



- 1.5 **"Authorized Representatives"** means those individuals appointed by the Owner and the Design/Builder from time to time in accordance with the provisions of Section 3.1.1 and Exhibit K hereof.
- 1.6 **"Certificate of Substantial Completion"** means a certificate prepared by the Design/Builder and forwarded to the Owner stating that the Project is sufficiently complete so it can be used for its intended purpose.
- 1.7 **"Certificate of Final Completion"** means a certificate prepared by the Design/Builder and forwarded to the Owner stating that the Project is finally complete and that the Design/Builder is entitled to Final Payment in accordance with the provisions of Section 5.13 hereof.
- 1.8 **"Change Directive"** means a written order signed by the Owner directing a change in the Work. A Change Directive shall state a proposed basis for adjustment, if any, in the GMP and/or Schedule. The Owner may order changes in the Work within the general scope of the Agreement, and a Change Directive shall be used in the absence of total agreement on the terms of a Change Order.
- 1.9 **"Change Order"** means a written order signed by the Design/Builder and the Owner authorizing a change in the Work, which also may adjust the GMP and/or the Schedule, and which shall constitute a Modification. The GMP and/or Schedule may be changed only by Change Order.
- 1.10 **"Change Proposal"** means a proposal for a Change Order submitted by the Design/Builder to the Owner, either at the request of the Owner, or at the Design/Builder's own initiative.
- 1.11 [Intentionally Deleted]
- 1.12 **"Construction Documents"** means the plans and specifications prepared by the Architect for the Project, approved by the Owner, and incorporated into this Agreement by reference after such approval, to be used to construct the Project. The Construction Documents shall set forth in detail all items necessary to complete the construction of the Project in accordance with the Contract Documents (subject to their completion following commencement of the Construction Phase). All amendments and modifications to the Plans and Specifications must be approved by the Owner prior to incorporation into this Agreement.
- 1.13 **"Construction Notice to Proceed"** means the notice given by the Owner to the Design/Builder stating that the Site is available to the Design/Builder and directing the Design/Builder to commence construction of the Project.
- 1.14 **"Construction Phase"** means the period set forth in the Schedule beginning with the issuance of the Construction Notice to Proceed and ending on the date of Final

Completion of the Project.

1.15 [Intentionally Deleted]

1.16 "**Contingency Costs**" means those items of Cost of the Work attributable to a contingency for which the Owner is responsible and which are payable by the Owner to the Design/Builder pursuant to a Change Order as provided in Article 6.

1.17 "**Contract Documents**" means those documents set forth on Exhibit C all of which, together with this Agreement, form the entire integrated agreement between the Owner and the Design/Builder.

1.18 "**Contract Time**" means the period of time, including authorized adjustments, allotted in the Schedule for the Substantial Completion of the Work.

1.19 [Intentionally Deleted]

1.20 "**Cost of the Work**" consists of those items of Work which are paid for by the Owner to the Design/Builder, and consist of those categories of costs set forth as allowable on Exhibit D. The "Estimated Cost of the Work" is the difference between the GMP and the Fee, as both may be adjusted pursuant to the provisions of the Contract Documents. The "Actual Cost of the Work" is the aggregate amount of costs actually chargeable to the Owner under the provisions of Exhibit D, up to the Estimated Cost of the Work.

1.21 "**CPM**" means a critical path method schedule in the form of precedents, networks and time sequences.

1.22 "**Day**" or "**Days**" means calendar days. If a Day requiring notice or action falls on a weekend, national holiday, the next non-weekend or non-holiday shall be applicable. "**Business Day**" or "**Business Days**" means Days other than weekend or national holidays.

1.23 "**Delay Costs**" means those items of Cost of the Work attributable to an Excusable Delay for which the Owner is responsible and which are payable by the Owner to the Design/Builder pursuant to a Change Order as provided in Article 6.

1.24 "**Design/Builder**" means ATHCO L.L.C., a Kansas corporation.

1.25 "**Design/Builder Event of Default**" shall have the meaning set forth in Section 12.1 hereof.

1.26 "**Design Materials**" means any and all documents, shop drawings, electronic information, data, plans, drawings, sketches, illustrations, specifications, descriptions, models and other information developed, prepared, furnished, delivered or required to be delivered by the Design/Builder (a) to the Owner under the Contract Documents or (b) developed or prepared by

the Design/Builder specifically to discharge its duties under the Contract Documents.

1.27 **"Design Phase"** means the period set forth in the Schedule commencing with the Design/Builder's receipt of a Notice to Begin Design and ending upon the date the Owner approves the Construction Documents.

1.28 **"Design Work"** means that portion of the Work consisting of the design services required to be provided in connection with the design of the Project as set forth in the Contract Documents, and subcontracted by the Design/Builder to the Architect, which shall be performed consistent with the standards of professional care exercised by national design firms.

1.29 **"Excusable Delay"** shall have the meaning set forth in Section 4.6.2 hereof.

1.30 **"Fee"** means the fee payable to the Design/Builder, which is a part of the GMP, as more fully described on Exhibit E attached hereto, and which is payable in accordance with the Fee Payment Schedule set forth in Exhibit A attached hereto.

1.31 **"Final Completion"** means the point at which the Work has been completed in accordance with the terms and conditions of the Contract Documents, including Punch list items.

1.32 **"Force Majeure"** means labor dispute, fire, unusual delay in transportation or delivery, unavoidable casualty, flood or other abnormal weather (assuming Design/Builder has taken reasonable precautions), earthquake, epidemic, civil disturbance, war, freight embargo, riot, sabotage (by persons other than the Design/Builder, Subcontractors and Team Subcontractors), material shortage or any other similar act or condition, in each case only to the extent the event in question is beyond the control of and without the fault or negligence of the Design/Builder.

1.33 **"Governmental Approvals"** means those governmental (including agency) actions required to be obtained by the Owner and necessary for the completion of the Project, including, but not limited to, modification of existing zoning, vacation of certain streets and/or alleys, and modifications to or variances from applicable building codes, all as more fully described on Exhibit F hereto.

1.34 **"Guaranteed Maximum Price" or "GMP"** means the amount set forth on Exhibit E hereto, which may be increased or decreased in accordance with the provisions of the Contract Documents.

1.35 [Intentionally deleted]

1.36 **"Indemnified Parties"** means the Owner, its elected officials, agents and employees.

1.37 **"Liquidated Damages"** means the damages payable by the Design/Builder to the Owner in the event the Design/Builder does not achieve Substantial Completion of the Project by the date required on the Schedule, as adjusted, as more fully described in Section 4.8 hereof.

1.38 **"Modification"** means an amendment to this Agreement executed by the parties after the date hereof.

1.39 **"Notice to Begin Design"** means the notice given by the Owner to the Design/Builder stating that the Design/Builder is authorized to begin the design of the Project.

1.40 **"Order of Magnitude Documents"** means the drawings, specifications and other documents prepared for the Design/Builder by the Architect for the Owner's review and approval prior to the preparation of the Construction Documents, as more particularly specified in Exhibit J hereto. The Order of Magnitude Documents shall illustrate the scale and relationship of Project components, outline the nature and structural exterior and three dimensional scale of the Project and shall fix and describe in detail the configuration and character of the Project concerning all items of the Project necessary for the complete and final preparation of the Construction Documents in accordance with the requirements of the Contract Documents, including architectural, mechanical and electrical systems, materials and such other elements as may be appropriate.

1.41 **"Owner Event of Default"** shall have the meaning set forth in Section 12.3 hereof

1.42 **"Party"** or **"Parties"** means the Owner and/or the Design/Builder; their respective permitted successors and/or assigns, and any other future signatories to this Agreement.

1.43 **"Performance and Statutory Bonds"** means the performance bond and statutory bond issued by the Surety, in the form set forth on Exhibit M, covering the faithful performance and completion of the Work, including payment for all materials and labor furnished or supplied in connection with the Work, by the Design/Builder, but excluding the Design Work.

1.44 **"Project"** means the building to be known as Community Park Play Structure, together with all on-site infrastructure, site improvements and appurtenances to be designed, constructed and installed in connection therewith, as more fully set forth and described in the Contract Documents and as are required thereby or reasonably inferred therefrom.

1.45 **"Punch List"** means those minor items of Work to be completed after Substantial Completion and prior to Final Completion, which do not prevent the Project from being used for the purpose for which it is intended and which will not prevent the issuance of a certificate of occupancy.

1.46 **"Retainage"** means the amount withheld from progress payments from the Owner to the Design/Builder from time to time, as more fully described in Section 5.5 hereof.

1.47 **"Savings"** means the difference, if any between the GMP and the Actual Cost of the Work plus Fee, and shall be allocated as set forth in Section 5.1 hereof.

1.48 **"Schedule"** means the schedule attached hereto as Exhibit H pursuant to which the Design/Builder has agreed to substantially complete the Work. The Schedule shall be adjusted pursuant to the provisions of the Contract Documents.

1.49 **"Scheduled Date of Substantial Completion"** means the date the Design/Builder has agreed to achieve Substantial Completion of the Project in accordance with the Schedule, as adjusted.

1.50 **"Scope Change Costs"** means those items of Cost of the Work attributable to changes in scope of the Work and payable by the Owner to the Design/Builder in addition to its Fee pursuant to a Change Order, as provided in Article 6.

1.51 **"Separate Contractors"** means those individuals or entities (including, but not limited to, concessionaires) who have entered into arrangements with the Owner for the provision of labor, materials or other services in connection with the Project.

1.52 **"Site"** is the real property on which the Project will be located.

1.52 **"Subcontract"** means an agreement between the Design/Builder (other than agreements between the Design/Builder and the Team Subcontractors) and another person or entity engaged to perform a portion of the Work.

1.54 **"Subcontractor"** means an individual or entity that has entered into an arrangement with the Design/Builder (other than Team Subcontractors) for the provision of labor, materials or other services required to be performed by the Design/Builder under the Contract Documents.

1.55 **"Substantial Completion"** means the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that it may be used by the Owner for its intended purpose.

1.56 **"Surety"** means one or more issuers of the Performance and Statutory Bonds, each of which shall be licensed to do business in Kansas.

1.57 **"Team Subcontracts"** means an agreement between the Architect and the Design/Builder in which the Design/Builder delegates a portion of its responsibilities under this Agreement.

1.58 **"Team Subcontractor"** means the Architect.

1.59 **"Unexcusable Delay"** shall have the meaning set forth in Section 4.6.2.

1.60 **"Work"** or **"Scope of Work"** means all labor, materials and services required to be performed or provided by the Design/Builder pursuant to the provisions of the Contract Documents, as more fully described in Exhibit O hereto

## ARTICLE 2 SCOPE OF WORK

### 2.1 Performance of Work

The Design/Builder covenants and agrees that it shall be responsible for performing and completing and for causing the Team Subcontractors and Subcontractors to perform and complete, the Work in accordance with the Scope of Work set forth in Exhibit O, the Contract Documents and Applicable Laws. The Design/Builder covenants that the Materials provided thereunder shall be appropriate for the purposes stated in Exhibit O. Although it is the responsibility of the Design/Builder to conform the Work to Applicable Laws at all times, to the extent there is a change in one or more Applicable Laws after the date of execution of this Agreement, and such change has the effect of increasing the cost or time of performance of the Work, such change may be the subject of a Change Order under the provisions of Article 6 hereof. Additionally, the Design/Builder shall be responsible for achieving Substantial Completion of the Project by the date of Substantial Completion set forth in the Schedule, as the same may be extended from time to time pursuant to the provisions of this Agreement, and shall achieve Final Completion within a reasonable time thereafter.

2.1.1 Design/Builder is not a licensed or authorized architect or engineer and Owner acknowledges that it is contracting with Design/Builder to merely furnish, but not to perform, design services. Owner further acknowledges that Design/Builder will subcontract all design services requiring a licensed design professional, if any, to licensed design professionals, duly authorized and registered to render such services in the state in which the Project is located. With this understanding, Owner waives any defense to an action by Design/Builder to enforce this Agreement which defense relates to Design/Builder's authorization to render design services in the state in which the Project is located.

2.1.2 The Owner acknowledges that the Design/Builder is not a design professional, but is merely furnishing, not performing, any licenses professional design services required by the Agreement, if any, and that the Design/Builder carries errors and omissions insurance limited to an amount not to exceed Ten Million Dollars (\$10,000,000) in the aggregate. Owner expressly agrees that the Design/Builder's liability to Owner for professional errors and omissions of design shall be limited to the recovery available through the errors and omissions insurance carried by the Design/Builder.

### 2.2 Professional Standard; Ownership of Documents

**2.2.1 Standards of Performance.** The Work shall be performed in accordance with the professional standards applicable to projects, buildings or work of complexity, quality and scope comparable to the Work and the Project, and shall be performed by the Design/Builder, Team Subcontractors and other Subcontractors. The Design/Builder may make such additions or

substitutions to personnel and responsibilities as it deems necessary or appropriate in order to carry out its responsibilities hereunder, provided such personnel shall be suitably qualified. Nothing in this Agreement shall be construed to create any contractual liability between the Owner and either Team Subcontractors or Subcontractors, except as otherwise specifically provided herein. Provided, however, that the Owner shall be an express third party beneficiary of the Architect's Team Subcontract.

### **2.2.2 Use of Design Materials.**

**2.2.2.1** The Owner shall have unlimited rights to copy and use in connection with the Project all Design Materials, including the right to use same on the Project at no additional cost to the Owner, regardless of degree of completion, provided that said services performed have been fully paid for as required by the terms of this Agreement. The Design/Builder agrees to and does hereby grant to the Owner and any assignee or successor of the Owner as owner of the Project a royalty-free license to any such Design Materials as to which the Design/Builder may assert any rights under the patent or copyright laws. The Design/Builder hereby assigns outright and exclusively to the Owner all copyrights in the design appearance of the Project. The Design/Builder, as part of its agreements with any Team Subcontractor, Subcontractor or consultant, will secure such license and use rights from each such entity, and shall defend, indemnify and hold the Owner and any successors or assigns harmless from any claims from such for claims by such entities for copyright or patent infringement.

