteria, or the Project Criteria remain to be developed by Owner and Design-Builder together, a cost-plus/GMP contracting approach is desirable.</p> <p>If there is certainty as to Owner’s Project Criteria, a lump sum fixed price for the completion of all design and construction services may be suitable, especially when the Owner procures Design-Builder’s services by competitive means. In such case, DBIA Document No. 525 should be used.</p> |
| General | Purpose of These Instructions | These Instructions are not part of this Agreement, but are provided to aid the parties in their understanding of the Agreement and in completing the Agreement. |
| General | Related Documents | This Agreement shall be used in conjunction with the General Conditions of Contract. Other related Contract Documents are listed in Article 2 of this Agreement. |
| General | Date | On Page 1, enter the date when both parties reach a final understanding. It is possible, due to logistical reasons, that the dates when the parties execute the Agreement may be different. Once both parties execute the Agreement, the effective date of the Agreement will be the date recorded on Page 1. This date does not, however, determine Contract Time, which is measured according to the terms of Article 5. |
| General | Parties: Owner and Design-Builder | On Page 1 enter the legal name and full address of Owner and Design-Builder, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company, or other. |
| 2.1.1 | GMP Exhibit, GMP Proposal | If a GMP is established upon execution of this Agreement, the GMP Exhibit must be attached pursuant to Section 6.6.1.1. If a GMP is established after execution of this Agreement, the GMP Proposal must be attached pursuant to Section 6.6.2. Both the GMP Exhibit and GMP Proposal will include those Basis of Design Documents Design-Builder uses as the basis for its GMP. |
| 2.1.5 | Construction Documents | After execution of the Agreement, and consistent with the requirements of Section 2.4 of the General Conditions of Contract, Design-Builder will prepare Construction Documents, subject to Owner’s review and approval. |
| 3.2 | Order of Precedence | <p>The Contract Documents are listed in Section 2.1 in the order of their precedence. The GMP Exhibit and GMP Proposal are based on the Basis of Design Documents, which are comprised of various documents. The parties should strongly consider establishing the priority of the various documents comprising the GMP Exhibit or GMP Proposal to avoid disputes should discrepancies arise among the documents. Moreover, Section 2.1.3 recognizes that there may be other exhibits attached to this Agreement. If this is the case, the parties should discuss whether these exhibits should be part of the Basis of Design Documents. If these exhibits are not made part of the Basis of Design Documents, these exhibits will not take priority over the Basis of Design Documents in the event of a conflict.</p> |
| 3.3 | Definitions | Terms, words and phrases used in the Agreement shall have the same meanings used in the General Conditions of Contract. |
| 3.4 | Prescriptive/Design Specifications | <p>The Owner is cautioned that consistent with legal precedent if it includes prescriptive/design specifications in its Project Criteria the Design-Builder is entitled to rely on the information provided and to the extent said information is not accurate, the Design-Builder is entitled to an adjustment in the Contract Price and/or Contract Time. Accordingly, the Owner to avoid such potential liability should consider using performance specifications.</p> |

| Section | Title | Instruction |
|---------|--|---|
| 4.1 | Work Product | This Agreement provides that the Design-Builder shall retain ownership of the Work Product it produces, but obligates Design-Builder to grant a limited license to Owner to use the Work Product according to the terms and circumstances described in Sections 4.2, 4.3, 4.4 and 4.5. |
| 4.2 | Owner's Limited License Upon Payment in Full | Design-Builder shall grant Owner, at Owner's sole risk, a limited license to use the Work Product at the completion of the Work in connection with Owner's occupation of the Project. This Section also provides the parties with the option of transferring ownership of some or all of the Work Product to the Owner upon payment in full for all Work performed. Generally, where the Owner desires ownership of Work Product, it is sufficient to transfer ownership of unique architectural and design elements. |
| 4.3 | Owner's Limited License Upon Owner's Termination for Convenience or Design-Builder's Election to Terminate | Owner should not use the Termination for Convenience Clause to obtain Design-Builder's valuable design concepts, and then seek lower bids from other design-builders. Therefore, where Owner terminates this Agreement for its convenience, and then decides to complete the Project with its own or third party forces, Design-Builder shall grant Owner the rights set forth in Section 4.2, provided Owner pays Design-Builder all amounts due Design-Builder as required by the Contract Documents, including paying Design-Builder an additional sum per Section 4.3.2 for the use of the Work Product. In the event Design-Builder elects to terminate this Agreement for cause, for reasons set forth in Section 11.4 of the General Conditions of Contract, these same conditions apply to Owner's use of the Work Product. |
| 4.3.2 | Additional Compensation | To minimize disputes, the parties should negotiate prior to the execution of the Agreement the amount Owner shall pay Design-Builder for the use of Design-Builder's Work Product in the event Owner terminates this Agreement for its convenience or Design-Builder elects to terminate this Agreement for cause. Enter this amount. |
| 4.4 | Owner's Limited License Upon Design-Builder's Default | If Design-Builder is properly terminated for default, Owner is granted a limited license to use the Work Product, to complete the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.2. |
| 4.5 | Owner's Indemnification for Use of Work Product | Owner's use or alteration of the Work Product shall be at its sole risk, and Owner must agree to defend, indemnify and hold harmless Design-Builder and anyone working by or through Design-Builder, including Design Consultants of any tier. |
| 5.1 | Date of Commencement | Design-Builder's obligation to commence work is triggered by its receipt of a Notice to Proceed unless the parties mutually agree otherwise. |
| 5.2.1 | Substantial Completion of the Entire Work | Enter the calendar days duration by which Substantial Completion has to be achieved. The parties in this Section have the option of modifying the definition of Substantial Completion set forth in the General Conditions of Contract. If this option is selected Substantial Completion will be deemed to be achieved no later than the date a Temporary Certificate of Occupancy is issued if applicable to the Project. |
| 5.2.2 | Interim Milestones | It may be that some portions of the Work must be completed in phases or within a prescribed period of time to accommodate Owner's needs. The parties may, at their option, identify these portions of the Work to be completed prior to Substantial Completion of the entire Work. Enter the calendar days, starting from the Date of Commencement, for achieving Substantial Completion of these identified portions of the Work. If these portions of the Work are required to be substantially completed by certain milestone dates, enter those dates. As presently drafted, no remedy is provided to the Owner if an interim milestone is not met. If the Owner has special requirements as it relates to interim milestones, the Owner may want to consider a remedy for the Design Builder's failure to meet an interim milestone, as well as providing a bonus to the Design-Builder for satisfying such interim milestone. |

| Section | Title | Instruction |
|---------|---------------------------------------|---|
| 5.4 | Liquidated Damages | <p>Owner should make a good faith evaluation of the amount that is reasonably necessary to compensate it for delay. Owner should not establish liquidated damages to penalize Design-Builder. Moreover, in the event a GMP is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing liquidated damages until such time as the GMP is established.</p> <p>Section 5.4 establishes a grace period between the Scheduled Substantial Completion Date and the assessment of liquidated damages in order to prevent disputes as to which party bears responsibility for only a few days of delay. The parties should enter the calendar days that may pass following the Scheduled Substantial Completion Date before liquidated damages will be assessed. The parties are also provided the option of establishing liquidated damages if the Design-Builder fails to achieve Final Completion within a specified number of days after Substantial Completion. If this option is selected, the parties have to negotiate the number of days, as well as the liquidated damages amount. The parties in negotiating liquidated damages should keep in mind that the amount of liquidated damages for failing to achieve Final Completion should be a considerably scaled down amount and should reflect the financial harm to the Owner. In no case should the total amount of liquidated damages for the Project exceed an amount that is reasonably necessary to compensate Owner for Project delay.</p> <p>The parties also have the option here of eliminating liquidated damages altogether in which case the Owner can recover actual damages for Project delay at an amount that is capped by the parties. The Owner is cautioned that it still cannot recover consequential damages under Section 10.5.1 of the General Conditions of Contract.</p> |
| 5.5 | Liquidated Damages Cap | The parties can agree to cap liquidated damages at a negotiated amount. |
| 5.6 | Early Completion Bonus | If the Project economics justify liquidated damages, then it is appropriate to couple these liquidated damages with an early completion bonus. The parties should enter the number of calendar days prior to the Scheduled Substantial Completion Date that will set the Bonus Date. Also, enter the amount of the bonus to be paid per day that will allow Owner to share with Design-Builder the economic benefits of early completion. Moreover, in the event a GMP is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing an early completion bonus until such time as the GMP is established. The parties also have the option in Section 5.6 of capping the early completion bonus at a negotiated amount. |
| 5.7 | Compensation for Force Majeure Events | The parties are provided the opportunity of providing the Design-Builder the right to receive compensation for Force Majeure Events. The parties agree to modify Section 8.2.2 of the General Conditions of Contract in which case the parties have to negotiate how many cumulative days of Force Majeure delays must occur before the Design-Builder is entitled to either a negotiated amount per day for delay or the direct costs it has incurred as a result of such delay. |
| 6.1.2 | Optional Pricing | This Agreement allows the parties the flexibility to establish within the Contract Price a different payment basis for certain preliminary portions of the Work which may be necessary to permit Design-Builder to furnish Owner with a GMP. Alternatively, the parties may use DBIA Document No. 520 to perform certain preliminary design services prior to setting the GMP. Enter a description of any such services, the basis for determining the price, and the price to be paid. |
| 6.2.1 | Design-Builder's Fee | Enter the amount of Design-Builder's Fee as a sum certain or as a percentage of the Cost of the Work. Design-Builder's Fee shall be commensurate with the services it provides and the risk it assumes in providing single point responsibility to Owner. |
| 6.2.2 | Adjustments to Design-Builder's Fee | For additive Change Orders, the parties have to negotiate the Fee the Design-Builder will receive. For deductive Change Orders, the parties have the option by checking the appropriate box of whether there will be no additional reduction or whether there will be an additional reduction based on a negotiated percentage. |

