

CONSULTANT SERVICES AGREEMENT

THIS AGREEMENT is made in Johnson County, Kansas, by and between the City of Overland Park, Kansas, hereinafter "City," and Eagle View Golf, LLC, hereinafter "Consultant." City intends to construct an improvement project (hereinafter called the Project) in Overland Park, Kansas, described as follows:

To work with the golf course architect, Schreiner Golf, Inc., in the design phase, to assist with construction methods and specification, earth moving and grading calculations, project scheduling and overall cost estimates for the re-modeling of the St. Andrews Golf Course.

City hereby contracts with Consultant for the furnishing of professional consultant in connection with the Project, for the furnishing of such consultant services more particularly described herein in consideration of these premises and of the mutual covenants herein set forth. By executing this Agreement, the Consultant represents to City that Consultant is professionally qualified to do this Project.

SECTION I - DEFINITIONS

As used in this Agreement, the following terms shall have the meanings ascribed herein unless otherwise stated or reasonably required by the Agreement, and other forms of any defined words shall have a meaning parallel thereto.

"City" means the City of Overland Park, Kansas.

"Consultant" means the company or individual identified on pg. 1. Consultant shall employ for the services rendered, engineers, architects, landscape architects, and surveyors licensed by the Kansas State Board of Technical Professions.

"Construction Cost" means and includes the cost of the entire construction of the Project, including all supervision, materials, supplies, labor, tools, equipment, transportation and/or other

facilities furnished, used or consumed, without deduction on account of penalties, liquidated damages or other amounts withheld from payment to the contractor or contractors, but such cost shall not include the Consultant's fee, or other payments to the Consultant and shall not include cost of land or rights-of-way and easement acquisition.

"Contract Documents" means those documents so identified in the Agreement for Construction for this Project, including all Consulting Documents. All terms defined in the General Conditions shall have the same meaning when used in this Agreement unless otherwise specifically stated or in the case of a conflict in which case the definition used in this Agreement shall prevail in the interpretation of this Agreement.

"Consultant Documents" means all documents required or reasonably implied by the nature of the Project, including, but not limited to, plans, specifications, drawings, tracings, designs, calculations, sketches, models and reports.

"Consulting Services" means the professional services, labor, materials, supplies, testing, surveying, title work, inspection, if applicable, and all other acts, duties, and services required of Consultant under this Agreement together with such other services as City may require pursuant to the terms of this Agreement.

"Project" is as above described.

"Project Manager" means the person employed by City and designated to act as the City's representative for the Project.

"Right-of-Way" and "Easements" means and includes street, highway, or road right-of-way and any other land dedicated to or otherwise subject to public use.

"Subsurface Borings and Testing" means borings, probings and subsurface explorations, laboratory tests and inspections of samples, materials and equipment; appropriate professional

interpretations of all the foregoing.

"Traffic Control Plan" means a specific plan that includes but is not limited to signing; application and removal of pavement markings; construction sequencing and scheduling; methods and devices for delineation and channelization; placement and maintenance of devices; traffic regulation; and inspection.

SECTION II - COMPENSATION

1. Total Fee: City agrees to pay Consultant a fixed amount of Twenty Thousand and 00/100 Dollars (\$ 20,000.00), including reimbursables. The fixed fee is based on the performance of the scope of services outlined in this Agreement, required to be completed on or before November 19, 2004. Payment to Consultant shall be as follows: The fee is based on four site visits. Each site visit will be \$5,000. If the consultant becomes the contractor, then a credit of \$2,500 per visit will be credited back to the City on the first pay application of the construction phase(when actual construction has begun). The total credit back to the City would be \$10,000.