**2.2.2.** If Design/Builder is paid in full for its services, then Owner may subsequently reuse the Design Materials without any additional compensation or agreement of Design/Builder, however, such reuse without written verification or adaptation by Design/Builder for the specific purpose, intended by Owner shall be at Owner's sole risk and without liability or legal exposure to Design/Builder whatsoever. Owner does not take any responsibility for the reuse of documents by others.

### **2.3 Local Conditions; Environmental Site Conditions**

**2.3.1 Local Conditions.** The Design\Builder understands that the Owner does not warrant that the various and sundry materials and information, including, for example, soil tests, bore reports, utility locations and other such data or as-builts, in the case of renovation of or addition to existing facilities, reflect actual conditions, provided, however, that the Owner shall provide Design/Builder with all known documentation of such conditions in its possession. The Design/Builder warrants that it has examined the site and conducted such tests and examinations as required by Owner. That being the case, should concealed conditions which could not be reasonably foreseen through testing or other site examination be encountered in the performance of the Work, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement, be encountered, there shall be equitable adjustment in the GPM for any extra work necessitated thereby, and, if necessary, the Contract Time may be adjusted.

2.3.2 [Intentionally deleted]

## 2.4 Order of Magnitude Documents and Construction Documents

**2.4.1 General.** Once the Owner gives the Design/Builder the Notice to Begin Design, the Design/Builder shall instruct the Architect and its Subcontractors to commence preparation of the Order of Magnitude Documents for review and approval by the Owner. After such approval, the Design/Builder shall cause the Architect and its Subcontractors to prepare the Construction Documents. The Order of Magnitude Documents and Construction Documents shall be consistent with, and develop in detail, the intent of the Contract Documents, and shall include documents customarily required for regulatory approval by governmental agencies. The Construction Documents shall also provide information customarily necessary for the use of such documents by those in the building trades and include all documents required for the complete and final construction of the Project, other than such details customarily developed in shop drawings or otherwise during construction. The Owner's review of the Order of Magnitude Documents and the Construction Documents shall be conducted in accordance with the durations and procedures set forth in Exhibits H and J hereto, and in accordance with the dates therefor set forth in the Schedule set forth in Exhibit H. Such review shall not relieve the Design/Builder from its responsibilities under this Agreement, or be deemed to be an approval or waiver by the Owner of any deviation from, or of the Design/Builder's failure to comply with, any provision or requirement of the Contract Documents, unless such deviation or failure has been identified as such in writing in the document submitted for approval by the Design/Builder and approved by the Owner.

**2.4.2 Reliance on Approvals.** The Design/Builder shall be entitled to rely on the approvals of the Owner with respect to the Design Materials. If the Owner revokes, modifies or otherwise changes in a material way its approval of a given system after such system has been designed and approved, or modifies the original Scope of Work in a material manner requiring modification to one or more systems which have been designed and approved, the Design/Builder shall be entitled to a Change Order in accordance with the provisions of Article 6 hereof, provided that prior to such approval the Design/Builder has made the Owner aware of future design decisions which may be affected by such approval. No Change Order shall be issued to the extent such modification is due to the fault or neglect of the Design/Builder.

**2.4.3 Review of Contract Documents and Field Conditions.** The Design/Builder shall be responsible for all errors, inconsistencies or omissions in the Contract Documents. The Design/Builder shall take field measurements and verify field conditions and shall carefully compare such field conditions and conditions and other information known to the Design/Builder with the Contract Documents before commencing activities. The Design/Builder shall perform the Work in accordance with the Contract Documents and submittals approved in accordance with the procedures set forth in Exhibit J.

## 2.5 Legal Requirements

The Design/Builder shall comply with Applicable Laws, and shall give applicable notices pertaining thereto. Except with respect to Governmental Approvals, the Design/Builder shall prepare and file all documents required to obtain the necessary approvals of governmental authorities having jurisdiction over the Work and/or the Project and shall secure and pay for permits and governmental fees, licenses and inspections necessary for the proper execution of the Work and completion of the Project. Notwithstanding the foregoing, the Owner has informed the Design/Builder that fees in connection with building permits, street use permits, and similar permits relating to construction will be waived by the applicable entities, and are not to be included in the GMP. If and to the extent such entities impose charges in the future for such permits, such charges shall be paid by the Owner, or shall be the subject of a Change Order to this Agreement in accordance with the Change Order provisions of this Agreement.

## 2.6 Services and Facilities

**2.6.1 General.** The Design/Builder shall provide everything required for the orderly progress and proper execution and completion of the Work and the Project in accordance with the requirements of the Contract Documents, whether temporary or permanent and whether or not incorporated or to be incorporated into the Work, including, but not limited to, design services, labor, materials, equipment, furnishings, tools, construction equipment and machinery, utilities, transportation and other facilities and services.

**2.6.2 Supervision.** The Design/Builder shall supervise and direct the Work in accordance with its best skill and attention. The Design/Builder shall be solely responsible for and have control over design and construction means, methods, techniques, sequences and procedures. The Design/Builder shall be responsible to the Owner for the acts and omissions of, and whenever this Agreement refers to the negligence, fault or omission of the Design/Builder, such term shall include the negligence, fault or omission of, the Design/Builder's employees, Team Subcontractors, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Design/Builder. The Design/Builder shall not be relieved of obligations to perform the Work in accordance with the Contract Documents by tests, inspections or approvals required or performed by persons other than the Design/Builder.

**2.6.3 Coordination.** In accordance with the requirements of Exhibit O hereto, the Design/Builder shall coordinate design and construction requirements with governmental agencies, utilities, and all other parties either involved in infrastructure improvements or otherwise affected by the design and construction requirements.

**2.6.4 Cooperation.** In accordance with the requirements of Exhibit O hereto, the Design/Builder shall assist the Owner's staff and reasonably cooperate with the Owner's legal, financial, design and construction consultants and all other designated representatives during the design and construction of the Project.

**2.6.5 Management.** The Design/Builder shall implement suitable management systems and work plans for the Project relative to Project safety, quality assurance and managing and controlling the Work.

**2.6.6 Reports.** The Design/Builder shall prepare and submit to the Owner, during both the Design Phase and the Construction Phase, monthly progress reports on the Work accomplished during the prior monthly period, which reports shall be prepared in a manner and in a format reasonably acceptable to the Owner. Such reports shall be furnished at the time of submission of each monthly Application for Payment. As part of such report, the Design/Builder shall provide an updated Schedule and specifically whether the Work is on schedule or behind schedule and actions being taken to correct Schedule slippage. The monthly report shall also set forth the Design/Builder's projected progress for the forthcoming month.

## **2.7 Warranty**

The Design/Builder warrants to the Owner that any and all materials, equipment and furnishings incorporated in the Work will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The foregoing warranty excludes damage or defect caused by abuse, modifications not executed by the Design/Builder, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. Such warranty shall exclude warranties relating to design, warranty of fitness, and any other express or implied warranties other than as set forth herein or in the Contract Documents; provided, however, that the foregoing shall not impair the rights of the Owner to maintain an action for breach of contract against the Design/Builder.

## **2.8 Taxes**

It is the intent of the Owner to supply the Design/Builder with a Sales and Compensating Tax Exemption Certificate for use in purchasing materials and supplies used on the project. The Design/Builder shall omit from its computed costs all Kansas sales and compensation taxes. Two copies of State of Kansas Project Completion Certification (Form STD-77) will be furnished the Owner by the Kansas Department of Revenue upon issuance of a tax exemption number. Two copies of the Project Completion Certification will be forwarded to the Design/Builder and must be signed and returned to the Owner upon completion of the Project. The Owner will forward one (1) copy of the Project Completion Certification to the Kansas Department of Revenue and retain one copy. All invoices must be retained by the Design/Builder for a period of five (5) years and are subject to audit by the Kansas Department of Revenue. Final payment will not be made to the Design/Builder until the Owner has received the two Project Completion Certifications from the Design/Builder along with a Consent of Surety Company to Final Payment.

## **2.9 Access by Owner**

The Design/Builder shall afford the Owner and its authorized designees access to the Project Site at all times, subject to reasonable prior notice for access outside of normal business hours.

## **2.10 Use of Site**

The Design/Builder shall, prior to on-site testing and inspection activities and prior to on-site mobilization for demolition and construction, prepare a mobilization plan for the Owner's review and approval based upon information provided to the Design/Builder by the Owner from time to time concerning the anticipated availability of the Site or portions thereof for tests and inspections to be performed in connection with the preparation of the Order of Magnitude Documents, and for demolition, excavation and construction activities. The foregoing mobilization plan shall be revised from time to time as necessary to incorporate additional information on site availability provided by the Owner. The Design/Builder shall confine operations at the Site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the Site with materials or equipment. The Design/Builder shall at all times confine its access and use of the Site to the areas designated by the Owner from time to time as being delivered and available to the Design/Builder. Notwithstanding any other provision of this subsection, the Owner acknowledges that the Schedule was developed based on certain representations of the Owner regarding availability of the Site, or relevant portions thereof, at certain times, and to the extent that any or all of the Site is not available for the Design/Builder's activities on a timely basis, the Design/Builder may be entitled to an equitable adjustment in the GMP and/or Schedule in accordance with the Change Order provisions of this Agreement.

## **2.11 Patents, Trademarks, Copyrights**

The Design/Builder shall pay, as a Cost of the Work, all applicable royalties and license fees on any and all matters arising in connection with the Work. The Design/Builder shall defend all suits or claims for infringement of patent, trademark, and copyrights against the Indemnified Parties, and shall save the Indemnified Parties harmless from loss on account thereof for any and all matters arising in connection with the Work or the Project (such costs to be paid as Cost of the Work), except with respect to any particular design process or the product of a particular manufacturer or manufacturers specified and required by the Owner, other than pursuant to the recommendation or suggestion of the Design/Builder or a Team Subcontractor; provided however, if the Design/Builder has reason to believe that the design, process or product so specified is an infringement of a patent, the Design/Builder shall be responsible for any loss resulting unless the Design/Builder has provided the Owner with prompt written notice of the Design/Builder's belief, and the Owner has nevertheless elected to go forward with such design,

process or product so specified.

## **2.12 Rubbish; Debris; Cleanup**

During the performance of all on-site Work, the Design/Builder shall at all times, as a Cost of the Work, keep the Site and adjacent streets, properties and sidewalks reasonably free from waste materials, debris and/or rubbish, and shall employ adequate dust control measures. If accumulation of such materials, debris, rubbish or dust constitutes a nuisance or safety hazard or is otherwise objectionable in the reasonable opinion of the Owner, the Design/Builder shall promptly remove them. Upon Substantial Completion of the Work, or any portion or component thereof, the Design/Builder shall remove from the Site, or applicable portion thereof, all tools, construction equipment, machinery, surplus materials, waste materials and rubbish and shall leave the Site in a "broom clean" condition. If the Design/Builder fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Design/Builder as a Cost of the Work.

## **2.13 Permits, Fees and Notices**

Unless otherwise provided in the Contract Documents, and subject to the provisions of Section 2.5 hereof, the Design/Builder shall secure and pay (as Cost of the Work) for all permits, governmental fees, licenses and inspections necessary for the proper execution and completion of the Work. To the extent there is a change in the type or cost of any of such permits, fees, licenses or inspection occurring after execution of this Agreement, there shall be an equitable adjustment in the GMP and Schedule on account of such change in accordance with the Change Order provisions of this Agreement. The Design/Builder shall comply with and give notices required by Applicable Laws.

## **2.14 Shop Drawings, Product Data and Samples**

**2.14.1 Documents and Samples at the Site.** From and after commencement of the Work, the Design/Builder shall maintain at the site one record copy of the Construction Documents, and any and all amendments thereto, in good order and marked to record changes and selections made during the Design Phase and Construction Phase. In addition, the Design/Builder shall maintain at the site approved shop drawings, product data, samples and similar required submittals. These shall be provided to the Owner upon completion of the Work.

### **2.14.2 Shop Drawings, Product Data and Samples.**

**2.14.2.1** Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Design/Builder, a Subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

2.14.2.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Design/Builder to illustrate materials or equipment for some portion of the Work.

2.14.2.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

2.14.2.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required the way the Design/Builder proposes to conform the construction to the Construction Documents.

2.14.2.5 The Design/Builder shall review and take appropriate action upon Shop Drawings, Product Data, Samples and similar submittals. The Owner has determined that it does not wish to review Shop Drawings, Product Data, Samples and similar submittals. If at a later date, the Owner wishes to review any such Shop Drawings, Product Data, Samples and similar submittals, it shall give reasonable prior notice to the Design/Builder, and shall conduct such review so as not to delay the Work.

**2.14.3 Responsibility.** The Design/Builder shall not be relieved of responsibility for the deviations from requirements of the Contract Documents by the Owner's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Design/Builder has specifically informed the Owner of such deviation at the time of the submittal and The Owner has given written approval to the specific deviation. The Design/Builder shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Owner's approval thereof.

## 2.15 Tests and Inspections

**2.15.1 Initial Tests and Inspections.** Tests, inspections and approvals of portions of the Work required by the Contract Documents, Applicable Laws or normal construction practices shall be made at an appropriate time. Unless otherwise provided, the Design/Builder shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and the costs of such tests, inspections and approvals shall be a Cost of the Work, provided, however, that the Owner shall be responsible for "special inspections" as required by local building codes. The Design/Builder shall give the Owner timely notice of when and where tests and inspections are to be made so that the Owner may observe such procedures. All costs of tests, inspections or approvals imposed upon the Design/Builder by Applicable Laws which do not become requirements until after execution of the Agreement shall be an increase to the GMP in accordance with the Change Order provisions of this Agreement.

**2.15.2 Additional Tests and Inspections.** If the Owner or public authorities having

jurisdiction determine that portions of the Work require additional testing, inspection or approval beyond that required by subsection 2.15.1, the Owner will instruct the Design/Builder to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Design/Builder shall give timely notice to the Owner of when and where tests and inspections are to be made so the Owner may observe such procedures. If such additional tests and/or inspections reveal failure of the portions of the Work to comply with the requirements of the Contract Documents, the costs of such tests and required correction shall be paid as a Cost of the Work, subject to the limitations set forth in Section 2.22 hereof. If the additional tests and/or inspections show that the portions of the Work comply with the requirements of the Contract Documents, the costs thereof shall be an increase to the GMP in accordance with the Change Order provisions of this Agreement.