| Section | Title | Instruction |
|---------|---|--|
| 6.3.3 | Wages for Design-Builder's Employees at Principal or Branch Offices | DBIA endorses reimbursing salaries and associated benefits of Design-Builder's Project personnel, such as accountants, stationed at offices other than the field office, when to do so is more efficient and cost effective. Enter the percentage markup to be applied for Project related overhead associated with such personnel. Insert, or attach as an exhibit, a list of such personnel and their job functions. |
| 6.3.4 | Employee Benefits | It may be simpler for the parties to agree on a multiplier (rather than actual costs) to compensate the Design-Builder for employee benefits. Accordingly, the parties may want to insert the multiplier to be applied to the wages and salaries of its reimbursable employees. |
| 6.3.7 | Costs for Defective/Non-Conforming Work | The Cost of the Work shall include the costs to repair or correct defective or non-conforming Work (including warranty or corrective work performed after Substantial Completion) unless caused by Design-Builder's negligence. DBIA believes that Design-Builder should not be penalized for inadvertent mistakes which are inevitable when designing and constructing a Project. To do so would encourage ultra-conservatism in every task, the ultimate cost of which would be greater than a proactive approach to performing the Work, which includes ordinary mistakes or inadvertence. |
| 6.3.24 | Warranty Escrow | At this section, the parties are provided the opportunity to establish prior to Final Completion an escrow account in a negotiated amount to be used to reimburse the Design-Builder for its costs incurred in performing warranty Work. If funds remain in the escrow account after the expiration of the warranty period, the funds are returned to the Owner subject to Design-Builder's share of any savings. Note that even if the escrow account is exhausted, if funds remain under the GMP, the Owner is still obligated to reimburse the Design-Builder for its warranty Work. |
| 6.4.4 | Allowance Value | This section recognizes that the parties may agree that certain items of Work should be treated as an Allowance Item and priced based on Allowance values. The Allowance Value for which the Design-Builder will be entitled to receive compensation includes direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the Allowance Item. All other costs associated with the Allowance Item, such as design fees, general conditions costs and fee are deemed to be included in the Contract Price. However, by checking the box, the parties agree that in the event the actual cost of the Allowance Item is greater than or less than the Allowance Value by a negotiated percentage, then Design-Builder's right to Fee and markup shall be determined pursuant to Section 6.2.2. |
| 6.6 | The Guaranteed Maximum Price | <p>This Agreement provides the parties flexibility in establishing the Contract Price. Parties can establish a GMP before or after entering into this Agreement, or elect to proceed on the basis of costs plus a fee, without a GMP.</p> <p>If a GMP method is elected, the GMP should not be established until the Basis of Design Documents are sufficiently defined to make the GMP realistic and meaningful. Setting it too early does not permit reasonable opportunity for scope definition and evaluation of Project risk. On the other hand, setting it too late may not achieve Owner's objective of having an early price guarantee to enable it to make decisions relative to the Project.</p> |
| 6.6.1.1 | GMP at Agreement Execution | <p>Enter the GMP, if appropriate. Attach as an exhibit to this Agreement the Basis of Design Documents used to establish the GMP. These documents comprise the GMP Exhibit which shall become a Contract Document pursuant to Section 2.1.1 of the Agreement. The Design-Builder does not guarantee any specific line item provided as part of the GMP.</p> <p>By selecting the alternate option, the Design-Builder agrees to guarantee the line item in its GMP for general conditions costs only. The Design-Builder agrees that it is responsible for paying general conditions costs in excess of this line item. The Design-Builder does not guarantee any other line items in the GMP.</p> |

| Section | Title | Instruction |
|-----------|--|--|
| 6.6.1.2 | GMP Contingency | <p>Enter the amount of Design-Builder's Contingency. The Contingency is for the exclusive use of the Design-Builder and covers all unanticipated costs incurred that are not the basis of a Change Order. This section sets forth by way of example only the type of costs that would be funded out of the Contingency. Other costs such as but not limited to any deductibles the Design-Builder is obligated to pay would be subject to reimbursement. The Design-Builder is also required to provide the Owner with a monthly status report accounting for the Contingency, including all reasonably foreseen uses and potential uses, of the Contingency for the upcoming three months.</p> <p>While not provided for in the Contingency provision, DBIA recognizes that there may be situations where the Owner will want to recapture the Contingency prior to Final Completion. For example, the Owner may want to use amounts in the Contingency to fund changes to the Project. The Owner's desire has to be balanced against the Design-Builder's need to use the Contingency to fund unanticipated costs for which it is liable. Accordingly, balancing these competing concerns is usually accomplished by releasing some of the Contingency to the Owner after the Design-Builder has bought out the Subcontractors, providing that the Design-Builder is not obligated to release Contingency amounts in excess of amounts identified for reasonably foreseen uses or potential uses of the Contingency.</p> |
| 6.6.2.1 | GMP Proposal After Execution of This Agreement | <p>At the request of Owner, Design-Builder shall submit its GMP Proposal, which shall include the items listed in Sections 6.6.2.1.1 to 6.5.2.1.9. If the parties agree to additions or deletions from this list, modify this Section 6.6.2.1 appropriately.</p> <p>The Agreement provides the parties with flexibility as to when the GMP Proposal will be submitted after execution of the Agreement. Prior to execution of the Agreement the parties should discuss when Owner desires Design-Builder to submit its GMP Proposal.</p> |
| 6.6.2.1.4 | Schedule | <p>Given that expedited delivery is one of the primary factors driving many owners to select the design-build method, DBIA strongly believes that the parties should discuss and understand what each party must do to support the Project schedule. The entire Work, both design and construction, should be scheduled. The schedule should indicate the dates for the start and completion of the various stages of the Work, including the date when Owner information and approvals are required, and any Owner created constraints. The Agreement also provides flexibility to establish the Scheduled Substantial Completion Date prior to submission of the GMP Proposal.</p> |
| 6.6.2.3 | Acceptance of GMP Proposal | <p>If Owner accepts the GMP Proposal, the parties should amend this Agreement to add the final GMP Proposal as a Contract Document pursuant to Section 2.1.1.</p> |
| 6.6.2.4 | Failure to Accept the GMP Proposal | <p>This Agreement provides three options for Owner in the event it fails to accept the GMP Proposal and two choices for Design-Builder if Owner fails to exercise any of the three options. These options are specifically designed to prevent one party from receiving a windfall in the event the parties cannot agree on the GMP and the Agreement is terminated.</p> <p>The parties should take note that if Owner exercises its option to terminate for convenience, or Design-Builder suspends performance, Design-Builder will not be entitled to payment for uncompleted Work provided by Section 8.2. However, additional payment for Owner's use of Work Product will be due Design-Builder pursuant to Section 4.3, if Owner proceeds to complete the Project using Design-Builder's Work Product.</p> |
| 6.6.3 | Savings | <p>One of the benefits of a GMP approach is the possibility that with good management by Design-Builder and timely support from Owner the actual Cost of the Work and Fee may be less than the GMP. This creates a savings pool that should result in a benefit to both Design-Builder and Owner. Sharing these savings creates an incentive for Design-Builder to save costs. Some factors to consider in determining how the Savings are shared include the timing for the establishment of the GMP and the amount of Design-Builder's Fee established under Section 6.2.1.</p> |

