

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

This **AGREEMENT** is made as of the 14th day of April in the year of 2008, by and between the following parties, for services in connection with the Project identified below:

OWNER:

*City of Overland Park,
City Hall, 8500 Santa Fe Drive
Overland Park, Kansas 66212 - 2866*

DESIGN-BUILDER:

*McCownGordon Construction, LLC
422 Admiral Boulevard, Suite 100
Kansas City, MO 64106*

PROJECT:

Aquatic Development Projects

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

Article 1

General

1.1 Duty to Cooperate. Owner and Design-Builder commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith to allow each party to realize the benefits afforded under this Agreement.

1.2 Definitions. Terms, words and phrases used in this Agreement shall have the meanings given them in Standard Forms of General Conditions of Contract between Owner and Design-Builder ("General Conditions of Contract") and as defined in the Contract Definitions.

Article 2

Scope of Work

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

Article 3
Contract Documents

- 3.1** The Contract Documents are comprised of the following:
- .1** This Agreement, including all exhibits:
 - .2** Guaranteed Maximum Price (GMP) Submittal (Exhibit A);
 - a. Project Schedule
 - b. Schedule of Values for payment of Design-Builder Fees
 - c. Labor & Expenses Rates for Additional Services
 - d. Clarifications to GMP as developed by McCownGordon Construction dated March 27, 2008
 - e. Geotechnical Report dated December 7, 2007
 - f. General Conditions Matrix
 - g. Drawings and Specifications as developed by SFS Architects, sheet L1 dated 12-28-07, sheet A102 Dated 12-19-07, sheet A100 and A101 dated 2-7-08, the slide replacement package design prepared by Splashtacular dated 2-18-08.
 - .3** The General Conditions of Contract (Exhibit B);
 - .4** Owner approved performance specifications organized according to Construction Specification Institute (CSI) "UniFormat";
 - .5** Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract;
 - .6** The following other documents, if any:
 - a. Performance Bond (Exhibit C)
 - b. Statutory Bond (Exhibit D)
 - c. Appointment of Service Agent (Exhibit E)
 - d. Owner's Permit List (Exhibit F)
 - e. Design and Construction Procedures for Phase 2 Services, Final Design and Construction (Exhibit G)

Article 4
Definitions

4.1 Phase 2 Services Schedule commences upon 1) the execution of the Final Agreement for Phase 2 Services by both parties, and 2) the receipt of a Notice-to-Proceed (NTP) from the Owner. Phase 2 concludes at the end of the Warranty Period, as defined in the Agreement and the General Conditions of Contract.

4.2 Design Development: The process of determining the form, arrangement, size, and materials of the work or a portion of the work, as described in the General Conditions of the Contract. Design Development consists of drawings prepared to an advanced level as defined

in the AIA Handbook of Professional Practice, 2001, pages 570, and preliminary outline prescriptive specifications organized according to CSI's "MasterFormat."

4.3 Construction Documents: The process of preparing working drawings, prescriptive specifications, and other documents describing the work or a portion of the work in sufficient detail to allow permitting by authorities having jurisdiction, and for the accurate and complete construction.

4.4 Construction Period: The Construction period is the time from the transfer of the project site to custody of the Design-Builder until substantial completion as defined by the General Conditions of the Contract.

4.5 Substantial Completion: As defined in the General Conditions of the Contract; prerequisites are:

- .1 Design-Builder's complete punch list of remaining minor items of Work to be completed with a schedule of completion for such items.
- .2 Owner's complete punch list of items to be completed to be issued concurrently with the Design-Builder's punch list.
- .3 Compliance with requirements of governing authorities, for submittals, inspections, and permits, including but not limited to an occupancy permit issued by the authority having jurisdiction.
- .4 Compliance with Owner's requirements for access to areas occupied by the Owner.
- .5 The Project is available for use by the Owner for its intended purposes.

4.6 Closeout: The process of completing all details of construction, testing and commissioning. Closeout period is the time from the Date of Substantial Completion until final payment, as defined by the General Conditions of Contract.