Site Visit No. 1	(\$ 5,000.00)
Site Visit No. 2	(\$ 5,000.00)
Site Visit No. 3	(\$ 5,000.00)
Site Visit No. 4	<u>(\$ 5,000.00)</u>
TOTAL	(\$20,000.00)

2. Additional Services: Consultant shall provide, with City's concurrence, services in addition to those listed in Section III when such services are requested or authorized in writing by City. Such services may include, but are not limited to, making computations and determinations of special assessments, making special trips requested by City other than

those required by Section III, preparing changes in plans ordered by City or made necessary by causes beyond the control of Consultant, providing services necessitated in the event the Consulting Services shall be suspended or abandoned, if such suspension or abandonment is not the result of a breach of this Agreement by the Consultant, and providing any other special services not otherwise covered by this Agreement which may be requested by City. Reimbursable expenses incurred in conjunction with additional services shall be paid separately and those reimbursable expenses shall be paid at actual cost. Records of reimbursable expenses and expenses pertaining to additional services shall be made available to City, if so requested.

3. Special Services: Consultant may be called on to serve as a consultant or witness in any litigation, arbitration, legal or administrative proceeding arising out of this Project. Consultant shall not be paid extra by City if its appearance is to defend its professional Consultant Services. Consultant shall not be paid extra by City to appear at eminent domain or appraiser's hearings necessary to acquire easements and right-of-way for the Project.
4. Billing: Consultant shall bill City monthly for all completed services. The bill submitted by Consultant shall itemize the services for which payment is requested. City agrees to pay Consultant within thirty (30) days of approval by the Governing Body.
5. City's Right to Withhold Payment: In the event City becomes credibly informed that any representations of Consultant provided in its monthly billing, are wholly or partially inaccurate, City may withhold payment of sums then or in the future otherwise due to Consultant until the inaccuracy and the cause thereof, is corrected to City's reasonable satisfaction. In the event City questions some element of an invoice, that fact shall be made known to Consultant immediately. Consultant will help effect resolution and transmit a

revised invoice, if necessary. Amounts not questioned by City shall be paid to Consultant in accordance with the contract payment procedures.

6. Progress Reports: A progress report must be submitted with each monthly pay request indicating the percentage of tasks completed to date. This report will serve as support for payment to Consultant.
7. Change Orders: This Agreement may be amended to provide for additions, deletions and revisions in the Consulting Services or to modify the terms and conditions thereof by either written amendment or by Change Order. The Contract Price and Contract Time may only be changed by a written Change Order approved by City, unless it is the result of an emergency situation in which case the Project Manager may give written approval to be followed by a written and approved Change Order. If notice of any change affecting the general scope of the Consulting Services or provisions of this Agreement, including but not limited to, Contract Price or Contract Time, is a requirement of any insurance policy held by Consultant as a requirement of this Agreement, the giving of such notice shall be the Consultant's responsibility.

SECTION III - RESPONSIBILITIES OF CONSULTANT

Consultant shall furnish and perform the various professional duties and services in all phases of the Project to which this Agreement applies as herein provided and which are required for the construction of the Project which services shall include:

1. Attend and participate in at least four meetings with City staff and the Architect to identify key components of the project that will be a part of the improvements. (Tentative meeting schedule shall be August 2, September 27, October 18 and November 15, 2004.)

2. Participate in the design phase by working with the staff, the Golf Course Advisory Committee and the Architect.
3. Establish a time line for construction using the critical path Method (CPM) working with the project manager and Architect.
4. Work with the Architect to coordinate all improvements into the drawings.

SECTION IV - CITY OF OVERLAND PARK'S RESPONSIBILITIES

1. Communication: City shall provide to Consultant information and criteria regarding City's requirements for the Project; examine and timely respond to Consultant's submissions; and give written notice to Consultant, who shall respond promptly, whenever City observes or otherwise becomes aware of any defect in the Consulting Services.
2. Access: City will provide access for Consultant to enter public and private property.
3. Duties: City shall furnish and perform the various duties and services in all phases of the Project which are outlined and designated in Section III as City's responsibility.
4. Program and Budget: City shall provide full information, including a program which shall set forth City's objectives, schedule, constraints, budget with reasonable contingencies, and other necessary design criteria.
5. Legal, Insurance, Audit: City shall furnish all legal, accounting and insurance counseling services as may be necessary at any time for the Project. City shall furnish all bond forms required for the Project.
6. Project Representative: City shall designate a Project Manager to represent City in coordinating this Project with Consultant, with authority to transmit instructions and define policies and decisions of City.