| Section | Title | Instruction |
|---------|--|--|
| 6.6.3.1 | Savings Calculations | This section provides that if the actual Cost of the Work and Design-Builder's Fee is less than the GMP, as such GMP may have been adjusted, the savings, if any, shall be shared. The Agreement offers two choices for distributing Savings. Choose a method and enter the appropriate figures. |
| 6.7 | Performance Incentives | In addition for the potential of the Design-Builder to share in Savings as set forth in Section 6.6.3, there may be other performance incentives that will influence Project success. Such incentives may include award fees tied to the Design-Builder achieving certain standards relative to client satisfaction, safety, and personnel retention. The parties are encouraged to discuss the use of such incentives during negotiation of this Agreement. Any agreement on the use of incentives should be set forth in an exhibit attached to this Agreement. |
| 7.1.1 | Progress Payments | Enter the day of the month when Design-Builder shall submit its Application for Payment. |
| 7.2.1 | Retainage | <p>Enter the percentage Owner will retain from Progress Payments to Design-Builder until fifty percent (50%) of the Work is completed. Owner should recognize that it creates undue hardship to hold retainage on Subcontractors that have completed their work early in the Project. Owner should accordingly consider releasing retainage on Subcontractors that complete work early in the Project, providing that these Subcontractors have satisfactorily performed their portion of the Work.</p> <p>The parties are provided the option of modifying the retainage provision by checking the box. This option excludes from retainage the Design-Builder's General Conditions costs and amounts paid to Design-Builder's Design Consultant. The rationale for selecting this option is that the Design-Builder is obligated to pay its General Conditions costs in full each month and that under the design-bid-build delivery method, the Owner typically does not retain sums from its designer.</p> |
| 7.2.2 | Release of Retainage | This section requires the Owner to release retainage to the Design-Builder. If the Design-Builder and Owner have established a warranty reserve in accordance with Section 6.3.2.4, the parties shall establish an escrow account at this time. |
| 7.4 | Interest | The parties should enter the rate at which interest will accrue on Design-Builder's payments if unpaid five (5) days after due. Late payment creates a hardship for Design-Builder, its Design Consultants and Subcontractors. |
| 7.5 | Record Keeping | The Owner is provided access to Design-Builder's accounting information as it relates to Costs of the Work. However, if the parties have agreed to multipliers or markups, the time to challenge and negotiate those percentages is at the time the parties execute the Agreement and not during the Project or after it has been completed. Accordingly, the Owner can at any time audit these percentages only to confirm that such percentage has been properly charged and not to challenge the composition of such percentage. |
| 8.1.3 | Termination for Convenience: Overhead and Profit | The parties should choose prior to execution of the Agreement the method that will be used to determine overhead and profit paid to Design-Builder in the event Owner terminates Design-Builder for its convenience. The parties may choose to set percentage rates for overhead and profit prior to execution of the Agreement, or may choose to determine reasonable sums to be paid for overhead and profit at the time of the termination. If the parties choose to set overhead and profit rates prior to execution of the Agreement, the percentages should be entered in Section 8.1.3. |

| Section | Title | Instruction |
|-----------|--|--|
| 8.2 | Termination for Convenience: Additional Payments | Although it is important for Owner to have a process for terminating this Agreement for convenience, the process must consider the interests of Design-Builder. If Owner terminates this Agreement for its own convenience, compensating Design-Builder for its costs will not be adequate because Design-Builder will have committed its resources for a small amount of revenue. Therefore, in addition to the overhead and profit paid in Section 8.1, Owner shall pay Design-Builder an additional sum, calculated as a percentage of the remaining balance of the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price. Enter the percentages Owner shall pay Design-Builder if Owner terminates this Agreement for its own convenience prior to or after the start of construction. |
| 8.3 | Termination for Convenience: Owner's Use of Work Product | Owner should not use the Termination for Convenience clause to obtain Design-Builder's valuable design concepts and then seek lower bids from another design-builder. If Owner terminates this Agreement for its own convenience, and chooses to proceed with the Project using Design-Builder's Work Product, Owner should pay an additional sum for the use of Design-Builder's Work Product pursuant to Section 4.3. |
| Article 9 | Representatives of the Parties | <p>Enter the name, title, address and telephone number of Owner's Senior Representative and Owner's Representative at Sections 9.1.1 and 9.1.2, respectively.</p> <p>Enter the name, title, address and telephone number of Design-Builder's Senior Representative and Design-Builder's Representative at Sections 9.2.1 and 9.2.2, respectively.</p> <p>The parties can elect to establish these Representatives during the performance of the Project rather than at the time of execution of this Agreement. If Representatives are identified after execution of the Agreement, an appropriate amendment should be made to the Agreement at the time these individuals are designated.</p> |
| 10.1 | Insurance | Attach an Insurance Exhibit setting forth in detail the insurance coverages required for the Project. Parties are advised to familiarize themselves with the terms of Article 5 of the General Conditions of Contract, Insurance and Bonds, and to consult their insurance advisor. |
| 10.2 | Bonds | Enter the type and amount of bonds or other performance security required for the Project. Where bonding is not required by statute, Owner may want to evaluate the project risks versus the bonding costs in deciding what type of performance security to require. |
| 11.1 | Other Provisions | Insert any other provisions. For example, the parties may elect to have disputes resolved through litigation rather than arbitration in which case the following optional language in this Section should be included. |



Standard Form of Agreement Between Owner and Design-Builder Cost Plus Fee with an Option for a Guaranteed Maximum Price

*This document has important legal consequences. Consultation with
an attorney is recommended with respect to its completion or modification.*

This **AGREEMENT** is made as of the _____ day of _____
in the year of 2010, by and between the following parties, for services in connection with the Project identified below:

OWNER:

City of Shawnee
11110 Johnson Drive
Shawnee, Kansas 66203

DESIGN-BUILDER:

(Name and address)

PROJECT:

Shawnee Town, 1929

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree as set forth herein.

Article 1 **Scope of Work**

1.1 Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents.

.1 The scope of work for design services is set forth in the Design Services Exhibit attached hereto to the Agreement

Article 2 **Contract Documents**

2.1 The Contract Documents are comprised of the following:

.1 All written modifications, amendments, minor changes, and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2009 Edition) (“General Conditions of Contract”);

.2 The GMP Exhibit referenced in Section 6.6.1.1 herein or the GMP Proposal accepted by Owner in accordance with Section 6.6.2 herein.

.3 This Agreement, including all exhibits (List for example, performance standard requirements, performance incentive arrangements, markup exhibits, allowances, unit prices, or exhibit detailing offsite reimbursable personnel) but excluding, if applicable, the GMP Exhibit;

.4 Written Supplementary Conditions, if any, to the General Conditions of Contract;

.5 The General Conditions of Contract;

.6 Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract;

Article 3 **Interpretation and Intent**

3.1 Design-Builder and Owner, prior to execution of the Agreement (and again, if applicable, at the time of acceptance of the GMP Proposal by Owner in accordance with Section 6.6.2 hereof), shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement, or if applicable, prior to Owner’s acceptance of the GMP Proposal.

3.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, or if applicable, after Owner’s acceptance of the GMP Proposal, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof. (*Note,*

the parties are strongly encouraged to establish in the GMP Exhibit or GMP Proposal (as applicable) the priority of the various documents comprising such exhibit or proposal.)

3.3 Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

3.4 ~~If Owner's Project Criteria contain prescriptive/design specifications: (a) Design-Builder is entitled to reasonably rely on the accuracy of the information represented in the prescriptive/design specifications and its compatibility with other information set forth in Owner's Project Criteria, including any design performance specifications; and (b) Design-Builder shall be entitled to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate prescriptive/design specification.~~

3.5 The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

3.6 In the event of an ambiguity in the Contract Documents, the parties shall be deemed to have jointly authored them, and as such, nothing shall be construed against or in favor of one party based on its being deemed the sole author.

Article 4 **Ownership of Work Product**

4.1 Work Product. All drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement ("Work Product") are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in Sections 4.2 through 4.5 below.

4.2 Owner's Limited License upon Project Completion and Payment in Full to Design-Builder. Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder shall grant Owner a limited license to use the Work Product in connection with Owner's occupancy of the Project, conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on the Owner's obligation to provide the indemnity set forth in Section 4.5 herein.

[At the parties' option, one the of following may be used in lieu of Section 4.2]:

Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder: (a) grants Owner a limited license to use the Work Product in connection with Owner's occupancy of the Project; and (b) transfers all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in that portion of the Work Product that consists of architectural and other design elements and specifications that are unique to the Project. The parties shall specifically designate those portions of the Work Product for which ownership in the Work Product shall be transferred. Such grant and transfer are conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on the Owner's obligation to provide the indemnity set forth in Section 4.5 herein.

or

Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder transfers to Owner all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in the Work Product. Such transfer is conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on the Owner's obligations to provide the indemnity set forth in Section 4.5 herein.

4.3 Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate. If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

.1 Use of the Work Product is at Owner's sole risk without liability or legal exposure to any Indemnified Party, and on the Owner's obligation to provide the indemnity set forth in Section 4.5 herein, and

.2 ~~If Owner terminates this agreement for its convenience, Owner agrees to pay Design-Builder would be entitled to a reasonable sum~~ the additional sum of _____ Dollars (\$) _____) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.2 if Owner resumes the Project through its employees, agents, or third parties.

This Article shall survive any termination or cancellation of this Agreement

~~**4.4 Owner's Limited License upon Design-Builder's Default.** If this Agreement is terminated due to Design-Builder's default pursuant to Section 11.2 of the General Conditions of Contract, then Design-Builder grants Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.2 above. Notwithstanding the preceding sentence, if it is ultimately determined that Design-Builder was not in default, Owner shall be deemed to have terminated the Agreement for convenience, and Design-Builder shall be entitled to the rights and remedies set forth in Section 4.3 above.~~

~~**4.5 Owner's Indemnification for Use of Work Product.** If Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product.~~

Article 5

Contract Time

5.1 Date of Commencement. The Work shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

5.2 Substantial Completion and Final Completion

5.2.1 Substantial Completion of the entire Work shall be achieved no later than _____ (_____) calendar days after the Date of Commencement (“Scheduled Substantial Completion Date”).

[At the parties’ option, the following supplemental language may be inserted at the end of Section 5.2.1]

The parties agree that the definition for Substantial Completion set forth in Section 1.2.18 of the General Conditions of Contract is hereby modified to read as follows:

“*Substantial Completion* is the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes, provided, however, that Substantial Completion shall be deemed to have been achieved no later than the date of issuance of a Temporary Certificate of Occupancy issued by the local building official, if a Temporary Certificate of Occupancy is applicable to the Project.”