4.7 Warranty Period: The warranty period commences on the date of Substantial Completion and is the 2 year period in which the Design-Builder or the Owner may discover and require the Design-Builder to correct defective work.

Article 5

Interpretation and Intent

5.1 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with design and construction industry standards. In the event of any inconsistency, conflict, or ambiguity between or among the Contract Documents, the Contract Documents shall take precedence in the order in which they are listed in Section 3.1 hereof.

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

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

Article 6

Ownership of Work Product

6.1 Work Product. All drawings, specifications and other documents and electronic data furnished by Design-Builder to Owner under this Agreement (“Work Product”) will be the sole property of Owner upon the Owner payment for services under this Agreement.

6.2 Owner’s Use of Work Product. If Owner fails to enter into a contract on this Project with Design-Builder to complete the design and construction of the Project and Owner proceeds to design and construct the Project through its employees, agents or third parties, upon payment by Owner of the amounts due Design-Builder for services under this Agreement, Owner may use Work Product to complete the Project, conditioned on the following: Use of the Work Product is at Owner’s sole risk without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier.

6.3 Owner’s Use of Work Product Upon Owner’s Termination for Convenience or Design-Builder’s Election to Terminate. If Owner elects to terminate this Agreement for Convenience or if Design – Builder elects to terminate this Agreement in accordance with the General Conditions of Contract, upon Owner’s payment of the amounts due Design-Builder under this Agreement, Owner may use the Work Product to complete the Project and subsequently occupy the Project, conditioned that use of the Work Product is at Owner’s sole risk without liability or legal exposure to Design Builder or Design Consultant.

6.4 Owner’s Use of Work Product Upon Design-Builder’s Default. If this Agreement is terminated by Owner due to Design-Builder’s default pursuant to Section 11.2 of the General Conditions of Contract and (i) it is determined that Design-Builder was in default and (ii) Owner has fully satisfied all of its obligations under the Contract Documents, Owner may use the Work Product in connection with Owner’s completion and occupancy of the Project conditioned on Owner’s express understanding that its use of the Work Product is at Owner’s sole risk and without liability or legal exposure to Design Builder or Design Consultant.

Article 7

Contract Time

7.1 Date of Commencement. The Work shall commence within five (5) days of Design-Builder’s receipt of Owner’s Notice to Proceed (“Date of Commencement”) and issuance of a building permit, unless the parties mutually agree otherwise in writing.

7.2 Substantial Completion and Final Completion. Substantial Completion and Final Completion are defined in the General Conditions of Contract, Section 6.6.

- .1 Substantial Completion of the entire Work shall be achieved no later than May 15, 2009, following the Date of Commencement (“Scheduled Substantial Completion Date”).

- .2 Interim milestones and/or Substantial Completion of identified certain portions of the Work shall be achieved as indicated in the GMP section of the Agreement.
- .3 Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable, but not later than sixty (60) days after Substantial Completion unless approved otherwise in writing by the Owner.
- .4 All of the dates set forth in this Article 7 ("Contract Time(s)") or related exhibits shall be subject to adjustment in accordance with the General Conditions of Contract.

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

7.4 Liquidated Damages. Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages, which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by the Scheduled Substantial Completion Date (the "LD Date"), Design-Builder shall pay Owner:

- .1 **Five Hundred (\$500) per day** as liquidated damages for each day that Substantial Completion extends beyond the LD Date for the Highland View Pool project.
- .2 **Five Hundred (\$500) per day** as liquidated damages for each day that Substantial Completion extends beyond the LD Date for the Stonegate Pool project.
- .3 **Five Hundred (\$500) per day** as liquidated damages for each day that Substantial Completion extends beyond the LD Date for the Tomahawk Ridge Slide project.
- .4 **Two Hundred and Fifty (\$250) per day** as liquidated damages for each day that Substantial Completion extends beyond the LD Date for the Tomahawk Ridge Backwash project.
- .5 **Two Hundred and Fifty (\$250) per day** as liquidated damages for each day that Substantial Completion extends beyond the LD Date for the Marty Pool Backwash project.