**2.15.3 Required Certificates.** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Design/Builder and promptly delivered to the Owner.

**2.15.4 Timing of Testing.** Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## **2.16 Execution, Correlation and Intent**

**2.16.1 Execution of Agreement.** Execution of this Agreement by the Design/Builder is a representation that the Design/Builder has visited the site, become familiar with the local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

**2.16.2 Intent of Contract Documents.** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Design/Builder. The Contract Documents are complementary and what is required by one shall be as binding as if required by all; performance by the Design/Builder shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

**2.16.3 Organization of Materials.** Organization of the Design Materials into divisions, sections and articles, and arrangement of drawings shall not control the Design/Builder in dividing the Work among Subcontractors or in establishing the extent of Work performed by any trade.

**2.16.4 Meaning of Words.** Unless otherwise stated in this Agreement, words which have well-known technical or construction industry meanings are used in accordance with such recognized meanings.

## **2.17 Labor and Materials; Liens.**

Unless otherwise provided in the Contract Documents, the Design/Builder shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work. The Design/Builder shall enforce strict discipline and good order among the Design/Builder's employees and other persons carrying out the Work. The Design/Builder shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

## **2.18 Cutting and Patching.**

**2.18.1 Cutting and Patching of the Work.** The Design/Builder shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly.

**2.18.2 Damage to Work of Owner or Separate Contractors.** The Design/Builder shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or Separate Contractors by cutting, patching or otherwise altering such construction, or by excavation. The Design/Builder shall not cut or otherwise alter such construction by the Owner or a Separate Contractor except with written consent of the Owner and of such Separate Contractor, such consent not to be unreasonably withheld. The Design/Builder shall not unreasonably withhold consent from the Owner or a Separate Contractor with respect to cutting or otherwise altering the Work.

## **2.19 Uncovering of Work**

**2.19.1 Uncovering.** If a portion of the Work is covered contrary to the Owner's written request (such notice to be given in sufficient time in advance so as not to delay the Work) or to requirements of the Contract Documents, it must, if required in writing by the Owner, be uncovered for the Owner's observation and be replaced without change in the Schedule or GMP; the costs of such uncovering and replacement shall be Cost of the Work, subject to the limitation set forth in Section 2.22 hereof.

**2.19.2 Covering of Work Requested to be Observed.** If a portion of the Work has been covered which the Owner has not specifically requested to observe prior to its being covered, the Owner may request to see such Work and it shall be uncovered by the Design/Builder. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner and shall increase the GMP. An appropriate time extension shall also be given. If such Work is not in accordance with the Contract Documents, the Design/Builder shall pay such costs as Cost of the Work, unless such condition was caused by the Owner or a Separate Contractor in which event the Owner shall be responsible for payment of such costs by appropriate Change Order, and an appropriate time extension shall also be given.

## 2.20 Correction of Work

**2.20.1 Work Rejected by Owner.** The Design/Builder shall promptly correct Work rejected by the Owner or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, in accordance with the provisions of Section 2.20.2. The Design/Builder shall bear the costs of correcting such rejected Work, as a Cost of the Work, including additional testing and inspection and compensation for services and expenses of the Owner made necessary thereby.

**2.20.2 Correction of Work.** If within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date for commencement of warranties under the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Design/Builder shall correct it promptly after receipt of written notice from the Owner to do so. This period of one year shall be extended with respect to portions of the Work first performed after Substantial Completion to one year after Substantial Completion of such Extended Work. This obligation shall survive acceptance of the Work under the Contract Documents and termination of this Agreement. The Owner shall give such notice promptly after discovery of the condition. Such costs shall be payable as provided in Section 5.1.

**2.20.3 Removal of Work.** The Design/Builder shall remove from the Site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Design/Builder nor accepted by the Owner. The costs incurred in removing such Work shall be a Cost of the Work, subject to the limitation set forth in this Agreement.

**2.20.4 Failure to Correct Non-conforming Work.** If the Design/Builder fails to correct non-conforming Work within a reasonable time, the Owner may correct it in accordance with the terms of this Agreement. If the Design/Builder does not proceed with correction of such non-conforming Work within a reasonable time fixed by written notice from the Owner, the Owner may remove it and store the salvable materials or equipment at the Design/Builder's expense. If the Design/Builder does not pay costs of such removal and storage within ten (10) Days after written notice, the Owner may, upon ten (10) additional Days written notice, sell such materials and equipment at auction or at private sale and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Design/Builder, including compensation for services and expenses made necessary thereby. If such proceeds of sale do not cover costs which the Design/Builder should have borne, the Design/Builder shall pay such excess to the Owner; if such proceeds are in excess of the costs which the Design/Builder should have borne, such excess shall be paid by the Owner to the Design/Builder. If such costs arise during the performance of the Work, such costs shall be charged against the Cost of the Work. If such costs arise after Substantial Completion, such costs shall be payable as provided in Section 5.1.

**2.20.5 Damaged or Destroyed Work.** The Design/Builder shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or Separate Contractors caused by the Design/Builder's correction or removal of Work which is not in accordance with the requirements of the Contract Documents. If such costs arise during the performance of the Work, such costs shall be charged against the Cost of the Work. If such costs arise after Substantial Completion, such costs shall be payable as provided in Section 5.1.

**2.20.6 No Limitation.** Nothing contained in this section 2.20 shall be construed to establish a period of limitation with respect to other obligations which the Design/Builder might have under the Contract Documents. Establishment of the time period of one year as described in Section 2.20.2 relates only to the specific obligation of the Design/Builder to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Design/Builder's liability with respect to the Design/Builder's obligations other than specifically to correct the Work.

## **2.21 Acceptance of Non-conforming Work.**

If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the GMP will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

**ARTICLE 3  
OWNER'S DUTIES AND RESPONSIBILITIES**

**3.1. Information and Services Required of the Owner.**

**3.1.1 Owner Designation of Authorized Representative.** The Owner shall designate, from time to time, one or more representatives authorized to act on the Owner's behalf with respect to the Project, together with the scope of his/her respective authority. Such designations as of the date hereof are set forth on Exhibit K hereto. Functions that this Agreement provides will be performed by the Owner can be delegated by the Owner only by written notice to the Design/Builder from the Owner. Exhibit K may be amended from time to time by the Owner pursuant to written notice of such amendment to the Design/Builder. The Design/Builder shall not be entitled to rely on directions (nor shall it be required to follow directions) from anyone outside the scope of that person's authority as set forth in written delegations pursuant to this Agreement. Directions and decisions made by Authorized Representatives of the Owner shall be binding on the Owner.

**3.1.2 Communication.** During the term of this Agreement, the Owner shall communicate with Team Subcontractors, Subcontractors, suppliers and others performing any part of the Work only through the Design/Builder's Authorized Representative designated on Exhibit K?? hereto, as may be amended from time to time.

**3.1.3 Consent and Approval.** Whenever the Owner's consent, approval, satisfaction or determination shall be required or permitted under the Contract Documents with respect to the Design/Builder's performance of the Work, and this Agreement does not expressly state that the Owner may act in its sole discretion, such consent, approval, satisfaction or determination shall not be unreasonably withheld, qualified, conditioned or delayed, whether or not such a "reasonableness" standard is expressly stated in this Agreement. Whenever the Owner's cooperation is required by the Design/Builder in order to carry out the Design/Builder's obligations hereunder, the Owner agrees that it shall act in good faith in so cooperating with the Design/Builder. The Owner shall cooperate fully with the Design/Builder and shall furnish decisions, information, and approvals required by this Agreement in a timely manner so as not to delay the Work, provided that the Owner shall have no less time for review and approval than set forth in Exhibit J.

**3.1.4 Governmental Approvals.** The Owner shall be responsible for obtaining the Governmental Approvals set forth on Exhibit F hereto. Any delay in obtaining the Governmental Approvals may entitle the Design/Builder to an equitable adjustment in the Schedule and GMP in accordance with the Change Order provisions of this Agreement, except to the extent such delay is due to the fault or neglect of the Design/Builder.

**3.2 [Intentionally deleted]**

### 3.3 [Intentionally deleted]

### 3.4 Activities on the Site by Owner or Separate Contractors

**3.4.1 Owner's Right to Award Separate Contracts.** The Owner reserves the right to perform work or operations related to the Project, with the Owner's own forces, and to award separate contracts to Separate Contractors in connection with other portions of the Project.

**3.4.2 Integration of the Work with Separate Contractors.** Following the request of the Owner, the Design/Builder shall prepare a plan in order to integrate the work performed by Separate Contractors with the performance of the Work, and shall submit such plan to the Owner for approval. The plan shall be fair and reasonable for the Design/Builder and the Separate Contractors, and the Design/Builder shall work with the Separate Contractors to reach agreement on such plan. The Design/Builder shall arrange the performance of the Work so that the Work and the work of the Separate Contractors are, to the extent applicable, properly integrated, jointed in an acceptable manner, and performed in the proper sequence so that any disruption or damage to the Work or to any work of Separate Contractors is avoided.

**3.4.3 Coordination.** The Design/Builder shall provide for the coordination of the activities of the Design/Builder and its Team Subcontractors and Subcontractors with the activities of the Separate Contractors. The Design/Builder shall participate with all Separate Contractors and the Owner in reviewing and coordinating the schedules of the Separate Contractors with the Schedule. The Design/Builder shall make any revisions to the Schedule deemed necessary to properly incorporate the work of the Separate Contractors with the Work. To the extent (a) the date of Substantial Completion is extended by such Schedule revision; (b) the Design/Builder is required to perform its Work materially out of sequence, and in a manner which is not as efficient or cost effective as originally planned; or (c) the Scope of Work is increased, an equitable adjustment in the GMP and the Schedule shall be made in accordance with the Change Order provisions of this Agreement.

**3.4.4 Use of Site.** The Design/Builder shall afford the Owner and all Separate Contractors reasonable opportunity for storage of materials and equipment and performance of their work. The Design/Builder shall also connect and coordinate its Work and operations with the Owner and all Separate Contractors' operations as required by the Contract Documents. The Owner shall direct the Separate Contractors to cooperate with the Design/Builder and to avoid actions or omissions which could interfere with or delay the activities of the Design/Builder.

**3.4.5 Deficiency in Work of Separate Contractors.** If part of the Design/Builder's Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Design/Builder shall, prior to proceeding with that portion of the Work, promptly report to the Separate Contractor and the Owner apparent discrepancies or defects in such other construction that would render it unsuitable for proper execution and results by the Design/Builder. The Design/Builder and the Separate Contractor shall use good faith efforts to resolve any such discrepancies or defects or any disagreements relating thereto. Failure of the

Design/Builder so to report shall constitute acceptance by the Design/Builder of the work of Separate Contractors as fit and proper to receive the Design/Builder's Work (except as to those defects or discrepancies that are not apparent), but only to the extent that the Owner is unable to recover against the Separate Contractor damages of the Design/Builder on account of such condition, as set forth below.

**3.4.6 Claims Involving Separate Contractors.** The Design/Builder shall defend and save harmless the Owner and each Separate Contractor against any and all damages or claims that may arise because and to the extent of loss occasioned by the breach of the Design/Builder's obligations hereunder, the costs of which shall be Cost of the Work. In the event that the Design/Builder unnecessarily and unreasonably delays the work of Separate Contractors by not cooperating with them as required hereby, or by not affording them reasonable opportunity to perform their work as stated herein, the Design/Builder shall, in such event, pay, as Cost of the Work, all reasonable direct incremental costs and expenses incurred by such Separate Contractors due to any such delays. If any Separate Contractor shall assert a claim or bring an action against the Owner alleging damage due to the fault or neglect of the Design/Builder, the Owner shall immediately notify the Design/Builder, who shall defend such claim. The Design/Builder shall pay all costs of defense, including attorney's fees, as well as any resulting judgment or settlement, as a Cost of the Work.

**3.4.7 Damage or Injury by Separate Contractors.** In the event that any Separate Contractor unnecessarily and unreasonably delays the Work by not cooperating with the Design/Builder, or by not affording the Design/Builder reasonable opportunity to perform the Work as stated herein, the Owner shall, in such event, pay all reasonable direct incremental costs and expenses incurred by the Design/Builder due to any such delays pursuant to the Change Order provisions of this Agreement.

### **3.5 Assignment of Separate Contracts**

If the Owner determines that it wishes to assign to the Design/Builder one or more contracts between the Owner and the Separate Contractor, it shall give the Design/Builder written notice of such desire, including in such notice a copy of such contract for the Design/Builder's review and approval. The Separate Contractor shall be fully qualified to perform the work under the to-be-assigned contract, shall possess the financial capability to perform its obligations under such to-be-assigned contract, and shall provide 100% payment and performance bonds covering such work from sureties meeting the standards set forth in Section 1.58 hereof. Such contract shall contain provisions similar to those contained in the Design/Builder's, and/or Architect's agreements with their Subcontractors with respect to liability, indemnification, retainage, payment, labor and other material items. Upon the Design/Builder's approval of the assignment of such contract, which approval shall not be unreasonably withheld, delayed or conditioned, such Separate Contractor shall cease to be a Separate Contractor and shall thereafter be deemed to be a Subcontractor of the Design/Builder, and the GMP shall be increased by Change Order in the amount of (A) such assigned contract, and (B) additional Fee pursuant to the provisions of Section

6.5.1.

### **3.6 Owner's Right to Stop the Work.**

If the Design/Builder persistently fails to correct Work which is not in accordance with the requirements of the Contract Documents and this Agreement or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by written order signed by the Owner, may deliver a notice to the Design/Builder setting forth that such a persistent and material failure is occurring and has occurred, and demanding that the Design/Builder commence a cure of such persistent and material failure within twenty (20) Days and diligently pursue such cure thereafter. In the event that the cure is not commenced and pursued diligently, the Owner may, by written notice to the Design/Builder, order the Design/Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; provided, however, that the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Design/Builder or any other person or entity and shall not give rise to any liability of the Owner to the Design/Builder resulting from any delay.