5.2.2 Interim milestones and/or Substantial Completion of identified portions of the Work shall be achieved as follows: *(Insert any interim milestones (“Scheduled Interim Milestone Dates”) for portions of the Work with different scheduled dates for Substantial Completion)*

~~5.2.3 Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.7 of the General Conditions of Contract.~~

5.2.4 All of the dates set forth in this Article 5 (“Contract Time(s)”) shall be subject to adjustment in accordance with the General Conditions of Contract.

5.3 **Time is of the Essence.** Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

5.4 **Liquidated Damages.** Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by ten (10) days after the Scheduled Substantial Completion Date (the “LD Date”), Design-Builder shall pay Owner Six Hundred Dollars (\$600) as liquidated damages for each day that Substantial Completion extends beyond the LD Date. *(If a GMP is not established upon execution of this Agreement, the parties should consider setting liquidated damages after GMP negotiations)*

~~[The parties may want to consider the following supplemental language within Section 5.4 if they want to assess liquidated damages for failing to meet Final Completion. In this case, the first sentence in Section 5.2.3 should be deleted and replaced with the following language]~~

Design-Builder understands that if Final Completion is not achieved within thirty (30) days of the Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Final Completion is not achieved within thirty (30) days of Substantial Completion, Design-Builder shall pay to Owner Two Hundred Dollars (\$200), as liquidated damages for each calendar day that Final Completion is delayed beyond the above-referenced number of days.

~~[In lieu of the liquidated damages specified in Section 5.4 or the alternate provided herein, the Parties may decide that the Agreement will provide for actual damages in the event of Project delay, with Owner being cautioned that there is a waiver of consequential damages]~~

~~**under Section 10.5.1 of the General Conditions of Contract. In this case, delete Sections 5.4 and 5.5 and insert the following]**~~

~~5.4~~ Design-Builder and Owner have agreed not to provide for liquidated damages in this Agreement for failure of Design-Builder to achieve the Contract Time(s) set forth in this Article 5. Design-Builder understands, however, that Owner may suffer actual damages in the event the Contract Time(s) set forth herein are not achieved. Owner shall be able to recover damages from Design-Builder to the extent it can demonstrate that said actual damages have been incurred, are directly related and caused by Design-Builder's failure to meet the Contract Time(s) set forth herein, and are not waived by Section 10.5.1 of the General Conditions of Contract. Notwithstanding the foregoing in no event shall Design-Builder's liability for actual damages for delays exceed _____ Dollars (\$_____).

5.5 Any liquidated damages assessed pursuant to this Agreement shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature, incurred by Owner which are occasioned by any delay in achieving Substantial Completion, Interim Milestone Dates (if any) or Final Completion.

~~**[The Parties may also desire to cap the liquidated damages payable under this Agreement, in which case the following language should be included at the end of Section 5.5.]**~~

Owner and Design-Builder agree that the maximum aggregate liability Design-Builder has for any liquidated damages that may be assessed under this Agreement shall be _____ Dollars (\$_____).

5.6 The Owner shall have the right to deduct said liquidated damages from any monies in its hands, otherwise due or to come due to the Design-Builder, or to sue for and recover compensation for damages for non-conformance of this Agreement.

~~5.6~~ **Early Completion Bonus.** If Substantial Completion is attained on or before _____ (_____) days before the Scheduled Substantial Completion Date (the "Bonus Date"), Owner shall pay Design-Builder at the time of Final Payment under Section 7.3 hereof an early completion bonus of _____ Dollars (\$_____) for each day that Substantial Completion is attained earlier than the Bonus Date. *(If a GMP is not established upon execution of this Agreement, the parties should consider setting the early completion bonus after GMP negotiations. If an early completion bonus is applicable to any dates set forth in Section 5.2.2 or 5.2.3 hereof, this Section 5.6 will need to be modified accordingly.)*

~~**[The Parties may also desire to cap the early completion bonus payable under Section 5.6 in which case the following language should be included].**~~

Owner and Design-Builder agree that the maximum aggregate amount that Design-Builder shall receive as the early Completion Bonus is _____ Dollars (\$_____).

5.7 ~~**[The Parties may also desire to modify Article 8.2.2 of the General Conditions of Contract relative to compensability of delays that would cause the Contract Time(s) to be extended. In such case, the following option can be used.]**~~

In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price for those events set forth in Section 8.2.1 above, provided, however, for Force Majeure Events, Design-Builder shall be entitled to an increase in the Contract Price providing that: (i) said events must exceed _____ cumulative days before Design-Builder is entitled to additional compensation; and (ii) said additional compensation shall be limited to:

[Check one box only]

\$ _____ dollars a day for each day work is delayed beyond the Scheduled Substantial Completion Date.

or

the direct costs and expenses Design-Builder can demonstrate it has reasonably actually incurred as a result of such event.

Article 6 **Contract Price**

6.1 Contract Price

6.1.1 Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to Design-Builder's Fee (as defined in Section 6.2 hereof) plus the Cost of the Work (as defined in Section 6.3 hereof), subject to any GMP established in Section 6.6 hereof and any adjustments made in accordance with the General Conditions of Contract.

6.1.2 For the specific Work set forth below, Owner agrees to pay Design-Builder, as part of the Contract Price, on the following basis: *(This is an optional section intended to provide the parties with flexibility to identify and price limited preliminary services, such as a lump sum or cost-plus arrangement for preliminary design, programming, or services necessary to enable Design-Builder to furnish Owner with a GMP before execution of this Agreement.)*

6.2 Design Services and Design-Builder's Fee

6.2.1 The cost of design services provided by the Design-Builder shall be \$ _____.

6.2.2 Design-Builder's Fee shall be:

(Choose one of the following:)

_____ Dollars (\$ _____), as adjusted in accordance with Section 6.2.2 below.

_____ percent (_____ %) of the Cost of the Work, as adjusted in accordance with Section 6.2.23 below.

6.2.23 Design-Builder's Fee will be adjusted as follows for any changes in the Work:

.1 For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design Builder shall receive a Fee of _____ percent (_____ %) of the additional Costs of the Work incurred for that Change Order, plus any other markups set forth at Exhibit _____ hereto.

.2 For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include:

[Check one box only]

No additional reduction to account for Design-Builder's Fee or any other markup.

or

An amount equal to the sum of: (a) _____ percent (_____%) applied to the direct costs of the net reduction (which amount will account for a reduction associated with Design-Builder's Fee); plus (b) any other markups set forth at Exhibit ____ hereto applied to the direct costs of the net reduction.

6.3 Cost of the Work. The term Cost of the Work shall mean costs reasonably incurred by Design-Builder in the proper performance of the Work. The Cost of the Work shall include only the following:

~~.1 Wages of direct employees of Design-Builder performing the Work at the Site or, with Owner's agreement, at locations off the Site, provided, however, that the costs for those employees of Design-Builder performing design services shall be calculated on the basis of prevailing market rates for design professionals performing such services or, if applicable, those rates set forth in an exhibit to this Agreement.~~

.2 Wages or salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work.

~~.3 Wages or salaries of Design-Builder's personnel stationed at Design-Builder's principal or branch offices engaged in managing company operations which support the project, but only to the extent said personnel are identified in Exhibit _____ and performing the function set forth in said Exhibit. The reimbursable costs of personnel stationed at Design-Builder's principal or branch offices shall include a _____ percent (_____%) markup to compensate Design-Builder for the Project-related overhead associated with such personnel.~~

.4 Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Sections 6.3.1 through 6.3.3 hereof.

~~**[In lieu of the language in Section 6.3.4 above, Design-Builder and Owner may want to include the following language:]**~~

A multiplier of _____ percent (_____%) shall be applied to the wages and salaries of the employees of Design-Builder covered under Sections 6.3.1 through 6.3.3 hereof.

.5 The reasonable portion of the cost of travel, accommodations and meals for Design-Builder's personnel necessarily and directly incurred in connection with the performance of the Work.

~~.6 Payments properly made by Design-Builder to Subcontractors and Design Consultants for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors and Design Consultants.~~

.7 Costs incurred by Design-Builder in repairing or correcting defective, damaged or nonconforming Work (including any warranty or corrective Work performed after Substantial Completion), provided that such Work was beyond the reasonable control of Design-Builder, or caused by the ordinary mistakes or inadvertence, and not the negligence, of Design-Builder or those working by or through Design-Builder. If the costs associated with such Work are recoverable from insurance, Subcontractors or Design Consultants, Design-Builder shall exercise best efforts to obtain recovery from the appropriate source and provide a credit to Owner if recovery is obtained.

- .8** Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work.
- .9** Costs less salvage value of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design-Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling and removing such items.
- .10** Costs of removal of debris and waste from the Site.
- .11** The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and reasonable petty cash expenses.
- .12** Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the Site, whether rented from Design-Builder or others, and incurred in the performance of the Work.
- .13** Premiums for insurance and bonds required by this Agreement or the performance of the Work.
- .14** All fuel and utility costs incurred in the performance of the Work.
- .15** Sales, use or similar taxes, tariffs or duties incurred in the performance of the Work.
- ~~**.16** Legal costs, court costs and costs of mediation and arbitration reasonably arising from Design-Builder's performance of the Work, provided such costs do not arise from disputes between Owner and Design-Builder.~~
- .17** Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.
- ~~**.18** The cost of defending suits or claims for infringement of patent rights arising from the use of a particular design, process, or product required by Owner, paying legal judgments against Design-Builder resulting from such suits or claims, and paying settlements made with Owner's consent.~~
- ~~**.19** Deposits which are lost, except to the extent caused by Design-Builder's negligence.~~
- .20** Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property.
- .21** Costs reimbursable under the Contingency under Section 6.7.1.2 herein.
- .22** Accounting and data processing costs related to the Work.
- .23** Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.