7.5 Warranty Period: The warranty period shall be two (2) years starting from the date of Substantial Completion. Warranty period does not limit warranties provided by suppliers for furnished materials or services, or by any established legal provision.

Article 8

Contract Price

8.1 Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to the Design-Builder's Fees (as defined in Section 8.2 hereof) plus the Cost of the Work (as defined in Section 8.3 hereof), subject to any

Guaranteed Maximum Price (GMP) established in Section 8.5 hereof and any adjustments made to such GMP in accordance with the General Conditions of Contract.

8.2 Design-Builder Fees

.1 **The Design-Builder Design sums outlined in 8.2.1.a-d below are comprised of the following:** wages and salaries, all direct and indirect expenses, and all overheads and profits associated with providing the architecture, engineering, design services required for the project in both the Design Consultants offices, other offices and the project site for design and during construction, testing and commissioning.

.a Design-Builder's Design Fees for Highland View Pool is a fixed lump sum amount of **three hundred thirty-four thousand seventy-three and 00/100** dollars (**\$334,073.00**) of the Cost of Work.

.b Design-Builder's Design Fees for Stonegate Pool is a fixed lump sum amount of **two hundred thirty-six thousand five hundred and 00/100** dollars (**\$236,500.00**) of the Cost of Work.

.c Design-Builder's Design Fees for Tomahawk Ridge Aquatic Center Slides is a fixed lump sum amount of **eighteen thousand seven hundred eighty-five and 00/100** dollars (**\$18,785.00**) of the Cost of Work.

.d Design-Builder's Design Fees for Marty and Tomahawk Ridge Aquatic Center Pools Backwash is a fixed lump sum amount of **five thousand three hundred thirty-seven and 00/100** dollars (**\$5,337.00**) of the Cost of Work.

.2 **Design Builder General Condition sums outlined in 8.2.2.a-d, below are comprised of the following:**

- Wages or salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work.
- Wages or salaries and expenses of Design-Builder's personnel stationed at Design-Builder's principal or branch offices to manage the company operations and/or support the Project.
- Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder.
- Costs less salvage value of consumable materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design-Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling and removing such items.

- Cost of removal of debris and waste from the site, and site sanitary services.
 - The reasonable costs and expenses incurred in establishing, operating and demobilizing the site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and similar office services.
 - Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the site, whether rented from Design-Builder or others, and incurred in the performance of the Work.
 - All fuel and utility costs incurred by the Design-Builder field office and for management and administration in the performance of the Work.
 - General signing for the Project.
 - Safety equipment, clothing, and materials for the Project.
 - A lockable, air conditioned office space of a minimum of 64sf for the Owner's Representative at site with a desk, work table, 4 drawer file cabinet, 110v electrical outlets and internet connection.
- .a Design-Builder General Conditions cost for Highland View Pool is a fixed lump sum amount of **two hundred thirty-four thousand three hundred seventy-eight and 00/100** dollars (**\$234,378.00**).
- .b Design-Builder General Conditions cost for Stonegate Pool is a fixed lump sum amount of **one hundred seventy-seven thousand two hundred thirty-eight and 00/100** dollars (**\$177,238.00**).
- .c Design-Builder General Conditions cost for Tomahawk Ridge Aquatic Center Slides is a fixed lump sum amount of **thirteen thousand one hundred twenty-six and 00/100** dollars (**\$13,126.00**).
- .d Design-Builder General Conditions cost for Marty and Tomahawk Ridge Aquatic Center Pools Backwash is a fixed lump sum amount of **four thousand three hundred thirty and 00/100** dollars (**\$4,330.00**).