### **3.7 Owner's Right to Carry out the Work**

If the Design/Builder defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven (7) Day period after receipt of written notice from the Owner to commence and diligently continue correction of such default or neglect with diligence and promptness, Owner may after such seven (7) Day period give the Design/Builder a second written notice to correct such deficiencies within such second seven (7) Day period. If the Design/Builder within such second seven (7) Day period after receipt of such second notice fails to commence and diligently continue to correct any deficiencies, the Owner, without prejudice to other remedies the Owner may have, may correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due to the Design/Builder the cost of correcting such deficiencies, including compensation for additional services and expenses made necessary by such default, neglect or failure. If payments then or thereafter due to the Design/Builder are insufficient to cover such amounts, the Design/Builder shall pay the difference to the Owner.

## ARTICLE 4 TIME

### 4.1. Progress and Completion

Time limits stated in the Contract Documents are of the essence of this Agreement. By executing the Agreement, the Design/Builder confirms that the Contract Time is a reasonable period of time for achieving Substantial Completion of the Work. Design/Builder agrees to have all work substantially completed NOT LATER THAN, July 31, 2003.

### 4.2 Schedule Obligations

**4.2.1 Contract Schedule.** The planning, design, construction and completion of the Project shall be undertaken and completed in accordance with the Schedule, which shall define major design and construction activities, their sequences and elapsed completion time from the date of the Notice to Begin Design. The Schedule shall not be modified except by a Modification.

**4.2.2 Prosecution of the Work.** The Design/Builder shall prosecute the Work so that the portion of the Work completed at any point in time shall be not less than as required by the Schedule. If the rate of progress is such that the total amount of Work and/or the degree of completion of the Project accomplished by the Design/Builder within any time period required by the Schedule is less than the amount therein specified, the Design/Builder shall so notify the Owner. If the delay is an Unexcused Delay, the Design/Builder shall prepare a recovery schedule for the Owner's review and approval, showing how the Design/Builder will compensate for the delays and achieve Substantial Completion by the date shown on the Schedule. If the Design/Builder is unable to demonstrate how it will overcome Unexcused Delays, the Owner may order the Design/Builder to employ such extraordinary measures as are necessary to bring the Work into conformity with the Substantial Completion Date set forth therein, the costs of which shall be paid as Cost of the Work. If the delay is an Excusable Delay, the Owner shall either (a) authorize an equitable extension in the Schedule to account for such delay, and equitably adjust the GMP on account of such delay, to the extent permitted by Article 6; or (b) request that the Design/Builder prepare a recovery schedule showing how (if possible) the Design/Builder can achieve Substantial Completion by the date shown on the Schedule, and equitably adjust the GMP in accordance with the Change Order provisions of this Agreement on account of any extraordinary activities required of the Design/Builder on account of such recovery schedule.

### 4.3 Project Schedule

Within thirty (30) Days after execution of this Agreement, the Design/Builder shall submit to the Owner, for review, a detailed schedule of Project activities and shall show in sufficient detail the starting and completion time sequences of design and construction activities.

### 4.4 [Intentionally deleted]

#### 4.5 [Intentionally deleted]

#### 4.6 Extensions of Time

**4.6.1 General.** An extension in the scheduled date of Substantial Completion will only be granted in the event of Excusable Delays affecting Work activities on the critical path.

**4.6.2 Excusable Delays.** To the extent any of the following events result in an actual delay in the Work affecting Work activities on the critical path, such shall constitute an "**Excusable Delay**" (to the extent not set forth below, a delay will be considered an "**Unexcusable Delay**"):

**4.6.2.1** Failure or inability of the Owner to make available any or all of the Site in accordance with the requirements of the Schedule.

**4.6.2.2** Failure or inability of the Owner or the Design/Builder to obtain necessary zoning changes, variances, code changes, permits or approvals from any governmental authority, or failure to obtain any street or alley vacations required for the performance of the Work, except to the extent due to the fault or neglect of the Design/Builder.

**4.6.2.3** Delays resulting from the acts or omissions of Separate Contractors, except to the extent Separate Contractors perform their work properly and in accordance with the Design/Builder's schedules.

**4.6.2.4** Delays resulting from Force Majeure.

**4.6.2.5** Differing, unusual or concealed site conditions that could not reasonably have been anticipated by the Design/Builder in preparing the Schedule, including, without limitation, archaeological finds, and excluding soil conditions (including rock or other geological conditions), underground foundations, abandoned utility lines and water conditions

**4.6.2.6** Delays resulting from the existence or discovery of Hazardous Materials on the Site not brought to the site by the Design/Builder.

**4.6.2.7** Delays resulting from changes in Applicable Laws occurring after the date of execution of this Agreement;

**4.6.2.8** Delays occurring due to the acts or omissions of the Owner and those within the control of the Owner, including, but not limited to, Separate Contractors.

**4.6.3 Requirements for Schedule Amendment due to Excusable Delays.** In order to obtain an extension of time due to an Excusable Delay, the Design/Builder shall comply with the following requirements:

**4.6.3.1** The Design/Builder shall notify the Owner of the Excusable Delay as soon as practicable, but in no event more than ten (10) Business Days after the Design/Builder

becomes aware of the occurrence of the Excusable Delay. Such notice shall describe the Excusable Delay and shall state the approximate number of Days the Design/Builder expects to be delayed. After the cessation of the Excusable Delay, the Design/Builder shall notify the Owner of the number of Days the Design/Builder believes that its activities were in fact delayed by the Excusable Delay. In the event that the delay arises as a result of a Change Order request by the Owner, the request for an extension of time contained in the resulting Change Order proposal shall be deemed sufficient for purposes of this subsection.

**4.6.3.2** Subject to the provisions of Section 4.3, the Design/Builder shall demonstrate to the satisfaction of the Owner that the Excusable Delay in fact delayed the performance of the Work.

**4.6.4 Decision by Owner.** Within thirty (30) Days after cessation of an event-giving rise to either an Excusable Delay or Unexcusable Delay, the parties will use good faith efforts to agree on the extent to which the Work has been delayed and whether the delay is an Excusable Delay or an Unexcusable Delay. In the absence of agreement between the parties as to the then current status of Excusable Delays and Unexcused Delays, the Owner will provide the Design/Builder with written notice of Owner's determination of the respective number of Days of Excusable Delay and/or Unexcusable Delay within ten (10) Days after receipt by the Owner of the Design/Builder's written request for such determination. The issuance by the Owner of such a determination shall not, however, be deemed a concurrence by the Design/Builder of the matters set forth therein, and the Design/Builder may invoke the dispute resolution procedures with respect to such determination. Pending completion of dispute resolution procedures, the Design/Builder may take such acceleration or other measures on account of the Owner's determination of Unexcusable Delay, and if completion of the dispute resolution procedures results in the Owner's determination being changed to Excusable Delay, the costs associated with such measures shall be paid by the Owner as an increase to the GMP in accordance with the Change Order provisions of this Agreement.

#### **4.7 Adjustment in GMP on Account of Extensions of Time.**

**4.7.1 Certain Excusable Delays.** Section 4.6 governs the extent to which the Design/Builder is entitled to an extension of time due to Excusable Delays. Provisions regarding additional compensation on account of such Excusable Delays are set forth in Article 6.

**4.7.2 Concurrent Delays.** To the extent the Design/Builder is entitled to an extension of time due to an Excusable Delay, but the performance of the Work would have been suspended, delayed or interrupted by the fault or neglect of the Design/Builder or by an Unexcusable Delay, the Design/Builder shall not be entitled to any additional costs for the period of such concurrency.

#### **4.8 Liquidated Damages**

**4.8.1 General.** The Design/Builder and the Owner acknowledge that in the event that the Design/Builder fails to achieve Substantial Completion of the Project by the date established therefor in the Schedule, as adjusted, the Owner will incur substantial damages and the extent of such damages shall be incapable of accurate measurement. Nonetheless, the parties acknowledge that on the date of this Agreement, the amount of liquidated damages set forth below represents a good faith estimate as to the actual potential damages that the Owner would incur as a result of late Substantial Completion of the Project. The amount of the liquidated damages calculated hereunder does not include any penalty.

**4.8.2 Amount of Liquidated Damages.** If the Design/Builder fails to achieve Substantial Completion of the Work on or before the date of Substantial Completion set forth in the Schedule, as adjusted, for any reason other than Excusable Delays, the Design/Builder shall pay to the Owner liquidated damages in the amount of Two Hundred Dollars (\$200.00) per Day for each Day the date of Substantial Completion is delayed beyond the date of Substantial Completion set forth in the Schedule. To the extent the Owner takes occupancy of the Project and begins using the Project for the purpose for which it was intended after the scheduled date of Substantial Completion, during the period commencing on the date of use and ending on the date of Substantial Completion, the Design/Builder shall be liable for the lesser of (I) the increased costs of use of the Project and lost net income attributable to incomplete Work or (ii) the daily rate set forth above. Payment of liquidated damages shall be made contemporaneously with the Owner's required payment to the Design/Builder at Substantial Completion, and such payments may be offset against each other.

**ARTICLE 5  
PAYMENT AND COMPLETION**

**5.1 Guaranteed Maximum Price**

The Owner shall pay the Design/Builder in current funds for the Design/Builder's performance of this Agreement the Cost of the Work (as defined in Exhibit D hereto).

**5.2 Schedule of Values**

Before the first Application for Payment, the Design/Builder shall submit to the Owner, and the parties shall agree upon, a schedule of values, setting forth the various portions of the Work, and the portions of the GMP allocated to each portion. This schedule of values shall be used as a basis for payment. Those portions of the schedule of values allocable to work performed by Subcontractors of the Design/Builder shall be finalized as and when the Subcontracts are finalized. All estimated construction costs not allocated to a Subcontract or to General Conditions shall be allocated to "Contingency" and shall be available for use by the Design/Builder for reallocation to other line items on an as-needed basis.

**5.3 Applications for Payment**

The Design/Builder shall deliver to the Owner on the last business Day of each month an Application for Payment covering the Cost of Work and Fee applicable to the Work performed during such month. Provided the Application for Payment is received not later than the last Day of the month, the Owner shall make payment to the Design/Builder within 30 days of receipt by Owner of the Application for Payment. With each Application for Payment the Design/Builder shall submit such evidence as may be necessary to demonstrate costs incurred or estimated to be incurred on account of Cost of the Work during such month and the percentage of completion of each category of Work.

**5.4 Amount of Progress Payments**

The Owner shall pay the Design/Builder the actual Cost of the Work (including payment for off-site stored materials) through the period covered by the Application for Payment, less Retainage as set forth in Section 5.5 below, provided that the payment amount before retainage will not exceed the percentage of completion of the Work multiplied by the GMP (excluding items of the GMP not subject to retainage), all as set forth in the schedule of values.

**5.5 Retainage**

5.5.1 [Intentionally deleted]

**5.5.2** With respect to Work, 10% Retainage shall be withheld from all trade work until the Work is 90% complete, thereafter, no further Retainage will be withheld. Retainage on account of Work shall be released upon Substantial Completion of the Work, less 150% of the value of any uncompleted Work or Punch list items and the Owner's estimate of any post-Substantial Completion damages payable under Section 4.8.2 (net of any estimated Savings payable to the Design/Builder). All Retainage shall be fully released within thirty (30) Days of Final Completion of the Work.

**5.6** [Intentionally deleted]

**5.7 Payment for On-Site and Off-Site Stored Materials**

Payment shall be made on account of materials and equipment delivered and suitably stored at the Site for subsequent incorporation in the Work. Payment may be similarly be made for materials and equipment suitably stored off the Site, conditioned upon the Design/Builder furnishing evidence to the Owner that (a) title to the materials and equipment will pass to the Owner upon payment therefor; (b) the materials and equipment are adequately insured; and such other matters as the Owner may reasonably request in order to protect its interests.

**5.8 Title to Work**

The Design/Builder warrants that title to all Work covered by an Application for Payment shall pass to the Owner no later than the time of payment. The Design/Builder further warrants that upon submittal of an Application for Payment, all Work for which Applications for Payment have been previously issued and payments received from the Owner shall, to the best of the Design/Builder's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Design/Builder, Team Subcontractors, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

**5.9 Withholding of Payment**

The Owner may withhold payment on account of an Application for Payment to the extent necessary to protect the Owner from loss because of:

**5.9.1** defective Work not remedied;

**5.9.2** third party claims filed or reasonable evidence indicating probable filing of such claims;

**5.9.3** failure of the Design/Builder to make payments of undisputed amounts to Team Subcontractors or Subcontractors for labor, materials or equipment;

**5.9.4** damage to the Owner or a Separate Contractor caused by the fault or neglect of

the Design/Builder to the extent not covered by insurance; or

**5.9.5** reasonable evidence that the Work will not be Substantially Completed within the Contract Time due to Unexcusable Delay, and that the unpaid balance of the GMP would not be adequate to cover liquidated damages for the anticipated Unexcused Delay.

When the above reasons for withholding payment are removed, payment shall be made for amounts previously withheld. Prior to any withholding pursuant to this Section, the Owner shall meet with the Design/Builder to discuss potential withholding, and attempt in good faith to resolve such issue without the need for withholding.

**5.10 [Intentionally deleted]**

**5.11 Substantial Completion**

When the Design/Builder considers that the Work, or a portion thereof which the Owner agrees to accept separately, is Substantially Complete, the Design/Builder shall prepare and submit to the Owner a comprehensive list of Punch list items. The Design/Builder shall proceed promptly to complete and correct Punch list items. Failure to include an item on the Punch list does not alter the responsibility of the Design/Builder to complete all Work in accordance with the Contract Documents. Upon receipt of the Punch list, the Owner will make an inspection to determine whether Substantial Completion has occurred. The Certificate of Substantial Completion shall state the date of Substantial Completion and shall be executed by the Owner and the Design/Builder. If the Owner and the Design/Builder cannot agree as to the appropriate date of Substantial Completion, such issue shall be submitted for dispute resolution in accordance with the procedures set forth in this Agreement. Notwithstanding such disagreement, the Design/Builder shall diligently proceed with completion of the Punch list items. Warranties required by the Contract Documents shall commence on the date of Substantial Completion or designated portion thereof unless otherwise provided in the Contract Documents.