SECTION V - GENERAL PROVISIONS

A. TERMINATION

1. Notice: City reserves the right to terminate this Agreement for either cause or for its convenience and without cause or default on the part of Consultant, by providing ten (10) days' written notice of such termination to Consultant. Upon receipt of such notice from City, Consultant shall, at City's option as contained in the notice: (1) immediately cease all Consulting Services; or (2) meet with City and, subject to City's approval, determine what Consulting Services shall be required of Consultant in order to bring the Project to a reasonable termination in accordance with the request of City. Consultant shall also provide to City copies of all drawings and documents completed or partially completed at the date of termination.

If City defaults on its obligation under this Agreement, Consultant is entitled to terminate this Agreement by providing ten (10) days' written notice.

2. Termination for Cause: If this Agreement is terminated for cause, after notice to Consultant, City may take over the Consulting Services and prosecute same to completion, by contract or otherwise, for the amount and at the expense of the Consultant, and the Consultant shall be liable to the City for any and all excess cost sustained by the City by reason of such prosecution and completion. When Consultant's services have been so terminated, such termination shall not affect any rights or remedies of the City against Consultant then existing or which may later accrue. Similarly, any retention or payment of monies due Consultant shall not release Consultant from liability.

3. Compensation for Convenience Termination: If City shall terminate for its convenience as herein provided, City shall compensate Consultant for all Consulting

Services completed to date of its receipt of the termination notice and any additional Consulting Services requested by City to bring the Project to reasonable termination.

Compensation shall not include anticipatory profit or consequential damages, neither of which will be allowed.

4. Compensation for Cause Termination: If City shall terminate for cause or default on the part of Consultant, City shall compensate Consultant for the reasonable cost of Consulting Services completed to date of its receipt of the termination notice. Compensation shall not include anticipatory profit or consequential damages, neither of which will be allowed. City also retains all its rights and remedies against Consultant including but not limited to its rights to sue for damages, interest and attorney fees.

5. Incomplete Documents: Neither Consultant nor its subcontractors shall be responsible for errors or omissions in documents which are incomplete as a result of an early termination under this Section; Consultant having been deprived of the opportunity to complete such documents and certify them as ready for construction.

B. DISPUTE RESOLUTION

City and Consultant 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, Consultant shall proceed with the Consulting Services as per this Agreement as if no dispute existed, and the City shall continue to make payment for Consultant's completed Services; and provided further that no dispute will be submitted to arbitration without both parties' express written consent.

C. **INSURANCE**

1. GENERAL

The Consultant 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. Consultant shall provide certificates of insurance and renewals thereof on forms provided by the City or on forms acceptable to the City. The City shall be notified by receipt of written notice from the insurer or the Consultant 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 Consultant, upon receipt of notice of any claim in connection with the Contract, shall promptly notify the City, providing full details thereof, including an estimate of the amount of loss or liability.

The Consultant shall promptly notify the City 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 City shall determine that the Consultant's aggregate limits of protection shall have been impaired or reduced to such extent that the City shall determine such limits inadequate for the balance of the project, the Consultant shall, upon notice from the City, promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the City.

3. COMMERCIAL GENERAL LIABILITY

Limits -

General Aggregate:	\$ 500,000
Products / Completed Operations:	\$ 500,000
Personal & Advertising Injury:	\$ 500,000
Each Occurrence:	\$ 500,000

Policy MUST include the following conditions:

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

Name City of Overland Park as "Additional Insured"

4. AUTOMOBILE LIABILITY

Policy shall protect the Consultant 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 City of Overland Park as "**Additional Insured**"

5. WORKERS' COMPENSATION

This insurance shall protect the Consultant against all claims under applicable state workers' compensation laws. The Consultant 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 City 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 City and Consultant.

7. AIRCRAFT LIABILITY

(Additional requirement applicable for aerial photograph or contract involving any use of aircraft.)