.3 The Overhead and Profit (Design-Builder's Fee) sums outlined in 8.2.3 a-d, below are comprised of the following:

- The cost of Design-Builder's capital used in the performance of the Work.
- Legal costs, court costs and costs of mediation and arbitration reasonably arising from Design-Builder's performance of the Work.
- The cost of defending suits or claims for infringement of patent rights arising from the use of a particular design, process, or product, paying legal judgments against Design-Builder resulting from such suits or claims. If such suits or claims are from items or circumstances specifically required by the Owner, the related costs and settlements as approved by the Owner will be an adjustment to the Contract Price.
- Other overhead and general expenses.

- All profit or loss associated with performing the Project:
 - .a Overhead and Profit (Design-Builder's Fee) for Highland View Pool is **3.50%** of the Cost of Work and General Conditions for a fixed lump sum amount of **one hundred sixty-three thousand three hundred seventy-six and 00/100** dollars (**\$163,376.00**).
 - .b Overhead and Profit (Design-Builder's Fee) for Stonegate Pool is **3.50%** of the Cost of Work and General Conditions for a fixed lump sum amount of **one hundred seventeen thousand seven hundred sixty-nine and 00/100** dollars (**\$117,769.00**).
 - .c Overhead and Profit (Design-Builder's Fee) for Tomahawk Ridge Aquatic Center Slides is **3.50%** of the Cost of Work and General Conditions for a fixed lump sum amount of **ten thousand four hundred seventy-four and 00/100** dollars (**\$10,474.00**).
 - .d Overhead and Profit (Design-Builder's Fee) for Marty and Tomahawk Ridge Aquatic Center Pools Backwash is **3.50%** of the Cost of Work and General Conditions for a fixed lump sum amount of **four thousand three hundred thirty-three and 00/100** dollars (**\$4,333.00**).
- .4 If Design-Builder Fees are established by the Owner as fixed lump sums as indicated herein, they will not change unless there are changes in the GMP. Design-Builder Fees may be adjusted for changes in the GMP for scope changes in accordance with the provisions of the Contract Documents. In such cases, the Design-Builder design fee, general conditions, and overhead and profit fees will utilize their respective percents, indicated above, of the changed amount, as applicable to the nature of the change, either increasing or decreasing. For certain types of changes to the GMP design fee and/or general conditions fee may not be applicable and, if so, would not be changed.

8.3 Cost of the Work. The term Cost of the Work shall mean costs reasonably incurred by Design-Builder in the direct and proper performance of the Work. The Cost of the Work is limited to the following:

- .1 Wages, benefits and employment costs (e.g. drug testing) of direct craft labor employees up to and including foreman of Design-Builder performing the Work at the Site or, with Owner's agreement, at locations off the Site.
- .2 Payments properly made by Design-Builder to subcontractors for performance of portions of the Work, including any insurance and bond premiums incurred by subcontractors. This excludes payments to any parties included in the Design Fee.
- .3 Costs incurred by Design-Builder in repairing or correcting defective, damaged or nonconforming Work, provided that such Work was beyond the reasonable control of Design-Builder, or caused by the ordinary mistakes or inadvertence, and not the negligence, of Design-Builder or those working by or through Design-Builder. If the costs associated with such defective, damaged or nonconforming Work are recoverable from insurance, Subcontractors or Design Consultants,

Design-Builder shall exercise best efforts to obtain recovery from the appropriate source and credit Owner if recovery is obtained. This item is not applicable to and excludes costs associated with lump sum subcontracts.

- .4 Cost for construction equipment utilized to move, lift or otherwise perform direct construction of the Work. This excludes general purpose vehicles or equipment associated with the site office such as a power generator, which should appropriately be covered in the General Conditions Fee.
- .5 Costs by Design-Builder for transportation of equipment and materials to site, inspection, testing, handling and storage, of such materials, equipment and supplies incorporated or reasonably used in completing the Work. This includes special storage facilities as may be required to the extent not included in General Conditions Fee.
- .6 Premiums for insurance and bonds required by this Agreement or the performance of the Work.
- .7 Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.
- .8 Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property.
- .9 Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.
- .10 **Competitive pricing with respect to Cost of the Work.** Unless otherwise agreed in writing by the Owner, all Work packages and material/equipment items estimated in the Cost of the Work at or above specified amounts will require that the Design-Builder obtain competitive bids in writing as follows:

At or above \$25,000 – at least two (2) competitive bids

At or above \$50,000 – at least three (3) competitive bids

At or above \$250,000 – at least three (3) competitive **sealed** bids, which shall be opened jointly with the authorized Owner Representative.