**5.12 Partial Occupancy or Use**

The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Design/Builder, provided such occupancy or use is consented to by the insurer of the Project and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is Substantially Complete, provided the Owner and the Design/Builder have accepted in writing the responsibilities assigned to each of them for payment, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. Immediately prior to such prior occupancy, the Owner and the Design/Builder shall jointly inspect the area to be occupied in order to determine and record the condition of the Work. Unless otherwise agreed, partial occupancy or use of a portion of the

Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

### **5.13 Final Completion and Final Payment**

**5.13.1 Final Completion.** When the Design/Builder considers that the Work is Finally Complete, the Design/Builder shall so notify the Owner. The Certificate of Final Completion shall set forth the date of Final Completion and shall be executed by the Owner and the Design/Builder. If the Owner and the Design/Builder cannot agree as to the appropriate date of Final Completion, such issue shall be submitted for dispute resolution in accordance with the procedures set forth in this Agreement.

**5.13.2 Conditions Precedent to Final Payment.** Neither final payment nor any final release of Retainage shall become due until the Design/Builder submits to the Owner:

**5.13.2.1** an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by the Owner) have been paid or otherwise satisfied;

**5.13.2.2** a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least thirty (30) Days' prior written notice has been given to the Owner;

**5.13.2.3** consent of Surety to final payment; and

**5.13.2.4** if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract Documents. If a Team Subcontractor or Subcontractor refuses to furnish a release or waiver required by the Owner, the Design/Builder may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien.

**5.13.3 Delay in Final Completion.** If after Substantial Completion of the Work, Final Completion is materially delayed through no fault of the Design/Builder or by the issuance of additional Change Orders or Change Directives by the Owner, the Owner shall, upon request of the Design/Builder, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed. If the remaining balance for Work not fully completed is less than the Retainage, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed shall be submitted by the Design/Builder to the Owner, and such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims by either the Design/Builder or the Owner.

### **5.13.4 Waiver of Claims at Final Payment**

**5.13.4.1** Acceptance of final payment by the Design/Builder shall constitute a waiver of affirmative claims by the Design/Builder, except those previously made in writing and

identified as unsettled at the time of final payment.

**5.13.4.2** The making of final payment by the Owner shall constitute a waiver of claims by the Owner, except those arising from (a) claims, security interests and encumbrances arising out of the Work after final payment, or identified in writing as unsettled at the time of final payment; (b) latent defects arising after final payment; or the terms of warranties required by the Contract Documents.

#### **5.14 Allowances**

The Design/Builder shall include in the GMP all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Design/Builder shall not be required to employ persons or entities against which the Design/Builder makes reasonable objection. Unless otherwise provided in the Contract Documents:

**5.14.1** materials and equipment under an allowance shall be selected promptly by the Owner to avoid delay in the Work, provided that the Owner shall be given no less time than provided in Exhibit J;

**5.14.2** allowances shall cover the cost to the Design/Builder of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

**5.14.3** allowances shall cover Design/Builder's costs for unloading and handling at the site labor, installation costs and other expenses;

**5.14.4** whenever costs are more than or less than allowances, the GMP shall be adjusted accordingly by Change Order in accordance with the provisions of Section 6.5. The amount of the Change Order shall reflect the difference between actual costs and the allowances under Section 5.13.2 and 5.13.3 plus Fee on such difference in accordance with Section 6.5 if the actual costs are greater than the allowances.

#### **5.15 Superintendent**

The Design/Builder employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Design/Builder, and communications given to the superintendent shall be as binding as if given to the Design/Builder, important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

#### **5.16 Documents and Samples at the Site**

The Design/Builder shall maintain at the site for the Owner one record copy of the drawings, specifications, addenda, Change Order and other Modifications, in good order and marked currently to record changes and selections made during construction, and in addition approved Shop Drawings, Product Data, Samples and similar required submittals. The Design/Builder shall also prepare one reproducible set of as-built drawings. These shall be provided to the Owner upon completion of the Work.

**ARTICLE 6**  
**CHANGES IN THE WORK; CLAIMS**

**6.1 Changes**

Changes in the Work shall be performed under applicable provisions of the Contract Documents, and subject to the provisions of Section 3.2 hereof, the Design/Builder shall proceed promptly, unless otherwise provided in the Change Order or Change Directive. If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Change Directive that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or the Design/Builder, the applicable unit prices shall be equitably adjusted. No GMP adjustment on account of a Change Order shall include the Design/Builder's or Team Subcontractors' profit, Fee, home office overhead or a formula allocation of indirect costs unless otherwise specifically allowed hereunder. Unless specifically provided otherwise herein, there shall be no reduction in Fee for Change Orders, which decrease the GMP.

**6.2 Change Directives**

The following procedures shall apply with respect to Change Directives:

**6.2.1** Upon receipt of a Change Directive signed by the Owner, the Design/Builder shall promptly proceed with the change in the Work involved and advise the Owner of the Design/Builder's agreement or disagreement with the method, if any, provided in the Change Directive for determining the proposed adjustment in the GMP or the Schedule. If the Design/Builder receives a written communication signed by the Owner which the Design/Builder believes is a Change Directive but is not so identified, it shall not proceed with the change in the Work until it receives from the Owner a written confirmation that such communication is in fact a Change Directive.

**6.2.2** A Change Directive signed by the Design/Builder indicates the agreement of the Design/Builder with the contents thereof, and shall convert the Change Directive to a Change Order.

**6.2.3** If the Design/Builder does not respond promptly or disagrees with the method for adjustment in the GMP or Schedule, the method and adjustment shall be determined as provided in Sections 6.5 or 6.10 below, as applicable. In such case, the Design/Builder shall keep and present, in such form as the Owner may request, an itemized accounting, together with appropriate supporting data.

**6.2.4** Pending final determination of cost to the Owner, amounts not in dispute shall be included in Applications for Payment. The amount of credit to be allowed by the Design/Builder to the Owner for a deletion or change which results in a net decrease in the GMP

shall be actual net cost. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for Fee shall be figured on the basis of net increase, if any, with respect to that change.

**6.2.5** If the Owner and the Design/Builder do not agree with the adjustment in Schedule or the GMP, such disagreement shall be determined as provided in Section 11.1.

### **6.3 Change Proposals**

If The Owner requests the Design/Builder to submit a Change Proposal which would entitle the Design/Builder to an increase in the GMP for costs of preparation of such Change Proposal pursuant to the provisions of this Section 6.3, the Design/Builder shall first estimate the costs of preparing such Change Proposal and inform The Owner in writing of such costs. The Owner shall then direct the Design/Builder either to proceed with the Change Proposal or cancel the Change Proposal. If The Owner directs the Design/Builder to proceed with the Change Proposal and then elects not to proceed with the Change Order contemplated therein, a Change Order shall be issued to reimburse the Design/Builder for any costs incurred by the Design/Builder on account of such Change Proposal, but only to the extent the Change Order contemplated by such Change Proposal involves a material change to the scope of the Work requiring modification to one or more systems which have been designed and approved in accordance with the standards set forth in Section 2.4.3. To the extent the preparation of such Change Proposal impacts the Schedule (e.g., other Work is suspended pending a decision on such Change Proposal or the Design Work is delayed due to the preparation of the Change Proposal), an equitable adjustment in the Schedule shall be made.

### **6.4 Claims**

In addition to submitting Change Proposals in response to the request of the Owner, the Design/Builder may submit one or more claims in the form of Change Proposals for any requested adjustment in the GMP and/or Schedule permitted pursuant to the provisions of this Agreement. In such cases, the Design/Builder shall give the Owner written notice within ten (10) Business Days after it becomes aware of the event giving rise to the Change Proposal. The Owner shall have four (4) Business Days after receipt of the Design/Builder's notice to either confirm or refute the basis for the Change Proposal. If either the Design/Builder or the Owner becomes aware of an act or omission of the other which would give rise to a breach of contract action, such party shall notify the other within a reasonable time after becoming aware of such act or omission. Failure to give any notice required by this Article 6 shall be deemed a waiver of the right of the claiming party to recover, but only to the extent the delay in giving notice prejudices the rights of the non-claiming party.

## 6.5 Change Orders Increasing or Decreasing Scope

6.5.1 With respect to Change Orders which increase or decrease the Scope or Cost of Work described on Exhibit O, that are not due to the errors or omissions of the Design/Builder or its Team Subcontractor or Subcontractors and are not attributable to Excusable Delays (with the exception of Excusable delays which are the attributable to the Owner or its Separate Contractors) or the contingencies set forth in Section 6.6 below, the GMP shall be increased or decreased by the following.

### 6.5.1.1 Work

6.5.1.1.1 The estimated increase in the Cost of the Work attributable to the Change Order and which would not have been incurred but for the Change Order, less the Cost of the Work performed by Design/Builder's own forces.

6.5.1.1.2 For Work performed by the Design/Builder's own forces, the Cost of the Work for such Work, plus a Fee of ten percent (10%) of the Cost of the Work.

6.5.1.2 **Design Work.** For Design Work, the sum of (A) the rates as set forth in Exhibit P plus (B) all expenses in connection therewith times a multiplier of 1.1 (collectively, the "Additional Design Services Cost")

6.5.1.3 [Intentionally Deleted]

6.5.2 **Decreased Scope.** With respect to Change Orders which decrease the Scope of Work described on Exhibit O, the GMP shall be decreased by the Cost of Work attributable to such Change Order. If the Change Order deletes a major part of the scope of Work, the Owner and the Design/Builder will negotiate in good faith an appropriate Fee reduction, taking into account the Design/Builder's and Team Subcontractors' administrative costs in connection with such Change Order.

## 6.6 Time Extensions on Account of Change Orders

The Design/Builder shall be entitled to a time extension in connection with any Change Order to the extent its time of performance is extended due to such Change Order. The Design/Builder shall present to the Owner an analysis showing how the Change Order affects the Work Schedule.

## ARTICLE 7 CORRECTION OF WORK

### 7.1 Correction of Work Prior to Completion

Prior to the date of Substantial Completion, the Design/Builder shall correct Work (including any Design Materials, items of Work, or any other part of the Work) which (a) the Owner reasonably rejects as being defective or non-conforming to the requirements of the Contract Documents in a written notice delivered to the Design/Builder or (b) the Design/Builder recognizes is defective or non-conforming to the Contract Documents. If other portions of the Work are adversely affected by or are damaged by such defective Work, the Design/Builder shall also correct, repair or replace such affected or damaged Work, as well as any other property of the Owner or others damaged by such defective or non-conforming Work. Prior to the date of Final Completion, the cost of correcting any damaged or defective work shall be paid as a Cost of the Work.

### 7.2 Correction of Work After Completion

For Defects identified by the Owner and for which the Owner has notified the Design/Builder within a period of twelve (12) months after the date of Substantial Completion, or within such longer period as may be provided by special warranties contained in the Contract Documents, the Design/Builder shall re-execute, correct, repair or replace all Work found to be defective or non-conforming to the Contract Documents (whether arising from a design or construction defect, error, omission or deficiency). If other portions of the Work adversely affected by or damaged by such defective Work, the Design/Builder shall also correct, repair or replace such affected or damaged Work, as well as any other property of the Owner or others damaged by such defective or non-conforming Work. To the extent that Savings were allocated in accordance with the provisions of Section 5.1 hereof, the costs of correcting any damaged or defective work shall be paid proportionately by the Owner and the Design/Builder from Savings; to the extent Savings are insufficient to pay such costs, the Design/Builder shall be solely responsible for such costs.

### 7.3 Acceptance of Non-conforming Work

If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the GMP will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

### 7.4 No Effect on Limitations

Nothing contained in this Article shall be construed to establish a period of limitation with respect to other obligations which the Design/Builder may have under the Contract Documents.

**ARTICLE 8**  
**TEAM SUBCONTRACTORS AND SUBCONTRACTORS**

**8.1 Team Subcontractors**

The Design/Builder shall enter into a Team Subcontract with the Architect pursuant to which the Design/Builder shall delegate the design responsibilities contained in this Agreement to the Architect. The Team Subcontracts shall require each Team Subcontractor, to the extent of the Work to be performed by such Team Subcontractor, to assume towards the Design/Builder all the obligations and responsibilities which the Design/Builder by the Contract Documents assumes towards the Owner. All Team Subcontracts shall incorporate the terms of this Agreement and the Contract Documents to the extent applicable to the Work to be performed by the Team Subcontractor. Each Team Subcontract shall expressly preserve and protect the rights of the Owner under the Contract Documents with respect to the Work to be performed by the Team Subcontractor so that the subcontracting thereof will not prejudice such rights, and shall include a provision granting to the Owner the right to succeed to the interest of, or otherwise accept an assignment of, such Team Subcontract, but only in the event of a termination of this Agreement by the Owner due to the existence of a Design/Builder Event of Default. Any such assignment shall be subject to the prior rights of the surety, if any, obligated under bond relating to the Agreement.

**8.2 Subcontracts**

**8.2.1 Incorporation of Contract Documents.** The Design/Builder shall enter into Subcontracts with various Subcontractors for portions of the Work to be delegated by the Design/Builder. The Subcontracts shall require each Subcontractor, to the extent of the Work to be performed by such Subcontractor, to assume towards the Design/Builder all the obligations and responsibilities which Design/Builder assumes towards the Owner. All Subcontracts shall incorporate the terms of this Agreement and the Contract Documents to the extent applicable to the Work to be performed by the Subcontractor.

**8.2.2 Assignment of Subcontracts.** Each Subcontract shall expressly preserve and protect the rights of the Owner under the Contract Documents with respect to the Work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights, and shall include provisions (a) granting to the Design/Builder the right to succeed to the interest of, or otherwise accept an assignment of, such Subcontract, but only in the event of a termination of the Team Subcontract by the Design/Builder (or its assignee) due to the existence of a default by the Team Subcontractor; and (b) granting to the Owner the right to succeed to the interest of, or otherwise accept an assignment of, such Subcontract, but only in the event of a termination of this Agreement by the Owner due to the existence of a Design/Builder Event of Default and a further termination of the Team Subcontract by the Owner. Any such assignment shall be subject to the prior rights of the surety, if any, obligated under bond relating to the Team Subcontract.