[Design-Builder and Owner may want to consider adding the following Section 6.3.24 to address the payment of warranty work:]

~~.24 Owner and Design-Builder agree that an escrow account in the amount of _____ Dollars (\$ _____) shall be established prior to Final Completion, which escrow shall be used to reimburse Design-Builder for the Costs of the Work incurred after Final Completion to perform warranty Work. The escrow agreement will provide that any sums not used at the expiration of the warranty period shall be returned to Owner, subject to any savings Design-Builder may be entitled to under this Agreement. In the event the warranty escrow account is exhausted, but funds remain under the GMP, Owner shall be obligated to pay Design-Builder the Costs of the Work incurred after Final Completion to perform warranty Work up to the GMP.~~

6.4 Allowance Items and Allowance Values

.1 Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth at the GMP Exhibit or GMP Proposal and are included within the GMP.

.2 Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Item. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

.3 No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner. Owner agrees that if Design-Builder is not provided written authorization to proceed by the date set forth in the Project schedule, due to no fault of Design-Builder, Design-Builder may be entitled to an adjustment of the Contract Time(s) and Contract Price.

.4 The Allowance Value includes the direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and general conditions costs, overhead and fee, are deemed to be included in the original Contract Price, and are not subject to adjustment notwithstanding the actual amount of the Allowance Item.

[In the Alternative, the parties may want to delete Section 6.4.4 and add the following provision].

In the event the actual direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the applicable Allowance Item is _____ percent (_____ %) greater than or less than the Allowance Value, Design-Builder and Owner agree that Design-Builder's right to Fee and markup shall be determined in accordance with Section 6.2.2.

.5 Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.4.4. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

6.5 Non-Reimbursable Costs The following shall be excluded from the Cost of the Work:

.1 Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 6.3.1, 6.3.2 and 6.3.3 hereof.

.2 Overhead and general expenses, except as provided for in Section 6.3 hereof, or which may be recoverable for changes to the Work.

- .3 ~~The cost of Design-Builder's capital used in the performance of the Work.~~
- .4 If the parties have agreed on a GMP, costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.

~~*(The parties shall comply with the following Section 6.6 based upon whether the GMP is agreed upon before the execution of this Agreement or will be developed and agreed upon after execution of this Agreement. If the parties do not use a GMP, this Section 6.6 shall be deemed inapplicable and compensation to Design-Builder shall be based on those fees and costs identified in the balance of this Article 6.)*~~

6.6 The Guaranteed Maximum Price ("GMP")

6.6.1 GMP Established Upon Execution of this Agreement

6.6.1.1 Design-Builder guarantees that it shall not exceed the GMP of _____ Dollars (\$_____). Documents used as a basis for the GMP shall be identified in an exhibit to this Agreement ("GMP Exhibit"). Design-Builder does not guarantee any specific line item provided as part of the GMP, and has the sole discretion to apply payment due to overruns in one line item to savings due to underruns in any other line item. Design-Builder agrees, however, that it will be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract Documents. *(While the GMP Exhibit will be developed in advance or concurrently with the execution of this Agreement, it is recommended that such exhibit include the items set forth in Section 6.6.2.1 below, to ensure that the basis for the GMP is well-understood).*

[In lieu of 6.6.1.1, Owner and Design-Builder may want to include the following language.]

Design-Builder guarantees that it shall not exceed the GMP of _____ Dollars (\$_____). Documents used as basis for the GMP shall be identified as an exhibit to this Agreement ("GMP Exhibit"). Design-Builder does not guarantee any specific line item provided as part of the GMP, provided, however, that it does guarantee the line item for its general project management and general conditions costs, in the amount of _____ Dollars (\$_____), and as set forth in the GMP Exhibit ("General Conditions Cap"). Design-Builder agrees that it will be responsible for paying the applicable general conditions costs in excess of the General Conditions Cap, as well as be responsible for all costs of completing the Work which exceed the GMP, as said general conditions line item and the GMP may be adjusted in accordance with the Contract Documents, including but not limited to the markups for Change Orders set forth in Section 6.2 herein.

6.6.1.2 The GMP includes a Contingency in the amount of _____ Dollars (\$_____) which is available for Design-Builder's exclusive use for unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) escalation of materials; (d) correction of defective, damaged or nonconforming Work, design errors or omissions, however caused; (e) Subcontractor defaults; or (f) those events under Section 8.2.2 of the General Conditions of Contract that result in an extension of the Contract Time but do not result in an increase in the Contract Price. The Contingency is not available to Owner for any

reason, including changes in scope or any other item which would enable Design-Builder to increase the GMP under the Contract Documents. Design-Builder shall provide Owner notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status report required by Section 2.1.2 of the General Conditions of Contract an

accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design-Builder agrees that with respect to any expenditure from the Contingency relating to a Subcontractor default or an event for which insurance may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently reimbursed for said costs by a Subcontractor or through insurance, then said recovery will be credited back to the Contingency.

The itemized breakdown of construction packages to be procured in accordance with the City's Purchasing Manual shall be listed in the "GMP Exhibit". For construction packages less than \$50,000, a minimum of three (3) competitive quotes shall be obtained through informal solicitations and the recommended vendor approved by the City Manager. For construction packages greater than \$ 50,000, sealed bids shall be required. Bids shall be opened jointly by representatives of the Design-Builder and Owner, and the recommended vendor approved by City Council.

6.6.2 — GMP Established after Execution of this Agreement

~~**6.6.2.1 GMP Proposal.** If requested by Owner, Design-Builder shall submit a GMP Proposal to Owner which shall include the following, unless the parties mutually agree otherwise:~~

~~.1 — A proposed GMP, which shall be the sum of:~~

~~i. Design-Builder's Fee as defined in Section 6.2.1 hereof;~~

~~ii. The estimated Cost of the Work as defined in Section 6.3 hereof, inclusive of any Design-Builder's Contingency as defined in Section 6.6.1.2 hereof; and~~

~~iii. If applicable, any prices established under Section 6.1.2 hereof.~~

~~.2 — The Basis of Design Documents, which may include, by way of example, Owner's Project Criteria, which are set forth in detail and are attached to the GMP Proposal.~~

~~.3 — A list of the assumptions and clarifications made by Design-Builder in the preparation of the GMP Proposal, which list is intended to supplement the information contained in the drawings and specifications and is specifically included as part of the Basis of Design Documents.~~

~~.4 — The Scheduled Substantial Completion Date upon which the proposed GMP is based, to the extent said date has not already been established under Section 5.2.1 hereof, and a schedule upon which the Scheduled Substantial Completion Date is based;~~

~~.5 — If applicable, a list of Allowance Items, Allowance Values, and a statement of their basis;~~

~~.6 — If applicable, a schedule of alternate prices;~~

~~.7 — If applicable, a schedule of unit prices;~~

~~.8~~ — If applicable, a statement of Additional Services which may be performed but which are not included in the GMP, and which, if performed, shall be the basis for an increase in the GMP and/or Contract Time(s); and

~~.9~~ — The time limit for acceptance of the GMP Proposal.

~~**6.6.2.2 Review and Adjustment to GMP Proposal.**~~ After submission of the GMP Proposal, Design-Builder and Owner shall meet to discuss and review the GMP Proposal. If Owner has any comments regarding the GMP Proposal, or finds any inconsistencies or inaccuracies in the information presented, it shall promptly give written notice to Design-Builder of such comments or findings. If appropriate, Design-Builder shall, upon receipt of Owner's notice, make appropriate adjustments to the GMP Proposal.

~~**6.6.2.3 Acceptance of GMP Proposal.**~~ If Owner accepts the GMP Proposal, as may be amended by Design-Builder, the GMP and its basis shall be set forth in an amendment to this Agreement.

~~**6.6.2.4 Failure to Accept the GMP Proposal.**~~ If Owner rejects the GMP Proposal, or fails to notify Design-Builder in writing on or before the date specified in the GMP Proposal that it accepts the GMP Proposal, the GMP Proposal shall be deemed withdrawn and of no effect. In such event, Owner and Design-Builder shall meet and confer as to how the Project will proceed, with Owner having the following options:

~~.1~~ — Owner may suggest modifications to the GMP Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the GMP Proposal shall be deemed accepted and the parties shall proceed in accordance with Section 6.6.2.3 above;

~~.2~~ — Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 6.1 hereof without a GMP, in which case all references in this Agreement to the GMP shall not be applicable; or

~~.3~~ — Owner may terminate this Agreement for convenience in accordance with Article 8 hereof; provided, however, in this event, Design-Builder shall not be entitled to the payment provided for in Section 8.2 hereof.