Except those Subcontractors previously selected as follows:

- 1. Aquatics - Westport Pools

The Design-Builder shall accept the lowest responsive bid received for each of the packages or items requested for bid, unless the Owner advises otherwise. If Owner directs selection of any other than the lowest responsive bid, the GMP shall be increased by the difference in price between the lowest responsive bid and the bid selected.

8.4 Non-Reimbursable Costs

Costs that would exceed the GMP as adjusted in accordance with the Contract Documents will not be reimbursed to the Design - Builder.

8.5 The Guaranteed Maximum Price Established Upon Execution of this Agreement for Performance of the Project.

- .1 **The sums outlined in 8.5.1 a-d, below** includes the Estimated Cost of the Work, any agreed contingency for the Cost of the Work, and the agreed Design-Builder Fees. Except for any items established in this Agreement as fixed lump sums, Design-Builder does not guarantee any specific line item provided as part of the GMP, except such items which are established by the Owner as fixed lump sums, but agrees that it will be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract Documents. Documents used as a basis for the GMP shall be identified in an exhibit to the Agreement (“GMP Exhibit A”).
 - .a Design-Builder guarantees for Highland View Pool that it shall not exceed the GMP of **five million two hundred seventy-seven thousand eight hundred seventy-eight and 00/100** dollars (**\$5,277,878.00**).
 - .b Design-Builder guarantees for Stonegate Pool that it shall not exceed the GMP of **three million eight hundred three thousand nine hundred twenty-eight and 00/100** dollars (**\$3,803,928.00**).
 - .c Design-Builder guarantees for Tomahawk Ridge Aquatic Center Slides that it shall not exceed the GMP of **three hundred thirty thousand three hundred eighty-two and 00/100** dollars (**\$330,382.00**).
 - .d Design-Builder guarantees for Marty and Tomahawk Ridge Aquatic Center Pools Backwash that it shall not exceed the GMP of **one hundred thirty-three thousand nine hundred ninety-four and 00/100** dollars (**\$133,994.00**).
- .2 **The contingency sums outlined in 8.5.2 a-d, below** are available for Design-Builder’s exclusive use for costs that are typically incurred in performing the work that are not specifically known at this time and are not included in any specific line item or authorized as a change under the Contract Documents. Such costs may include, but are not limited to, cost estimate variances or unforeseen changes in market pricing, quantity of work increases in the project based on design development that are not changes in scope, subcontractor or supplier nonperformance, and unforeseen site conditions that are not the Design-Builder responsibility. The Cost of Work Contingency is not available to Owner for any reason. Design-Builder shall provide Owner with notice of all anticipated charges against the Cost of Work Contingency. If such Contingency is not fully utilized during the course of the Project any residual amount is considered as savings in the Cost of Work and shared by Design-Builder and Owner in accordance with the shared savings provisions of this Agreement.
 - .a The Cost of Work for Highland View Pool does include a contingency amount of **one hundred sixty-eight thousand two hundred forty-eight and 00/100** dollars (**\$168,248.00**). The Cost of Work for Highland View Pool does not include Owner Contingency in the amount of **one hundred twelve thousand five hundred fifty-one and 00/100** dollars (**\$112,551.00**). Use of the Owner Contingency is for the exclusive use of

the Owner and shall be subject to any Design-Builder's General Conditions and Fees upon authorization by the Owner. Any approved changes shall be subject to the Design-Builder's General Conditions as outlined in Article 8 of this contract with the exception of 8.6, Savings.