**8.2.3 Approval of Subcontracts.** The Team Subcontracts are not required to be approved by the

Owner. Those portions of the Work that the Design/Builder does not intend to perform with the Design/Builder's own personnel shall be performed under Subcontracts. The Design/Builder shall obtain bids from Subcontractors and shall deliver such bids to the Owner. The Owner will then determine, with the advice of the Design/Builder, which bids will be accepted. The Owner may designate specific persons or entities from whom the Design/Builder has no objection and from whom the Design/Builder shall obtain bids. If a specific bidder among those whose bids are delivered by the Design/Builder to the Owner (1) is recommended to the Owner by the Design/Builder; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents, but The Owner requires that another bid be accepted, then the GMP shall be amended to adjust the GMP by the difference between the bid of the person or entity recommended to the Owner by the Design/Builder and the amount of the Subcontract actually signed with the person or entity designated by the Owner. Subcontracts shall conform to the payment procedures of this Agreement and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. Proposed Subcontractors will be deemed accepted unless the Owner objects in writing within ten (10) days after submission by the Design/Builder.

- 8.2.4** With the Owner's approval, not to be unreasonably withheld, the Design/Builder may perform portions of the Work with its own personnel or pursuant to Subcontracts with affiliates of the Design/Builder ("Self-Performed Work") without obtaining bids with respect to such Work. In such case, the Design/Builder shall present to the Owner such documentation as is reasonable for the Owner to substantiate that the Design/Builder or its affiliates will be performing such Work on competitive terms and conditions and at market rates. With respect to Self-Performed Work, the entity performing the Self-Performed Work shall be entitled to compensation equal to the Cost of the Work on account thereof, plus fee equal to ten percent (10%) of the Cost of the Work applicable thereto. The Self-Performance fee is in addition to, and not in lieu of, the Fee on Cost of the Work payable to the Design/Builder. For purposes of calculating such Design/Builder Fee, the Cost of the Work allocable to Self-Performed Work and the Self-Performance Fee shall both be deemed to be Cost of the Work.

**ARTICLE 9  
INSURANCE AND BONDS; INDEMNIFICATION**

**9.1 Insurance to be Provided by the Design/Builder**

The Design/Builder shall provide the insurance required of it by the provisions of Exhibit L hereto, the cost of which shall be paid as a Cost of the Work.

**9.2 Insurance to be Provided by the Owner**

The Owner shall provide the insurance required of it by the provisions of Exhibit L, the cost of which shall not be included in the GMP.

**9.3 Statutory and Performance Bonds**

The Design/Builder shall obtain, and shall furnish and deliver to the Owner, the Statutory and Performance Bonds prior to, and as a condition precedent to, commencement of the Work on the Site. The Statutory and Performance Bonds shall be furnished on behalf of the Design/Builder, shall name the Owner as obligee, and shall be in the penal sum equal to One Hundred per cent of the construction cost. The Statutory and Performance Bonds shall be in the forms set forth as Exhibit M hereto, and shall be issued by the Surety. All premiums for the Statutory and Performance Bonds shall be a Cost of the Work.

**9.4 Indemnification**

**9.4.1 Definition.** For purposes of indemnification requirements, the term "Loss" shall have the meaning set forth as follows:

"Loss" means any and all loss, damage, liability or expense, of any nature whatsoever, whether incurred as a judgment, settlement, penalty, fine or otherwise (including attorney's fees and the cost of defense), in connection with any action, proceeding, demand or claim for injury, including death, to any person or persons or damages to or loss of, or loss of the use of, property of any person, firm or corporation, including the parties hereto, which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of this Agreement whether arising before or after the completion of the Services required hereunder.

**9.4.2 Indemnity.** For purposes of this Agreement, Design/Builder hereby agrees to indemnify, defend and hold harmless the Owner, its employees and agents from any and all Loss where Loss is caused or incurred or alleged to be caused or incurred in whole or in part as a result of the negligence or other actionable fault of the Design/Builder, Team Subcontractor or Subcontractor, their affiliates, subsidiaries, employees, agents and assignees and their respective servants, agents and employees.

It is agreed as a specific element of consideration of this Agreement that this indemnity

shall apply notwithstanding the joint, concurring or contributory or comparative fault or negligence of the Owner or any third party and, further notwithstanding any theory of law including, but not limited to, a characterization of the Owner's or any third party's joint, concurring or contributory or comparative fault or negligence as either passive or active in nature; provided, however, that the Design/Builder's obligation hereunder shall not include amounts attributable to the fault or negligence of the Owner or any third party for whom the Design/Builder is not responsible.

In the case of any claims against the Owner, its employees or agents indemnified under this Agreement, by an employee of the Design/Builder, its Team Subcontractor or Subcontractor, their affiliates, subsidiaries, or assignees, the indemnification obligation contained in this Agreement shall not be limited by any limitation on amount or type of damages, compensation or benefits payable by or for the Design/Builder, its Team Subcontractors or Subcontractor, their affiliates, subsidiaries, or subcontractor/assignees, under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**ARTICLE 10  
PROTECTION OF PERSONS AND PROPERTY**

**10.1 Safety Precautions and Programs**

**10.1.1 Site Safety.** The Design/Builder shall be responsible for initiating, maintaining and providing supervision of safety precautions and programs in connection with the Work, and shall also comply with any and all insurance carrier-mandated safety requirements and programs.

**10.1.2 Notices.** In connection with the performance of the Work, the Design/Builder shall give notices and comply with Applicable Laws bearing on the safety of persons and property and their protection from damage, injury or loss.

**10.2 Safety of Persons and Property**

**10.2.1 Reasonable Precautions.** The Design/Builder shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

**10.2.1.1** employees on the Work and other persons who may be affected thereby;

**10.2.1.2** the Work and materials and equipment to be incorporated therein, whether in storage on or off the Site under care, custody or control of the Design/Builder; and

**10.2.1.3** other property at the Site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of the Work.

**10.2.2 Safeguards.** The Design/Builder shall erect and maintain, as required by existing conditions and performance of the Work, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities, and shall comply fully with the requirements of OSHA.

**10.2.3 Use of Explosives.** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Design/Builder shall exercise utmost care and carry on such activities under supervision of properly qualified personnel in accordance with City ordinance.

**10.2.4 Remedy of Damage.** The Design/Builder shall promptly remedy damage and loss (other than damage or loss covered under Builder's Risk property insurance required to be carried by the Owner) to property referred to in Section 10.2.1.2 and 10.2.1.3 to the extent caused in whole or in part by the Design/Builder or anyone directly employed by or in control of

Design/Builder and for whose acts Design/Builder may be liable and for which the Design/Builder is responsible under Sections 10.2.1.2 and 10.2.1.3, except to the extent damage or loss attributable to acts or omissions of the Owner, Separate Contractors or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable. The foregoing obligations of the Design/Builder are in addition to the Design/Builder's obligations under Section 9.4. All costs incurred by the Design/Builder in connection with its obligations under this Section shall be Cost of the Work, but shall not increase the GMP.

**10.2.5 Designation of Safety Coordinator.** The Design/Builder shall designate or cause to be designated a responsible member of its organization at the Site whose full-time duty shall be the prevention of accidents.

**10.2.6 Loads.** The Design/Builder shall not load or permit any part of the Work or the Site to be loaded so as to endanger its safety.

### **10.3 Security**

The Design/Builder shall take any and all precautions that may be reasonably necessary to render all portions of the Work, the Site and any adjacent areas affected by the Work secure in all material respects, to decrease the likelihood of accidents, and to avoid vandalism and other contingencies which are liable to delay the Work or give rise to claims or liabilities. The Design/Builder shall furnish and install all necessary facilities to provide safe means of access to all points where Work is being performed. The Design/Builder shall take all precautions and measures as may be reasonably necessary to secure the Project at all hours, including evenings, holidays and non-work hours. Such precautions may include provision of security guards.

### **10.4 Damage to Property at the Site**

The Design/Builder shall be responsible for any and all damage or loss to property at the Site, except to the extent caused by the acts or omissions of the Owner, its Separate Contractors, or its representatives, employees or agents and not covered by required insurance. The costs and expenses incurred by the Design/Builder under this Article shall be paid as a Cost of the Work to the extent that such costs and expenses are in excess of or are not covered by required insurance, and to the extent of any deductibles.

### **10.5 Damage to Property of Others**

The Design/Builder shall avoid damage, as a result of the Design/Builder's operations, to existing sidewalks, curbs, streets, alleys, pavements, utilities, adjacent property, the work of Separate Contractors and the property of the Owner. The Design/Builder shall repair any such damage caused by the operations of the Design/Builder, which costs shall be paid as a Cost of the Work to the extent that such costs and expenses are in excess of or are not covered by required insurance, and to the extent of any deductible.

#### **10.6 Failure of Design/Builder to Repair Damage**

If the Design/Builder fails to commence the repair of damage to property as set forth in this Article, and diligently pursue such repair, then the Owner, after ten (10) Days prior written notice to the Design/Builder (provided the Design/Builder has not commenced such repair during such ten (10) Day period), may elect to repair such damages with its own forces and to deduct from payments due or to become due to the Design/Builder amounts paid or incurred by the Owner in correcting such damage.

#### **10.7 Emergencies**

If an emergency affecting the safety of persons or property, the Design/Builder shall act, at the Design/Builder's discretion, to prevent threatened damage, injury or loss. Additional costs or extensions of time claimed by the Design/Builder on account of an emergency not caused by the fault or neglect of the Design/Builder shall be determined as provided in Section 6.2 hereof.

## ARTICLE 11 DISPUTES

### 11.1 Dispute Resolution

Owner and Design/Builder/Architect agree that disputes relative to the Project should first be addressed by negotiations between the parties. If direct negotiations fail to resolve the dispute, the party initiating the claim that is the basis for the dispute shall be free to take such steps as it deems necessary to protect its interests; provided, however, that notwithstanding any such dispute, Design/Builder shall proceed with the Services as per this Agreement as if no dispute existed, and the Owner shall continue to make payment for Design/Builder's completed Services; and provided further that no dispute will be submitted to mediation or arbitration without both parties' express written consent.

**ARTICLE 12**  
**EVENTS OF DEFAULT AND REMEDIES; TERMINATION**

**12.1 Design/Builder Events of Default**

12.1.1 if the Design/Builder persistently fails or neglects to carry out the Work in accordance with the provisions of the Contract Documents, and fails, after seven (7) Days notice from the Owner, to commence a cure to correct such failure or neglect and thereafter diligently pursue such cure to completion;

12.1.2 if the Design/Builder materially breaches this Agreement and fails, after seven (7) Days notice from the Owner, to commence a cure to correct such breach and thereafter diligently pursues such cure to completion (such breach to include, but not be limited to, failure to make payment to Team Subcontractors for materials or labor in accordance with the respective agreements between the Design/Builder and the Team Subcontractors or persistent disregard of Applicable Laws)

12.1.3 if a custodian, trustee or receiver is appointed for the Design/Builder, or if the Design/Builder becomes insolvent or bankrupt, is generally not paying its debts as they become due or makes an assignment for the benefit of creditors, or the Design/Builder causes or suffers an order for relief to be entered with respect to it under applicable Federal bankruptcy law or applies for or consents to the appointment of a custodian, trustee or receiver for the Design/Builder, or bankruptcy, reorganization, arrangement or insolvency proceedings, or other proceedings for relief under any bankruptcy or similar law or laws for the relief of debtors, are instituted by or against the Design/Builder, and in any of the foregoing cases such action is not discharged or terminated within sixty (60) Days of its institution.

**12.2 Remedies of the Owner upon a Design/Builder Event of Default**

12.2.1 Termination of Agreement. Upon the occurrence of a Design/Builder Event of Default, the Owner shall have the right to terminate this Agreement upon an additional seven (7) Days written notice to the Design/Builder, provided that the Design/Builder has not commenced a cure within such seven (7) Day period. Without prejudice to any other rights or remedies of the Owner, the Owner, subject to any prior rights of the Surety, may:

12.2.1.1 take possession of the Site and of all materials, equipment, tools and construction equipment thereon owned by the Design/Builder;

12.2.1.2 accept assignment of the Team Subcontracts and/or Subcontracts; and

12.2.1.3 finish the Work by whatever reasonable method the Owner may deem expedient

When the Owner terminates the Agreement as aforesaid, the Design/Builder shall not be entitled

to receive further payment until the Work is finished. If the unpaid balance of the GMP exceeds costs incurred in finishing the Work, such excess shall be paid to the Design/Builder, up to the amount due the Design/Builder to date. If such costs exceed the unpaid balance of the GMP, the Design/Builder shall pay the difference to the Owner.

**12.2.2 Recourse to Statutory and Performance Bonds.** Upon the occurrence of a Design/Builder Event of Default and termination of this Agreement by the Owner, the Owner may call upon the Surety to perform its/their obligations under the Statutory and Performance Bonds, if applicable. The Owner agrees that, so long as the Surety shall not be in default under the Statutory and Performance Bonds, the Owner shall not exercise its rights to correct deficiencies, take over the Work or complete the Work and deduct an amount equal to expenditures incurred by the Owner in so doing.

### **12.3 Owner Events of Default**

The following shall be considered "Owner Events of Default":

**12.3.1** if the Work is stopped for a period of one hundred eighty (180) Days through no act or fault of the Design/Builder for any of the following reasons:

**12.3.1.1** issuance of an order of a court or other public authority having jurisdiction;

**12.3.1.2** an act of government, such as a declaration of national emergency, making material unavailable;

**12.3.2** if the Work is stopped for a period of thirty (30) Days through no act or fault of the Design/Builder because the Owner has not made payment of undisputed amounts set forth in an Application for Payment within the time stated in the Contract Documents.

### **12.4 Remedies of the Design/Builder upon an Owner Event of Default**

If an Owner Event of Default exists and is continuing, the Design/Builder may, upon seven (7) Days additional written notice to the Owner, terminate the Agreement and recover from the Owner payment for Work performed and for proven loss with respect to materials, equipment tools, construction equipment and services rendered, including reasonable overhead and profit; provided, however, if the Owner Event of Default is the condition described in Section 12.3.1, no overhead and profit shall be paid to the Design/Builder on account of uncompleted Work.

### **12.5 Remedies not Exclusive**

Except as otherwise provided in this Agreement, no remedy under the terms of this Agreement is intended to be exclusive of any other remedy, but each and every such remedy shall

be cumulative and shall be in addition to any other remedies, existing now or hereafter, at law, in equity or by statute. No delay or omission to exercise any right or power accruing shall impair any such right or power nor shall it be construed to be a waiver of any Event of Default or acquiescence therein, and every such right and power may be exercised from time to time as often as may be deemed expedient.