If Owner fails to exercise any of the above options, Design-Builder shall have the right to (i) continue with the Work as if Owner had elected to proceed in accordance with Item .2 above, and be paid by Owner accordingly, unless and until Owner notifies it in writing to stop the Work, or (ii) suspend performance of Work in accordance with Section 11.3.1 of the General Conditions of Contract, provided, however, that in such event Design-Builder shall not be entitled to the payment provided for in Section 8.2 hereof.

6.6.3 Savings

6.6.3.1 If the sum of the actual Cost of the Work and Design-Builder's Fee (and, if applicable, any prices established under Section 6.1.2 hereof) is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") shall be shared as follows:

(Choose one of the following:)

Fifty percent (50 %) to Design-Builder Fifty percent (50 %) to Owner.

or

The first _____ Dollars (\$ _____) of Savings shall be provided to ~~(choose either Design-Builder or Owner)~~ _____, with the balance of Savings, if any, shared _____ percent (_____ %) to Design-Builder and _____ percent (_____ %) to Owner.

6.6.3.2 Savings shall be calculated and paid as part of Final Payment under Section 7.3 hereof, with the understanding that to the extent Design-Builder incurs costs after Final Completion which would have been payable to Design-Builder as a Cost of the Work, the parties shall recalculate the Savings in light of the costs so incurred, and Design-Builder shall be paid by Owner accordingly.

6.7 Performance Incentives

6.7.1 Owner and Design-Builder have agreed to the performance incentive arrangements set forth in Exhibit _____.

~~[The parties are encouraged to discuss and agree upon performance incentives that will influence project success. These incentives may consist of Award Fees, incentives for safety, personnel retention, client satisfaction and similar items.]~~

Article 7 Procedure for Payment

7.1 Progress Payments

7.1.1 Design-Builder shall submit to Owner on the fifth (5th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

7.1.2 Owner shall make payment within ~~ten (10)~~ thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.

7.1.3 If Design-Builder's Fee under Section 6.2.1 hereof is a fixed amount, the amount of Design-Builder's Fee to be included in Design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the percentage of the Work completed, less payments previously made on account of Design-Builder's Fee.

7.2 Retainage on Progress Payments

7.2.1 Owner will retain _____ percent (_____ %) of each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional retention amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.

7.2.1 Owner shall retain from each Application for Payment amounts as follows:

- a. Retainage of 10 per cent of payments authorized until the work is 50 per cent complete.

- b. After the Work is 50 per cent complete, retainage of 5 per cent of payments authorized, provided the Contractor is making satisfactory progress and there is no specific cause for greater retainage.

Retainage shall not be reduced if the Work is behind schedule. Owner shall reinstate the 10 percent retainage any time the Work falls behind schedule.”

[Design-Builder and Owner may want to consider substituting the following retainage provision]

Owner will retain _____ percent (_____ %) of the cost of Work, exclusive of General Conditions costs, and any amounts paid to Design-Builder’s Design Consultant, from each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional amounts from Design-Builder’s subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.

7.2.2 ~~Within fifteen (15) days a~~ After Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to Section 6.6 of the General Conditions of Contract, Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to: (a) the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion; and (b) all other amounts Owner is entitled to withhold pursuant to Section 6.3 of the General Conditions of Contract.

[If Owner and Design-Builder have established a warranty reserve pursuant to Section 6.3.24 above, the following provision should be included]

If a warranty reserve has been established pursuant to Section 6.3.24 above, Owner shall at the time of Substantial Completion retain the agreed-upon amounts and establish an escrow account as contemplated by Section 6.3.24 above.

7.3 Final Payment. Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Owner shall make payment on Design-Builder’s properly submitted and accurate Final Application for Payment (less any amount the parties may have agreed to set aside for warranty work) within ~~ten (10)~~ thirty (30) days after Owner’s receipt of the Final Application for Payment, provided that: (a) Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.2 of the General Conditions of Contract; and (b) Owner shall have the right to withhold all amounts to which Owner is entitled to withhold pursuant to Section 6.3 of the General Conditions of Contract.

7.4 Interest. ~~Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing five (5) days after payment is due at the rate of _____ percent (_____ %) per month until paid.~~

7.5 Record Keeping and Finance Controls. Design-Builder acknowledges that this Agreement is to be administered on an “open book” arrangement relative to Costs of the Work. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner’s accountants shall be afforded access to, and the right to audit from time to time, upon reasonable notice, Design-Builder’s records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment. Such inspection shall take place at Design-Builder’s offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by the Owner and Design-Builder as part of this

Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, but the composition of such multiplier or markup is not subject to audit.

Article 8 Termination for Convenience

8.1 Upon ten (10) days' written notice to Design-Builder, Owner may, for its convenience and without cause, elect to terminate this Agreement. In such event, Owner shall pay Design-Builder for the following:

- .1 All Work executed and for proven loss, cost or expense in connection with the Work;
- .2 The reasonable costs and expenses attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with Subcontractors and Design Consultants; and

~~.3~~ *(Choose one of the following:)*

~~The fair and reasonable sums for overhead and profit on the sum of items .1 and .2 above.~~

or

Overhead and profit in the amount of _____ percent (_____ %) on the sum of items .1 and .2 above.

~~8.2~~ In addition to the amounts set forth in Section 8.1 above, ~~Design-Builder shall be entitled to receive one of the following as applicable:~~

~~.1~~ If Owner terminates this Agreement prior to commencement of construction, ~~Design-Builder shall be paid _____ percent (_____ %) of the remaining balance of the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price.~~

~~.2~~ If Owner terminates this Agreement after commencement of construction, ~~Design-Builder shall be paid _____ percent (_____ %) of the remaining balance of the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price.~~

8.3 If Owner terminates this Agreement pursuant to Section 8.1 above and proceeds to design and construct the Project through its employees, agents or third parties, Owner's rights to use the Work Product shall be as set forth in Section 4.3 hereof. Such rights may not be transferred or assigned to others without Design-Builder's express written consent and such third parties' agreement to the terms of Article 4.

~~*[The following Article 9 should only be used if Owner and Design-Builder agree to establish their respective representatives at the time the Agreement is executed rather than during the performance of the Project.]*~~

Article 9 Representatives of the Parties

9.1 Owner's Representatives

9.1.1 Owner designates the individual listed below as its Senior Representative (“Owner Senior Representative”), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual’s name, title, address and telephone numbers)*

Carol Gonzales
City Manager
11110 Johnson Drive
Shawnee, Kansas 66203
913-742-6200

9.1.2 Owner designates the individual listed below as its Owner’s Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract: *(Identify individual’s name, title, address and telephone numbers)*

Bert Schnettgoecke, P.E.
Senior project Engineer
11110 Johnson Drive
Shawnee, Kansas 66203
913-742-6271

9.2 Design-Builder’s Representatives

9.2.1 Design-Builder designates the individual listed below as its Senior Representative (“Design-Builder’s Senior Representative”), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual’s name, title, address and telephone numbers)*

9.2.2 Design-Builder designates the individual listed below as its Design-Builder’s Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract: *(Identify individual’s name, title, address and telephone numbers)*

9.2.3 Design-Builder designates and assigns the following individuals to the Project. Individuals listed shall not be removed from the Project without the consent of the Owner.

Article 10
Bonds and Insurance

10.1 Insurance. Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit attached hereto and in accordance with Article 5 of the General Conditions of Contract.

10.2 Bonds and Other Performance Security. Design-Builder shall provide ~~the following performance bond and labor and material payment bond or other performance security:~~ bonds as set forth in the Bond Exhibit attached hereto and in accordance with Article 5 of the General Conditions of the Contract.

Performance Bond.

~~_____~~ *(Check one box only. If no box is checked, then no bond is required.)*

_____ Required; Not Required

_____ **Payment Bond.**
_____ **(Check one box only. If no box is checked, then no bond is required)**

_____ Required; Not Required

_____ **Other Performance Security.**
(Check one box only. If no box is checked, then no other performance security is required.
If the "Required" box is checked, identify below the specific performance security that is
being required and all salient commercial terms associated with that security.)

_____ Required; Not Required

Article 11 Other Provisions

11.1 Other provisions, if any, are as follows: *(Insert any additional provisions)*

~~***[In lieu of Sections 10.3.1 through 10.3.3 of the General Conditions of Contract, the Parties may want to delete such sections and include the following alternative disputes proceeding clause.]***~~

11.1.1 Any claims, disputes, or controversies between the parties arising out of or related to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 10.2 of the General Conditions of Contract shall be resolved in a court of competent jurisdiction in the state in which the Project is located.

11.1.2 During the performance of this Agreement or any subcontract or agreement resulting thereof, the Design-Builder and Owner agree that each shall observe, and shall require all subcontractors and vendors to observe, the provisions of the Kansas Acts Against Discrimination (K.S.A. 44-1001, et seq.) and Title VI of the Civil Rights Act of 1964 as amended, and shall not discriminate because of race, veteran status, religion, color, sex, national origin, ancestry, age, disability, or low income. All solicitations or advertisements for employees, subcontractors, and vendors, shall include the phrase "equal opportunity employer" or a similar phrase to be approved by the Kansas Human Rights Commission ("Commission").

If the Design-Builder, a subcontractor or vendor fails to comply with the manner in which the design-Builder, subcontractor or vendor reports to the Commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Design-Builder, subcontractor, or vendor shall be deemed to have breached the Agreement and this Agreement may be cancelled, terminated or suspended, in whole or in part by the Owner.