- .b The Cost of Work for Stonegate Pool does include a contingency amount of **one hundred seventy-seven thousand five hundred five and 00/100 dollars (\$177,505.00)**. The Cost of Work for Stonegate Pool does not include Owner Contingency in the amount of **eighty-four thousand eight hundred sixteen and 00/100 dollars (\$84,816.00)**. Use of the Owner Contingency is for the exclusive use of the Owner and shall be subject to any Design-Builder's General Conditions and Fees upon authorization by the Owner. Any approved changes shall be subject to the Design-Builder's General Conditions as outlined in Article 8 of this contract with the exception of 8.6, Savings.
- .c The Cost of Work for Tomahawk Ridge Aquatic Center Slides does include a contingency amount of **nine thousand three hundred fifty-six and 00/100 dollars (\$9,356.00)**.
- .d The Cost of Work for Marty and Tomahawk Ridge Aquatic Center Pools Backwash does include a contingency amount of **five thousand five hundred twenty-one and 00/100 dollars (\$5,521.00)**.

.3 GMP Composition

- .1 The GMP is comprised of the following elements:
 - a. Design-Builder's Fees as defined in Section 8.2 hereof;
 - b. the Cost of the Work as defined in Section 8.3 hereof, and;
 - c. any agreed Design-Build Contingency as defined in Section 8.5.2.
- .2 Technical documents, including but no limited to, the Owner's Program of Facility Requirements, Schematic Design which comprised a list of the drawings and specifications, Owner's Criteria, the RFQ/RFP, including all addenda, as used for the basis for the GMP proposal;
- .3 A list of the assumptions and clarifications made by Design-Builder in the preparation of the GMP Proposal, which list is intended to supplement the information contained in the drawings and specifications;
- .4 The Substantial Completion Date upon which the proposed GMP is based, and the schedule upon which the Scheduled Completion Date is based;
- .5 The following estimate of allowances and statements of their basis, are included in the Cost of Work. Overruns or under runs of such allowances will change the GMP and will be adjusted by change order.
 - .a Highland View Pool

Rock Excavation	\$ 20,000
Sanitary Tap Fee	\$ 12,000
Water Tap Fee	\$ 35,000
Exterior Monument Sign	\$ 10,000
Deck Shade Structures	\$ 24,000

.b	<u>Stonegate Pool</u>	
	Rock Excavation	\$ 10,000
	Exterior Monument Sign	\$ 10,000
	Deck Shade Structures	\$ 24,000

- .6 If applicable, a schedule of alternate prices;
- .7 If applicable, a schedule of unit prices;
- .8 If applicable, a statement of Additional Services and related rates for such services.

8.6 Savings

If at the time of final payment to Design-Builder, the sum of the actual Cost of the Work and Design-Builder's Fees is less than the GMP, as such GMP may have been adjusted over the course of the Project for approved scope changes, the difference ("Savings) shall be calculated per this Section, 8.6, and paid as part of the Final Payment under Section 9.3 hereof and shall be shared as follows:

- .1 Up to and including a total Savings of **one hundred twenty-five thousand and 00/100** dollars (**\$125,000**) for Highland View Pool shall be shared Fifty percent (50%) to Design-Builder and Fifty percent (50%) to Owner. All savings over \$125,000 shall be for the total benefit of the Owner.
- .2 Up to and including a total Savings of **one hundred ten thousand and 00/100** dollars (**\$110,000**) for Stonegate Pool shall be shared Fifty percent (50%) to Design-Builder and Fifty percent (50%) to Owner. All savings over \$110,000 shall be for the total benefit of the Owner.
- .3 Up to and including a total Savings of **ten thousand and 00/100** dollars (**\$10,000**) for Tomahawk Ridge Aquatic Center Slides shall be shared Fifty percent (50%) to Design-Builder and Fifty percent (50%) to Owner. All savings over \$10,000 shall be for the total benefit of the Owner.
- .4 Up to and including a total Savings of **five thousand and 00/100** dollars (**\$5,000**) for Marty and Tomahawk Ridge Aquatic Center Pools Backwash shall be shared Fifty percent (50%) to Design-Builder and Fifty percent (50%) to Owner. All savings over \$5,000 shall be for the total benefit of the Owner.