## **12.6 Termination or Suspension for Convenience**

**12.6.1 Termination for Convenience.** The Owner may terminate this Agreement, or any portion of Work to be performed hereunder at any time by a notice in writing from the Owner to the Design/Builder for the Owner's convenience. In such case, the Owner shall pay to the Design/Builder all funds due the Design/Builder for work performed up to the date of termination, plus all demobilization and close-out costs, including, but not limited to, any amounts payable to Subcontractors for early termination, plus reasonable overhead and profit on Work performed. All funds due hereunder, including unpaid Retainage, shall be released within thirty (30) Days of termination of the Agreement for convenience.

**12.6.2 Suspension for Convenience.** The Owner may, without cause, order the Design/Builder in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine. An adjustment shall be made for increases in the cost of performance of the Work, including Fee on the increased cost of performance, caused by the suspension, delay or interruption, in accordance with the Change Order provisions of this Agreement. No adjustment shall be made to the extent the performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Design/Builder is responsible. Adjustments made in the cost of performance may have a mutually agreed fixed or percentage Fee.

**ARTICLE 13  
MISCELLANEOUS PROVISIONS**

**13.1 Governing Law**

This Agreement shall be governed by the laws of Kansas.

**13.2 Successors and Assigns**

The Owner and the Design/Builder respectively bind themselves, their partners, shareholders, successors, assigns and legal representatives to the other Party hereto and to shareholders, successors, assigns and legal representatives of such other Party in respect to covenants, agreements and obligations contained in the Contract Documents. Neither Party shall assign the Agreement as a whole without the written consent of the other Party. If either Party attempts to make such an assignment without such consent, that Party shall nevertheless remain legally responsible for all of its obligations under the Agreement and the Contract Documents.

**13.3 Written Notice**

Written notice shall be deemed to have been duly served on the date of delivery if delivered in person, on the day after deposit if delivery by overnight courier, or two (2) Days after deposit if delivery by placing in the United States mail, first class and certified, return receipt requested with postage prepaid. All notices shall be addressed to the appropriate Authorized Representative as follows:

If to the Owner:

Greg Ruether, Manager of Parks and Forestry  
8500 Santa Fe Drive  
Overland Park, Kansas 66212

If to the Design/Builder:

Brad Mohr, General Manager  
13500 W. 108<sup>th</sup> St.  
Lenexa, KS 66215

**13.4 Commencement of Statutory Limitation Period and Statute of Repose Period**

**13.4.1 Before Substantial Completion.** As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of

limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.

**13.4.2 Between Substantial Completion and Final Completion.** As to acts or failures to act occurring between the relevant date of Substantial Completion and prior to Final Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of Final Completion.

**13.4.3 After Final Completion.** As to acts or failures to act occurring after the date of Final Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Design Builder pursuant to any applicable warranty, the date of any correction of Work or failure to correct Work by the Design/Builder, or the date of actual commission of any other act or failure to perform any duty or obligation by the Design/Builder or the Owner, whichever occurs last.

**13.4.4 Statute of Repose.** The time period for the applicable Statute of Repose shall commence to run at Substantial Completion of the Work.

### **13.5 Affirmative Action and Other Laws**

The Design/Builder, Team Subcontractors and Subcontractors shall comply with the provisions of Exhibit N hereto with respect to affirmative action and other laws.

### **13.6 Modifications**

No Modifications or Change Orders shall be valid unless in writing and signed by the Owner and the Design/Builder or their respective permitted successors and assigns.

### **13.7 No Third Party Beneficiaries**

Nothing contained herein shall create a contractual relationship with, or any rights in favor of, any third party.

### **13.8 Independent Contractor**

The Design/Builder is an independent contractor and as such is not an agent or employee of the City.

### **13.9 Work Product Format**

1. Project Drawings: Project drawings which are developed by Design/Builder through the use of a Computer Aided Drafting (CAD) System shall be made

available to Owner by providing a floppy disk. However, due to the potential that the information set forth on the electronic media (disk) can be modified by Owner, or Owner's consultants, unintentionally or otherwise, Design/Builder shall remove all indices of its ownership, professional corporation name, seal, and/or involvement from each electronic display. For documentation purposes, two sets of an original electronic media (disk) and two (11" x 17" size or larger) duplicate hard copy sets will be prepared. One set will be given to Owner and one set will be retained by Design/Builder. If Owner provides such electronic media (disk) to others for any purpose, Owner shall require the electronic media (disk) to be returned to Owner upon completion of such use. Owner recognizes that use of such electronic media (disk) will be at Owner's sole risk and without any liability risk or legal exposure by Design/Builder.

2. Project Documentation: All documentation provided the Owner other than project drawings shall be furnished on a microcomputer diskette, 3.5 inch, 1.44mb, in either Microsoft Word file format or ASCII file format.
3. "Record" Drawings: Following construction, Owner will provide copies of changes and alterations made in the field during construction to Design/Builder to provide "record" drawings, unless Design/Builder has provided a floppy disk to Owner on which Owner can make changes. Design/Builder has the right to rely on the information provided by the Owner in preparing such documents, and shall have no independent duty to verify its accuracy.

### **13.10. Federal Lobbying Activities**

(Only applies to projects receiving federal funds via the Owner)

31 USCA Section 1352 requires all subgrantees, contractors, subcontractors and consultants who receive federal funds via Owner to certify that they will not use federal funds to pay any person for influencing or attempting to influence a federal agency or Congress in connection with the award of any federal contract, grant, loan or cooperative agreements. In addition, contract applicants; recipients and sub-recipients must file a form disclosing any expenditure they make for lobbying out of non-federal funds during the contract period.

Necessary forms are available from the Owner's Project Manager and should be returned to Owner with other final contract documents. It is the responsibility of Design/Builder to obtain executed forms from any of its subcontractors who fall within the provision of the Code and to provide Owner with the same.

### **13.11 Appointment of Service Agent**

Design/Builder, as a registered business in Kansas, has a local agent appointed and registered with the Secretary of State.

### **13.12 Covenant Against Contingent Fees**

Design/Builder warrants that he/she has not employed or retained any company or person, other than a bona fide employee working for Design/Builder, to solicit or secure this Agreement, and that he/she has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gifts, or any other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, Owner may terminate this Agreement without liability or may, in its discretion, deduct from the Fee or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

### **13.13 Compliance with Laws**

Design/Builder shall abide by all applicable federal, state and local laws, ordinances and regulations applicable to the Project Work at the time Services are rendered. Design/Builder shall secure all occupational licenses and permits from public and private sources necessary for the fulfillment of his/her obligations under this Agreement.

### **13.14 Interpretation**

Any and all headings of this Agreement are for convenience of reference only and do not modify, define or limit the provisions thereof. Words of any gender shall be deemed and construed to include correlative words of the other gender. Words importing the singular number shall include the plural number and vice versa, unless the context shall otherwise be deemed to include all supplements and/or amendments to any such exhibits or documents entered into in accordance with the terms hereof and thereof. All references to any person or entity shall be deemed to include any person or entity succeeding to the rights, duties and obligations of such person or entity in accordance with the terms of this Agreement. Where reference is made in this Agreement to another Contract Document, the reference refers to that provision as amended or supplemented by the other provisions of the Contract Documents.

### **13.15 Severability**

If any provision of this Agreement is held to be inoperative or unenforceable as applied in any particular case because it conflicts with any other provision hereof or any constitution, statute, ordinance, rule of law or public policy, or for any other reason, such holding shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case, or of rendering any other provision herein contained inoperative or unenforceable to any extent whatever. The invalidity of any one or more phrases, sentences, clauses or sections contained in this Agreement shall not affect the remaining portions of this Agreement or any part hereof, and they shall otherwise remain in full force and effect.

### **13.16 Whole Agreement**

This Agreement, the Exhibits hereto and the Contract Documents shall constitute the entire

agreement between the Parties, and no inducements, considerations, promises or other references shall be implied in this Agreement that are not expressly addressed herein.

### **13.17 Accounting Records**

The Design/Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement; the accounting and control systems shall be reasonably satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to the Design/Builder's records, books, correspondence, instructions, drawings, receipts, Team Subcontracts, Subcontracts, vouchers, memoranda and other data relating to this Agreement, and the Design/Builder shall preserve these for a period of three (3) years after final payment, or for such longer period as may be required by law.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

By: \_\_\_\_\_  
Authorized Signatory

Title: \_\_\_\_\_

**CITY OF OVERLAND PARK, KANSAS**

By: \_\_\_\_\_  
Ed Eilert, Mayor

ATTEST:

\_\_\_\_\_  
Marian Cook, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
J. Bart Budetti  
Senior Assistant City Attorney

## LIST OF EXHIBITS

Exhibit A	Schedule of Fee Payments
Exhibit C	List of Contract Documents
Exhibit D	Cost of the Work
Exhibit E	Guaranteed Maximum Price and Fee
Exhibit F	Owner Governmental Approvals
Exhibit H	Schedule
Exhibit J	Procedures for Review of Design Materials
Exhibit K	Designation of Authorized Representatives
Exhibit L	Insurance Requirements
Exhibit M	Payment and Performance Bond Forms
Exhibit N	Affirmative Action and Other Laws
Exhibit O	Scope of Work
Exhibit Q	Appointment of Service Agent

**EXHIBIT A**  
**SCHEDULE OF FEE PAYMENTS**

Design/Builder shall bill City monthly for all completed services. The bill submitted by the Design/Builder shall itemize the services for which payment is requested. City agrees to pay Design/Builder within thirty (30) days of approval by the Governing Body

**EXHIBIT C**  
**LIST OF CONTRACT DOCUMENTS**

The contract documents shall include the contract between the owner and the design/builder, and those plans, specifications, drawings, and general and special conditions reasonably and customarily required for a project of this scope and magnitude.

**EXHIBIT D  
COST OF THE WORK**

1. **"Cost of the Work"**. The term "Cost of the Work" shall mean costs incurred by the Design/Builder in the performance of the Work. The following are categories of cost and expense to be paid by the Owner to the Design/Builder as Cost of the Work:

2. **Construction Costs**

2.1 **Labor Costs**

2.1.1 Wages of Workers directly employed by the Design/Builder to perform the construction of the Work at the Site or, with the Owner's agreement, at off-site workshops.

2.1.2 Wages or salaries of the Design/Builder's supervisory and administrative personnel when stationed at the Site and wages, salaries and other costs of project management, pre-construction services, form design, foundation engineering, manpower planning, purchasing, estimating and data processing, whether performed at the Site or in the Design/Builder's or Contractor's offices, including, but not limited to services rendered during the Design Phase of the Project.

2.1.3 Wages and salaries of the Design/Builder's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

2.1.4 Costs paid or incurred by the Design/Builder for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in subsections 2.1.1 through 2.1.3 above.

2.2 **Subcontract Costs**

Amounts due Subcontractors in accordance with the requirements of the Subcontracts.

2.3 **Costs of Materials and Equipment Incorporated in the Completed Construction**

2.3.1 Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.

2.3.2 Costs of materials described in subsection 2.3.1 in excess of those actually

installed by required to provide reasonable allowance for waste and spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work, or at the Owner's option, shall be sold by the Design/Builder, amount realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

## **2.4 Costs of other Materials and Equipment, Temporary Facilities, and Related Items**

**2.4.1** Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the Workers, which are provided by the Design/Builder at the Site and fully consumed in the performance of the Work; and cost, less salvage value, on such items if not fully consumed, whether sold to others or retained by the Design/Builder. Costs for items previously used by the Design/Builder shall mean fair market value.

**2.4.2** Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the Workers, which are provided by the Design/Builder at the Site, whether rented from the Design/Builder or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rental charges for equipment owned by the Design/Builder shall be at then prevailing rates.

**2.4.3** Costs of removal of debris from the Site.

**2.4.4** Costs of facsimiles, telegrams and long distance telephone calls, postage and delivery charges (whether originating at the Site or at the offices of the Design/Builder, telephone service at the Site and reasonable petty cash expenses of the Site office.

**2.4.5** That portion of the reasonable travel and subsistence expenses of the Design/Builder's personnel incurred while traveling in discharge of duties connected with the Work.

## **2.5 Premiums; Taxes; Fees; Royalties**

**2.5.1** That portion directly attributable to this Agreement of premiums for insurance and the Statutory and Performance Bonds. In the event that the Design/Builder elects to self-insure against one or more risks associated with the Work, the cost of insurance for such risks shall be deemed to be the lowest guaranteed cost then available to the Design/Builder or the Contractor under a fully insured program.

**2.5.2** Sales, use, gross receipts or similar taxes imposed by a governmental authority which are related to the Work and for which the Design/Builder is liable.

**2.5.3** Fees and assessments for any permits, licenses and inspections required by the Contract Documents.

2.5.4 Fees of testing laboratories for tests required by the Contract Documents or governmental authorities.

2.5.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents. The costs of defending suits or claims for infringement of patent rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Design/Builder resulting from such suits or claims and payments of settlements in connection therewith.

2.5.6 Deposits lost for cause other than the Design/Builder's negligence.

## **2.6 Emergencies; Repairs to Damaged, Defective, or Non-conforming Work**

2.6.1 Costs incurred in taking action to prevent threatened damage, injury or loss in case of emergency affecting the safety of persons and property, as provided in Section 10.6 of the Agreement.

2.6.2 Costs incurred in repairing or correcting Work damaged or improperly executed by Workers in the employ of the Design/Builder.

2.6.3 Costs incurred in repairing or correcting Work damaged or improperly executed by individuals or entities (including, but not limited to, Subcontractors) other than those described in subsection 2.6.2, but only to the extent the Design/Builder does not recover such costs from the party responsible therefor.

## **2.7 Other Costs**

Other costs incurred in the performance of the Work, if and to the extent approved in writing by the Owner, which approval shall not be unreasonably withheld.

## **3. Items not Included in Cost of the Work**

3.1 Salaries and other compensation of the Design/Builder's personnel stationed at the Contractor's principal office or offices other than the Site, except as specifically provided in subsections 2.1.2 and 2.1.3 above.