Limits- Single Limit Bodily Injury; Including Passengers; and Property Damage:

\$ 1,000,000 Each Occurrence

Coverage must include all Owned, Hired and Non-Owned Aircraft.

Policy MUST include the following condition:

Name City of Overland Park as "Additional Insured" on the hired and non-owned Aircraft Liability.

E. INDEMNITY

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 Consulting Services required hereunder.

2. Indemnity: For purposes of this Agreement, Consultant hereby agrees to indemnify, defend and hold harmless the City, 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 Consultant, its affiliates, subsidiaries, employees, agents and subcontractors/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 City or any third party and, further notwithstanding any theory of law including, but not limited to, a characterization of the City'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 Consultant's obligation hereunder shall not include amounts attributable to the fault or negligence of the City or any third party for whom the Consultant is not responsible.

In the case of any claims against the City, its employees or agents indemnified under this Agreement, by an employee of the Consultant, its affiliates, subsidiaries, or subcontractor/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 Consultant, its affiliates, subsidiaries, or subcontractor/assignees, under workers' compensation acts, disability benefit acts, or other employee benefit acts.

F. AFFIRMATIVE ACTION/OTHER LAWS

1. During the performance of this Agreement, the Consultant agrees that:
 - a. Consultant 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 Consultant shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the commission;
- c. if the Consultant fails to comply with the manner in which the Consultant reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Consultant 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 Consultant 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 Consultant 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 Consultant 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 Consultant:

- who employs fewer than four employees during the term of such contract; or
- whose contracts with the City cumulatively total \$5,000 or less during the fiscal

year of the City.

2. The Consultant further agrees that the Consultant 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.

G. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements, whether oral or written, covering the same subject matter. This Agreement may not be modified or amended except in writing mutually agreed to and accepted by both parties to this Agreement.

H. APPLICABLE LAW

This Agreement is entered into under and pursuant to, and is to be construed and enforceable in accordance with, the laws of the State of Kansas.

I. ASSIGNMENT OF AGREEMENT

This Agreement shall not be assigned or transferred by Consultant without the written consent of the City.

J. NO THIRD PARTY BENEFICIARIES

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

K. INDEPENDENT CONTRACTOR

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

L. WORK PRODUCT FORMAT

1. Project Documentation: All documentation provided the City 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.

M. FEDERAL LOBBYING ACTIVITIES

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

31 USCA Section 1352 requires all subgrantees, contractors, subcontractors and consultants who receive federal funds via City 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 subrecipients must file a form disclosing any expenditures they make for lobbying out of non-federal funds during the contract period.

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

N. COVENANT AGAINST CONTINGENT FEES

Consultant warrants that he/she has not employed or retained any company or person, other than a bona fide employee working for Consultant, 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, City may terminate this Agreement without liability or may, in its discretion, deduct from the Contract Price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

O. COMPLIANCE WITH LAWS

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

P. TITLES, SUBHEADS AND CAPITALIZATION

Title and subheadings as used herein are provided only as a matter of convenience and shall have no legal bearing on the interpretation of any provision of this Agreement. Some terms are capitalized throughout this Agreement but the use of or failure to use capitals shall have no legal bearing on the interpretation of such terms.

Q. SEVERABILITY CLAUSE

Should any provision of this Agreement be determined to be void, invalid, unenforceable or illegal for whatever reason, such provision(s) shall be null and void; provided, however, that the remaining provisions of this Agreement shall be unaffected thereby and shall continue to be valid and enforceable.

[The remainder of this page is intentionally left blank.]

R. EXECUTION OF CONTRACT

The parties hereto have caused this Agreement to be executed in triplicate this _____ day of _____ 20 ____.

CITY OF OVERLAND PARK, KANSAS

ATTEST:

By: _____
Ed Eilert, Mayor

Marian Cook, City Clerk

APPROVED AS TO FORM:

Bart Budetti
Senior Assistant City Attorney

Eagle View Golf, LLC

By: _____
Authorized Signatory

Title