8.7 Warranty Guaranteed Maximum Price (WGMP): The WGMP referenced herein is applicable, with Owner approval, to performing warranty work and services by the Design-Builder. Amounts not utilized from the WGMP at the completion of the warranty period will be shared fifty percent (50%) to the Owner and fifty percent (50%) to the Design-Builder.

- .1 The WGMP for Highland View Pool is established as **.20% of the Cost of Work, Design-Builders Design fees General Conditions and Design-Builders Fees (Overhead and Profit).**
- .2 The WGMP for Stonegate Pool is established as **.20% of the Cost of Work, Design-Builders Design fees General Conditions and Design-Builders Fees (Overhead and Profit).**
- .3 The WGMP for Tomahawk Ridge Aquatic Center Slides is established as **.20% of the Cost of Work, Design-Builders Design fees General Conditions and Design-Builders Fees (Overhead and Profit).**
- .4 The WGMP for Marty and Tomahawk Ridge Aquatic Center Pools Backwash is established as **.20% of the Cost of Work, Design-Builders Design fees General Conditions and Design-Builders Fees (Overhead and Profit)**

Article 9

Procedure for Payment

9.1 Progress Payments

- .1 Design-Builder shall submit to Owner on the last Friday of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.
- .2 Owner shall make payment within forty-five (45) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.
- .3 If Design-Builder's Fees under Section 8.2 herein is a fixed lump sum amount or unit price, the amount of Design-Builder's Fees to be included in design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the Schedule of Values of Invoicing Plan established, less payments previously made on account of Design-Builder's Fee.
- .4 For amounts invoiced as Cost of the Work, Applications for Payment shall show the percentage completion of each portion of the work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the work in the schedule of values.

The Design-Builder shall retain for review by the Owner at any time actual cost documentation such as subcontractor invoices approved by the Design-Builder, Design-Builder craft labor and material cost records, transportation costs associated with delivery of equipment and materials to be permanently installed, and other supporting documentation. Invoiced amounts without valid supporting cost documentation will not be paid and are not subject to claim by the Design-Builder.

9.2 Retainage on Progress Payments

- .1 Owner will retain ten percent (10%) of each Application for Payment provided, however, that when fifty percent (50%) of the Work has been completed by Design-Builder and project is proceeding satisfactorily as solely determined by the Owner, Owner will not retain any additional amounts from Design-Builder's subsequent Applications for Payment.
- .2 Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to Section 6.6 of the General Conditions of Contract, Owner shall release to Design-Builder fifty percent (50%) of the retained amounts relating, as applicable, to the entire Work or completed portion of the Work. Remaining retention will be included in the Final Application for Payment.

9.3 Final Payment. Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment within forty-five (45) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7 of the General Conditions of Contract.

9.4 Record Keeping and Finance Controls. Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement relative to Costs of the Work, which is not fixed lump sum or unit price amounts. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access from time to time, upon reasonable notice, to Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment.

Article 10

Representatives of the Parties

10.1 Owner's Representatives

- .1 Owner designates the individual listed below as its Senior Representative ("Owner's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract:

Tony Cosby
Manager, Leisure Services
City of Overland Park – Parks & Recreation
8101 Marty Street
Overland Park, KS 66204
913-895-6351

- .2 Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract:

Tony Cosby
Manager, Leisure Services
City of Overland Park – Parks & Recreation
8101 Marty Street
Overland Park, KS 66204
913-895-6351

10.2 Design-Builder's Representatives

- .1 Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract:

Ramin R. Cherafat
Vice President
McCownGordon Construction, LLC
422 Admiral Boulevard, Suite 100
Kansas City, MO 64106
816-960-1111

- .2 Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual shall represent the Owner in day to day activities of the Project, including the authority and responsibility included in the General Conditions of Contract:

Chris Vaeth
Senior Project Manager
McCownGordon Construction, LLC
422 Admiral Boulevard, Suite 100
Kansas City, MO 64106
816-960-1111

Article 11

Bonds and Insurance

11.1 Insurance. Design-Builder shall procure in accordance with Article 5 of the General Conditions of Contract the following insurance coverages:

- .1 **General.** The Contractor shall secure and 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. Contractor 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 Contractor 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 Contractor, 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 Contractor 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 Contract.