3.2 Expenses of the Design/Builder's principal office and offices, other than the Site office.

3.3 Overhead and general expenses, except as may be included in Sections 1 and 2 above.

3.4 The capital expenses of the Design/Builder, including interest on capital employed for the Work.

3.5 Costs which would cause the GMP to be exceeded.

**EXHIBIT E**  
**GUARANTEED MAXIMUM PRICE**

1. **Guaranteed Maximum Price.** The **Guaranteed Maximum Price** as of the date of execution of the Agreement is detailed following.

Total Cost of Design and Construction	<b>\$ 75,000</b>
---------------------------------------	------------------

**Guaranteed Maximum Price: \$ 75,000**

**EXHIBIT F**  
**OWNER GOVERNMENTAL APPROVALS**

Owner reserves the right to review and approve all design and construction documents and all shop drawings and material selections.

**EXHIBIT H  
SCHEDULE**

Scheduled shall be submitted within thirty days of execution of this agreement, as set forth in Section 4.3, Project Schedule.

**EXHIBIT J**  
**PROCEDURES FOR REVIEW OF DESIGN MATERIALS**

The design/builder is responsible for specifying design materials. Owner reserves the right to review and approve all design material selections.

**EXHIBIT K**  
**DESIGNATION OF AUTHORIZED REPRESENTATIVES**

**For the Design/Builder:**

Brad Mohr  
ATHCO L.L.C  
13500 W. 108<sup>th</sup> St.  
Lenexa, KS 66215  
(913) 469-8134

**For the Owner**

Greg Ruether  
City of Overland Park  
8500 Santa Fe Drive  
Overland Park, KS 66212  
(913) 327-6634

**EXHIBIT L**  
**INSURANCE REQUIREMENTS**

1. GENERAL

The Design/Builder shall maintain, throughout the duration of this Contract, insurance (on an occurrence basis unless otherwise agreed to) of such types and in at least such amounts as required herein. Professional Liability may be written on a "claims made" basis. Design/Builder shall provide certificates of insurance and renewals thereof on forms provided by the Owner or on forms acceptable to the Owner. The Owner shall be notified by receipt of written notice from the insurer or the Design/Builder at least thirty (30) days prior to material modification or cancellation of any policy listed on the Certificate.

2. NOTICE OF CLAIM REDUCTION OF POLICY LIMITS

The Design/Builder, upon receipt of notice of any claim in connection with the Agreement, shall promptly notify the Owner, providing full details thereof, including an estimate of the amount of loss or liability.

The Design/Builder shall promptly notify the Owner of any reduction in limits of protection afforded under any policy listed in the Certificate (or otherwise required by the Contract Documents) in excess of \$10,000.00, whether or not such impairment came about as a result of this Agreement.

In the event the Owner shall determine that the Design/Builder's aggregate limits of protection shall have been impaired or reduced to such extent that the Owner shall determine such limits inadequate for the balance of the project, the Design/Builder shall, upon notice from the Owner, promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the Owner.

3. COMMERCIAL GENERAL LIABILITY

Limits -

General Aggregate:	\$ 1,000,000
Products / Completed Operations:	\$ 1,000,000
Personal & Advertising Injury:	\$ 1,000,000
Each Occurrence:	\$ 1,000,000

Policy MUST include the following conditions:

Explosion, Collapse & Underground  
Independent Contractors  
Pollution Liability (Applicable only to contracts involving pollutants such as  
asbestos & lead abatement, sludge or other waste abatement, etc.)

AND

4. AUTOMOBILE LIABILITY

Policy shall protect the Design/Builder against claims for bodily injury and/or property damage arising out of the ownership or use of any owned, hired and/or non-owned vehicle and must include the protection for either:

Any Auto

Or

All Owned Autos;  
Hired Autos; and  
Non-Owned Autos

Limits -

Each Accident, Combined Single Limits, Bodily Injury and Property Damage:

Same as General Liability

Policy MUST include the following condition:

**Name Owner as "Additional Insured"**

5. WORKERS' COMPENSATION

This insurance shall protect the Design/Builder against all claims under applicable state workers' compensation laws. The Design/Builder shall also be protected against claims for injury, disease or death of employees for which, for any reason, may not fall within the provisions of workers' compensation law. The policy limits shall not be less than the following:

Workers' Compensation: Statutory

Employers Liability -

Bodily Injury by Accident:	\$ 100,000 Each Accident
Bodily Injury by Disease:	\$ 500,000 Policy Limit
Bodily Injury by Disease:	\$ 100,000 Each Employee

6. INDUSTRY RATINGS

The Owner will only accept coverage from an insurance carrier who offers proof that it:

- a) Is licensed to do business in the State of Kansas;
- b) Carries a Best's policyholder rating of B+ or better; and
- c) Carries at least a Class X financial rating.

OR

Is a company mutually agreed upon by the Owner and Design/Builder.

7. SUBCONTRACTORS' INSURANCE

If a part of the Agreement is to be sublet, the Design/Builder shall either:

Cover all Team Subcontractors and Subcontractors in its insurance policies, or  
Require each Team Subcontractor and Subcontractor not so covered to secure insurance which will protect subcontractor against all applicable hazards or risks of loss as and in the minimum amounts designated.

Whichever option is chosen, Design/Builder shall indemnify and hold harmless the Owner as to any and all damages, claims or losses, including attorney's fees, arising out of the acts or omissions of its Team subcontractors and Subcontractors.

EXHIBIT M  
STATUTORY AND PERFORMANCE BOND FORMS

CITY OF OVERLAND PARK, KANSAS

STATUTORY BOND

KNOW ALL MEN BY THESE PRESENTS, that we \_\_\_\_\_  
ATHCO L.L.C

as Contractor and principal, and \_\_\_\_\_,  
\_\_\_\_\_ 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 State of  
Kansas, in the penal sum Seventy Five Thousand and 00/100 Dollars (\$ 75,000 )  
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, firmly by these presents:

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

WHEREAS, the said Contractor has on the \_\_\_\_\_ day of \_\_\_\_\_, 2003,  
entered into an Agreement with the City of Overland Park, Kansas, a copy of which is attached  
hereto and incorporated herein for furnishing all tools, equipment, materials, transportation and  
supplies, performing all labor, and constructing public improvements described in the Agreement  
and the Contract Documents, all in accordance with Specifications, Plans and other Contract  
Documents on file in the office of the City Clerk of the City of Overland Park, Kansas.

NOW, THEREFORE, if the Contractor or the subcontractors of the Contractor shall pay all  
indebtedness incurred for supplies, materials, transportation or labor furnished, or equipment used or  
consumed in connection with or in or about the construction or making of the improvements  
described in the above-mentioned Contract Documents, then this obligation shall be void; otherwise,  
it shall remain in full force and effect.

The said Surety, for value received, hereby stipulates and agrees that no change, extension of time,  
alteration or addition to the terms of the Agreement and the Contract Documents to the work to be  
performed thereunder, or the Plans and Specifications accompanying the 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, Contract Documents or to the Plans and  
Specifications.

PROVIDED, that it is expressly agreed that this 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 50 percent, so as to bind the Contractor and the Surety to  
the full and faithful performance of the Agreement as 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.

The said Surety further agrees that any person to whom there is due any sum for labor furnished, transportation, materials, equipment or supplies used or consumed in connection with or in or about the construction of said public improvement, as hereinbefore stated or said person's assigns, may bring action on this bond for the recovery of said indebtedness within six (6) months from the completion of said public improvement.

IN TESTIMONY WHEREOF, the said Contractor has hereunto set his/her hand, and the 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 \_\_\_\_\_, 2003.

ATHCO L.L.C.  
Contractor/Principal

ATTEST:

\_\_\_\_\_  
Secretary

By \_\_\_\_\_ (SEAL)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Surety Company

By \_\_\_\_\_ (SEAL)

By \_\_\_\_\_  
Attorney-in-Fact

By \_\_\_\_\_  
Kansas Agent

NOTE:

1. A Statutory Bond is required only in connection with a Contract exceeding forty thousand dollars (\$40,000.00) in accordance with K.S.A. 60-1111 as amended.
2. Contractor shall be responsible for seeing to it that this Statutory Bond is filed with the Clerk of the District Court for Johnson County, Kansas.
3. Date on bond must not be prior to date of contract.
4. If Contractor is partnership, all partners should execute bond.
5. Surety companies executing bonds must appear on the Treasury Departments most current list (Circular 570 as amended) and be authorized to transact business in the state of Kansas.
6. Accompany this bond with Attorney-in-Facts Authority from the surety company certified to include the date of the bond.

CITY OF OVERLAND PARK, KANSAS

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned \_\_\_\_\_,  
ATHCO L.L.C.

of \_\_\_\_\_ Lenexa, Kansas \_\_\_\_\_ as principal, hereinafter referred to as the "Contractor,"  
and \_\_\_\_\_

a corporation organized under the laws of the State of \_\_\_\_\_ and authorized to  
conduct business in the State of Kansas, as surety, are held and firmly bound unto the City of  
Overland Park, Kansas, hereinafter referred to as "City," in the penal sum of \_\_\_\_\_  
Seventy Five Thousand and 00/100 \_\_\_\_\_ Dollars (\$ 75,000 )

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 Contractor, has on the \_\_\_\_\_ day of \_\_\_\_\_,  
2003, executed a written Agreement with the aforesaid City for furnishing in a good, substantial and  
workmanlike manner all construction, labor, materials, equipment, tools, transportation,  
superintendence and other facilities and accessories for \_\_\_\_\_

Community Park Playground Structure  
designated, defined and described in the Agreement and the Contract Documents, and in accordance  
with the Specifications and Plans and other Contract Documents therefor; a copy of said Agreement  
being attached hereto and made a part hereof;

NOW, THEREFORE, if said Contractor 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 two years from the date of final payment, 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  
thereunder 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 50 percent, so as to bind the Contractor  
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 Contractor is declared by City to be in default under the Contract, the City having performed City's obligations thereunder, 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, which sum shall not exceed the amount set forth in the first paragraph hereof. 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 Contractor 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 \_\_\_\_\_, 2003.

\_\_\_\_\_  
ATHCO L.L.C.  
Contractor/Principal

ATTEST: By \_\_\_\_\_ (SEAL)

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
Title

\_\_\_\_\_  
Surety Company

By \_\_\_\_\_ (SEAL)  
Attorney-in-Fact

By \_\_\_\_\_  
Kansas Agent

NOTE:

1. Date of bond must not be prior to date of contract.
2. If Contractor is partnership, all partners should execute bond.
3. Surety companies executing bonds must appear on the Treasury Departments most current list (Circular 570 as amended) and be authorized to transact business in the state of Kansas.
4. Accompany this bond with Attorney-in-Facts Authority from the surety company certified to include the date of the bond.

**EXHIBIT N**  
**AFFIRMATIVE ACTION AND OTHER LAWS**

1. During the performance of this Agreement, the Design/Builder agrees that:
  - a. Design/Builder shall observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and shall not discriminate against any person in the performance of work under the present contract because of race, religion, color, sex, disability, national origin, ancestry or age;
  - b. in all solicitations or advertisements for employees, the Design/Builder shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the commission;
  - c. if the Design/Builder fails to comply with the manner in which the Design/Builder reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Design/Builder shall be deemed to have breached the present contract and it may be canceled, terminated or suspended, in whole or in part, by the contracting agency;
  - d. if the Design/Builder is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the commission which has become final, the Design/Builder shall be deemed to have breached the present contract and it may be canceled, terminated or suspended, in whole or in part, by the contracting agency; and
  - e. the Design/Builder shall include the provisions of subsections (a) through (d) in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or vendor.

The provisions of this section shall not apply to a contract entered into by a Design/Builder who employs fewer than four employees during the term of such contract or whose contracts with the Owner cumulatively total \$5,000 or less during the fiscal year of the Owner.

2. 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 to furnish any certification required by any federal, state or local governmental agency in connection therewith.

**EXHIBIT O**  
**SCOPE OF WORK**

**PLAY STRUCTURES –**

The structures will be located at the Overland Park Community Park, 137<sup>th</sup> & Switzer. Proposal is for adjacent structures of approximately equal size. One structure shall be for age 2 to 5 and one structure for ages 5-12. The structures, including fall zones, will be allowed to occupy a maximum area of 90' x 70'. The City shall provide a level concrete pad with cutouts for posts. The City shall also configure the pad as to meet the suppliers plan. The supplier will be responsible for placement of post cutouts and staking of layout of concrete pad. Maximum funding of \$75,000.00 is available, including all delivery, installation and fall surface cost. Proposals exceeding the available funding will not be considered. Acceptable colors for the play structures will be green and tan.

Preferred features would be:

- Swings (2-tot seats for ages 2 to 5 and 2-belt seats for 5-12)
- Slides
- Climbers
- Activity panels
- 3-spring features (age 2 to 5)
- Poured in-place fall surface

Not acceptable:

- Roofs
- Plastic coated chains
- Bubble panels
- Chain climbers
- Single "T-post" swings structures

General instructions:

- Bidder will state the estimated delivery date
- All equipment must meet the minimum standards of IPEMA/ASTM/CPSC requirements, as well as meeting the newest ADA standards (the number of upper-level play stations coordinated with the number of ground-level stations).
- Provide both 2-D site drawings and 3-D color renderings.
- Each vendor will submit not more than one (1) design.
- Provide name and phone number of three (3) customers with like playground installations that are not more than two years old that the City may contact and inspect. These locations must be within the Kansas City metro areas.
- Provide the names, addresses, and phone numbers of both the manufacturer and the local agent.
- Provide copy of the manufacturers warranty.
- Submit six (6) copies of each proposal.

- There will be no personal presentations. Proposals will be accepted until the stated deadline and will then be evaluated and the award made to the “best” proposal, not necessarily the lowest cost.
- No metal slides will be considered.
- Support post can be either steel or aluminum.
- The installer must be certified by the NPSI or an equivalent organization and follow the installation guidelines set forth by that organization.
- Delivery and installation costs must be included in the proposal price.
- 4 ½” minimum post diameter of composite structures
- Swings:
  - Tot swings:
    - Single post arch, 5” minimum post diameter or double post arch 3 ½” minimum diameter posts.
  - Belt swings:
    - Double post arch, 3 ½ “ minimum diameter posts.
- No galvanized swing posts.
  
- Each vendor submitting proposals will plainly label each proposal as follows:

1. Community Park Play Structure