If the Design-Builder, a subcontractor or vendor is found guilty of a violation of the Kansas Acts Against Discrimination under a decision or order of the Kansas Human Rights Commission which has become final, the Design-Builder, subcontractor or vendor shall be deemed to have breached this Agreement, and this Agreement may be cancelled, terminated or suspended in whole or in part by the Owner.

The Design-Builder shall include the above provisions in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or vendor.

The Design-Builder further agrees that the Design-Builder shall abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 et seq.) and the applicable provision of the Americans With Disabilities Act (42 U.S.C. 1201 et seq.) as well as all other federal, state and

local laws, ordinances and regulations applicable to this Project and shall furnish any certification required by any federal, state or local laws, ordinances and regulations applicable to this project and shall furnish any certification required by any federal, state or local governmental agency in connection therewith.

11.1.3 Design-Builder shall immediately upon notice from the City that such Design-Builder has been awarded the contract, shall apply for and obtain a city business occupation license through the City Clerk, pursuant to Chapter 5.04 of the Shawnee Municipal Code, and any amendment thereto existing at the time of such notice.

In executing this Agreement, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

OWNER:

DESIGN-BUILDER:

City of Shawnee

(Name of Owner)

(Name of Design-Builder)

(Signature)

(Signature)

Jeff Meyers

(Printed Name)

(Printed Name)

Mayor

(Title)

(Title)

Date: _____

Date: _____

ATTEST:

Stephen Powell, City Clerk

.....
Shawnee, Kansas _____, 2010

The forgoing Agreement and bonds are in due form, according to law, and hereby approved.

Attorney for Owner

Caution: An original DBIA document has this caution printed in blue. This is a printable copy and an original assures that changes will not be obscured as may occur when documents are reproduced.

GMP EXHIBIT
(To be prepared when Agreement is executed)

DESIGN SERVICES EXHIBIT
(To be prepared when Agreement is executed)

INSURANCE EXHIBIT

.1 The Design-Builder shall secure and maintain throughout the duration of this Agreement insurance of such types and in such amounts as may be necessary to protect Design-Builder and the interests of the Owner and agents of the Owner against all hazards or risks of loss as hereinafter specified and at least in the minimum limits established herein. The form and limits of such insurance, together with the underwriter thereof in each case, shall be approved by the Owner, but regardless of such approval it shall be the responsibility of the Design-Builder to maintain adequate insurance coverage at all times. Failure of the Design-Builder to maintain adequate coverage shall not relieve Design-Builder of any contractual responsibility or obligation.

.2 The Design-Builder shall obtain and deliver to Owner a Certificate of such Insurance naming (Except the Worker's Compensation and Employer's Liability Policy and Professional Liability Policy) the City of Shawnee as additional insured. Satisfactory certificates of insurance shall be filed with the Owner prior to starting any work on this Agreement and shall be maintained with the original of these Contract Documents. The certificates shall state that thirty (30) days written notice will be given to the Owner before any policy covered thereby is changed or canceled.

Certificates and renewals shall be on Standard ACORD™ forms with Admitted Carriers issuing industry coverage ratings that include a Best's policy holder rating of "A" or better and at least a Class C financial rating or carriers mutually agreed upon by both parties.

.3 Worker's Compensation and Employer's Liability: This insurance shall protect the Design-Builder against all claims under applicable state worker's compensation laws. The Design-Builder shall also be protected against claims for injury, disease, or death of employees which, for any reason, may not fall within the provisions of a worker's compensation law. This policy shall include an "all states" endorsement. This policy shall include a waiver of subrogation.

The minimum limits for workers compensation and employers' liability insurance required for this Agreement as follows:

| <u>Workers Compensation</u> | <u>Statutory</u> |
|--|---------------------|
| <u>Employers Liability:</u> | |
| <u>Bodily Injury – Each Occurrence</u> | <u>\$500,000.00</u> |
| <u>Disease – Each Employee</u> | <u>\$500,000.00</u> |
| <u>Disease – Policy Limit</u> | <u>\$500,000.00</u> |

.4 Commercial Business Automobile Liability: This insurance shall protect the Design-Builder against all claims for injuries to members of the public and damage to property of others arising from the use of motor vehicles, and shall cover operation on and off the site of all motor vehicles licensed for highway use, whether they are owned, non-owned, or hired. The policy shall name the Owner as additional insured. This policy shall include a waiver of subrogation. The minimum limits for automobile liability insurance required for this Agreement shall be the same as are set forth for the Commercial General Liability coverage.

.5 Commercial General Liability: This insurance shall protect the Design-Builder against all claims arising from injuries to members of the public or damage to property of others other than the construction work itself arising out of any act or omission of the Design-Builder or its agents, employees, or subcontractors. The policy shall include: Premises-Operations; Independent Contractor Protection; Products Liability and Completed Operations; and Broad Form Property Damage. In addition, this policy

shall specifically insure the contractual liability assumed by the Design-Builder as provided under Article 7 of the General Conditions of Contract.

The property damage liability coverage shall contain no exclusion relative to blasting, explosion, collapse of buildings or damage to underground property. The coverage shall be without exclusion for contract liability or independent contractors, shall name the Owner as an additional insured, and shall include a waiver of subrogation.

The minimum limits for bodily injury and property damage liability insurance required for this Agreement shall include an each occurrence limit of \$2 million and a general aggregate of \$2 million as follows:

| | |
|---|--------------------|
| <u>Bodily Injury and Property Damage Liability,</u> | |
| <u>Each Occurrence</u> | <u>\$2,000,000</u> |
| <u>General Aggregate</u> | <u>\$2,000,000</u> |
| <u>Products – Completed Operations Aggregate</u> | <u>\$2,000,000</u> |
| <u>Personal & Adv. Injury</u> | <u>\$2,000,000</u> |

.6 Professional Liability Coverage: This insurance shall provide continuous coverage from the beginning of the Project and continuing for a term of 3 years from the date of substantial completion. The minimum limits for bodily injury and property damage liability insurance required for this Agreement shall include an each occurrence limit of \$1 million and a general aggregate of \$1 million, with a deductible not to exceed \$100,000. The coverage shall include errors and omissions as well as property damage, bodily injury, and design build projects. This policy shall include a waiver of subrogation.

.7 Builder's Risk and Property Coverage: This insurance shall provide for the continuing full cost of replacement of the Project and \$200,000 for Owner provided furnishings and equipment at the time of loss, up to the full project cost. All premiums and deductibles will be the responsibility of the Design-Builder. Coverage is to be all risk (special cause of loss), replacement cost valuation with no coinsurance. Terrorism per TRIA is to be included. The Owner is to be listed as a loss payee.

BOND EXHIBIT

.1 Design-Builder shall provide a Performance and Maintenance Bond and a Statutory Bond in accordance with Article 5 of the General Conditions of Contract. A failure to maintain or a cancellation of the Performance and Maintenance Bond or Statutory Bond, due to failure to pay premium or any other cause, shall be a breach of this Agreement. The Performance and Maintenance Bond and the Statutory Bond shall be in amounts each equal to one hundred percent (100%) of the initial Contract Price as well as subsequent modifications thereto. The Performance and Maintenance Bond shall be for a period of one year for buildings and two (2) years for site work after the date of Substantial Completion for the Work. The Performance and Maintenance Bond shall protect the Owner against all damages losses, and expenses which may occur to the Owner, by reason of defective materials used, or by reason of defective workmanship done, for, the design and construction of said Work. If any items covered by the Performance and Maintenance Bond are not repaired or replaced by Design-Builder within a reasonable time, as determined by the Owner, or if a hazard occurs as the result of disrepair, the Owner shall have the right to correct, or have corrected such disrepair, at the expense of Design-Builder or Surety. Design-Builder shall require the attorney-in-fact who executes the required bonds on behalf of the Surety to provide the Owner with a letter granting to the Owner the authority to date the bonds and power of attorney the same date as the date of the Agreement. All bonds shall be executed by a surety company appearing on the U.S. Department of the Treasury's most current listing of approved sureties (Department Circular 570 , as amended). The Design-Builder shall cause the Statutory Bond to be filed with the Clerk of the District Court of Johnson County, Kansas, prior to commencement of the Work, and shall furnish to Owner a receipt of filing.

.2 Bonds may be obtained through the Design-Builder's usual source, and the cost thereof shall be included in the Contract Sum.

.3 Satisfactory bonds shall be filed with the Owner prior to starting any work on this Agreement and shall be maintained with the original of these Contract Documents.

.4 The Design-Builder shall require the attorney-in-fact who executes the required bonds on behalf of the surety to affix thereto a certified and current copy of the power of attorney.

.5 Each bond shall be executed on the form attached hereto, signed by a Surety Company authorized to do business in the State of Kansas and acceptable as Surety to the Owner. Each bond shall include Surety Bond Claim procedures including the name of a contact person, address, and telephone number that would handle claims for each type of bond.

CITY OF SHAWNEE, KANSAS

PERFORMANCE AND MAINTENANCE BOND

BOND NO. _____

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, _____ of as principal, hereinafter referred to as the "Design-Builder," and,

_____ ,
a corporation organized under the laws of the State of _____, and authorized to transact business in the State of Kansas, as Surety, are held and firmly bound unto the City of Shawnee, Kansas, hereinafter referred to as "City," in the penal sum of: _____ Dollars (\$ _____) lawful money of the United States of America, for the payment of which sum well and truly to be made we bind ourselves, and our heirs, executors, administrators, successors and assigns, jointly and severally by these presents:

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

WHEREAS, the above bonded Design-Builder, has on the _____ day of _____, 2010, executed a written Agreement with the aforesaid City for furnishing in a good, substantial and workmanlike manner and to further guarantee for a period of one year for buildings and two years for site work after the date of Substantial Completion, all design, construction, labor, materials, equipment, tools, transportation, superintendence and other facilities and accessories for the design and construction of Shawnee Town, 1929, as designated, defined and described in the Agreement and the Contract Documents, and in accordance with the Specifications and Plans and other Contract Documents therefore; a copy of said Agreement being attached hereto, all terms and conditions of which are incorporated herein and made a part hereof;

NOW, THEREFORE, if said Design-Builder shall in all particulars promptly and faithfully perform each and every covenant, condition, and part of the Agreement, and the Conditions, Specifications, Plans and other Contract Documents thereto attached or by reference made a part thereof, according to the true intent and meaning in each case, and the improvements shall be constructed so as to endure without defect and need of repair for a period of one year for buildings and two years for site work from the date of Substantial Completion, then this obligation shall be and become null and void; otherwise it shall remain in full force and effect.

PROVIDED, that said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Agreement or the work to be performed there under or the Specifications, Plans and other Contract Documents accompanying same shall in any way affect its obligation on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Agreement or to the work or to the Specifications, Plans and other Contract Documents.

PROVIDED, FURTHER, that it is expressly agreed that the bond shall be deemed amended automatically and immediately, without formal and separate amendments hereto, upon amendment to the Agreement not increasing the contract price more than 25 percent, so as to bind the Design-Builder and the Surety to the full and faithful performance of the Agreement so amended. The term "*amendment*" wherever used in this bond, and whether referring to this bond or the Agreement, shall include any alteration, addition, extension, or modification of any character whatsoever.

WHENEVER Design-Builder is declared by City to be in default under the Contract, of any of the terms and conditions of the contract attached hereto and incorporated herein, the City having performed City's obligations there under, the Surety may promptly remedy the default or shall within fourteen (14) days from the date of notice from the City:

1. Commence completing the Agreement in accordance with its terms and conditions;

or

2. Commence the process of obtaining a bid or bids for completing the Agreement in accordance with its terms and conditions, and upon determination by the City and the Surety jointly of the lowest and best responsive, responsible bidder, arrange for an Agreement between such bidder and the City, and make available as work progresses sufficient funds to pay the cost of completion less the balance of the Contract Price, including other costs and damages for which the surety may be liable hereunder. The term "*balance of the Contract Price*," as used in this paragraph, shall mean the total amount payable by City to Contractor under the Agreement and any amendments thereto, less the amount properly paid by City to Contractor. No right of action shall accrue on this bond to or for the use of any person or corporation other than the City or successors of the City

IN TESTIMONY WHEREOF, said Design-Builder has hereunto set his/her hand, and said Surety has caused these presents to be executed in its name; and its corporate seal to be hereunto affixed by its attorney-in-fact duly authorized thereunto so to do at

_____ ,
on this, the _____ day of _____, 2010.

_____ By (SEAL): _____
Design-Builder/Principal

_____ ATTEST: _____
Title Secretary

_____ Surety Company _____ Surety Representative

_____ Surety Address _____ Surety Phone Number

_____ Attorney-in-Fact By (SEAL):

_____ Kansas Resident Agent

CITY OF SHAWNEE, KANSAS

STATUTORY BOND

BOND NO. _____

_____, a _____, organized under the laws of the state of _____, and authorized to do business in the state of Kansas, as surety ("Surety"), and _____, as principal ("Design-Builder"), enter into and execute this Bond ("Statutory Bond"), and bind themselves unto the City of Shawnee, Kansas and any Beneficiary of this Statutory Bond, in the initial amount of \$ _____, one hundred percent (100%) of the Contract Sum or such greater amount as the Contract Sum may be adjusted from time to time in accordance with the Contract between the Design-Builder and the City of Shawnee as Owner, (the "Penal Sum").

WHEREAS, the Design-Builder has executed a contract with the Owner dated _____ to timely and fully provide all labor, tools, equipment and materials or supplies in conformance with generally accepted standards for quality, skill and construction of similar projects, in a workmanlike manner, designated, described and required by the Instruction to Bidders, Bid Proposal, the Contract, General and Technical or Special Specifications of the Contract, and any Written Addendum's or Change Orders, (the "Contract"), used or consumed in connection with or in or about the Shawnee Town,1929 Project in the City of Shawnee, Johnson County, Kansas (the "Project");

WHEREAS, the Owner has required the Design-Builder to guarantee payment of all labor, materials, tools, equipment or supplies furnished pursuant to the Contract for the Project that were used or consumed in connection with or in or about the Project, and all indebtedness incurred for labor furnished, materials, tools, equipment or supplies, used or consumed in connection with or in or about the Project, and

WHEREAS, the Owner has required the Design-Builder to furnish this Statutory Bond as a condition to awarding and executing the Contract with the Contractor, to guarantee the stated obligations.

NOW THEREFORE, if the Design-Builder and the subcontractors of the Design-Builder shall pay all indebtedness incurred for labor furnished, materials, tools, equipment or supplies, used or consumed in connection with or in or about the Project, or the making of the Project improvements described in the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect;

The Surety and the Design-Builder, both jointly and severally, and for themselves, their heirs, administrators, executors, successors and assigns agree:

- 1) The Contract is incorporated by reference and made a part of this Bond. The Surety and the Design-Builder are bound for the full performance of the Contract and all of the terms and conditions, both express and implied, and, without limitation, specifically including the Design-Builder's obligation to pay all indebtedness incurred for labor furnished, materials, tools, equipment or supplies, used or consumed in connection with or in or about the Project.
- 2) For purposes of this Statutory Bond, "Beneficiary" is defined as any person or entity to whom there is due any sum for labor, materials, tools, equipment or supplies furnished pursuant to the Contract for the Project that were used or consumed in connection with or in or about the Project, or whom otherwise incurred indebtedness for labor furnished, materials, tools, equipment or supplies, used or consumed in connection with or in or about the Project, and any such person or entity's assigns.
- 3) In no event is the Surety obligated hereunder for sums in excess of the Contract Sum or such greater amount as the Contract Sum may be adjusted from time to time in accordance with the Contract between the Design-Builder and Owner.

- 4) Upon receipt of a claim from a Beneficiary hereunder, the Surety must promptly, and in no event later than thirty (30) days after receipt of such claim, respond to such claim in writing (furnishing a copy of such response to the Owner) by:
- a. making payment of all sums not in dispute; and
 - b. stating the basis for disputing any sums not paid.
- 5) The Surety waives notice of any Modifications to the Contract, including changes in the Contract Time, the Contract Sum, the amount of liquidated damages, or the Work to be performed in connection with the Project. The parties expressly agree that this Bond shall be deemed amended automatically and immediately, without formal and separate amendments hereto, upon amendment to the Contract not increasing the Contract Sum more than 25 percent (25%), so as to bind the Design-Builder and the Surety to the full and faithful performance of the Contract so amended. The term "*amendment*" or "*modification*" wherever used in this Bond, and whether referring to this Bond or the Contract, shall include any alteration, addition, extension, or modification of any character whatsoever.
- 6) **METHOD OF NOTICE.** All notices to the Surety, the Design-Builder or the Owner must be given by Certified Mail, Return Receipt Requested, to the address set forth for each party below:

SURETY:

Name: _____
 Attention: _____
 Street: _____
 City, State, _____
 ZIP: _____

DESIGN-BUILDER:

Name: _____
 Attention: _____
 Street: _____
 City, State, _____
 ZIP: _____

OWNER: City of Shawnee, Kansas
 City Hall
 Attn: Doug Wesselschmidt, Director of Development Services
 11110 Johnson Drive
 Shawnee, Kansas 66203

with a copy to:

Office of the City Attorney
 City Hall
 Attn: Ellis Rainey
 11110 Johnson Drive
 Shawnee, Kansas 66203

- 7) The recitals contained in this Statutory Bond are expressly made part of this Statutory Bond.
- 8) This Statutory Bond shall be governed by, and construed in accordance with, the laws of the State of Kansas without regard to its conflict of laws provisions.
- 9) In the event any legal action shall be filed upon this Statutory Bond, venue shall lie exclusively in the District Court of Johnson County, Kansas.

IN TESTIMONY WHEREOF, said Design-Builder has hereunto set his/her hand, and said Surety has caused these presents to be executed in its name; and its corporate seal to be hereunto affixed by its attorney-in-fact duly authorized thereunto so to do at

_____ ,
 on this, the _____ day of _____, 2010.

DESIGN-BUILDER

SURETY

 (Typed Firm Name)

 (Typed Firm Name)

 (Seal)

 (Seal)

By: _____

By: _____

 (Signature)

 (Signature)

 (Printed Name)

 (Printed Name)

 (Title)

 (Title)

 (Address)

 (Address)

 (Phone Number)

 (Phone Number)

 (Date of Execution)

 (Date of Execution)