In the event the City shall determine that the Contractor'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 Contractor shall, upon notice from the City, promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the City.

.3 Minimum Requirements Commercial General Liability Policy

Limits –

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

Policy MUST include the following conditions:

- a. Explosion, Collapse & Underground
- b. Independent Contractors

AND

Umbrella/Excess Liability

Limits –

Each Occurrence:	\$1,000,000
General Aggregate:	\$1,000,000

The Umbrella / Excess Liability must be at least as broad as the underlying policy.

- .4 **Minimum Requirements Automobile Liability.** Policy shall protect the Contractor against claims for bodily injury and/or property damage arising from

the ownership or use of any owned, hired and/or non-owned vehicle and must include protection for either:

Any Auto

or

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

Limits (Same as General Liability) –
Combined Single Limits,
Bodily Injury and Property Damage - Each Accident

Policy MUST include the following condition:

NAME CITY OF OVERLAND PARK AS “ADDITIONAL INSURED”

.5 Minimum Requirements Worker’s Compensation. This insurance shall protect the Contractor against all claims under applicable state workers' compensation laws. The Contractor shall also be protected against claims for injury, disease or death of employees 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

Employer's 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 Minimum Requirements Owner’s Protective Liability. The Contractor shall take out, pay for and deliver to the City, an Owner's Protective Liability insurance policy written on an occurrence basis and naming the City as named insured. The policy shall be maintained during the life of this Contract. Limits of protection shall be at least \$1,000,000 Combined Single Limits, Bodily Injury and Property Damage, and shall contain no exclusion relative to any function performed by the City or its employees and agents in connection with the Project.

.7 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 policy holder 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 Contractor.

- .8 Subcontractor's Insurance.** If a part of the Contract is to be sublet, the Contractor shall either:
- a.** Cover all subcontractors in its insurance policies, **or**
 - b.** Require each 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, contractor shall indemnify and hold harmless the City as to any and all damages, claims or losses, including attorney's fees, arising out of the acts or omissions of its subcontractors.

11.2 Design - Builder Property Insurance ("Builder's Risk")

- .1** Unless otherwise provided in the Contract Documents, Design - Builder shall procure and maintain property insurance from insurance companies authorized to do business in the State of Kansas upon the entire Project to the full insurable value of the Project, including professional fees, overtime premiums and all other expenses incurred to replace or repair the insured property. The property insurance obtained by Design - Builder shall include as additional insured's the interests of Owner, Design-Builder, Design Consultants, Subcontractors and Sub-Subcontractors, and shall insure against the perils of fire and extended coverage, theft, vandalism, malicious mischief, collapse, flood, earthquake, debris removal and other perils or causes of loss as called for in the Contract Documents. The property insurance shall include physical loss or damage to the Work, including materials and equipment in transit, at the Site or at another location as may be indicated in Design-Builder's Application for Payment and approved by Owner.
- .2** Unless the Contract Documents provide otherwise, Design - Builder shall procure and maintain boiler and machinery insurance that will include the interests of Owner, Design-Builder, Design Consultants, Subcontractors and Sub-Subcontractors.
- .3** Prior to commencing any Work, Design - Builder shall provide Owner with certificates evidencing that (i) all Design - Builder's insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect until Design-Builder has completed all of the Work and has received final payment from Owner and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to Owner. Design - Builder's property insurance shall not lapse or be canceled if Owner occupies a portion of the Work pursuant to Section 6.6.3 of the General Conditions of the Contract. Design - Builder shall provide Owner with the necessary endorsements from the insurance company prior to occupying a portion of the Work.
- .4** Any loss covered under Design - Builder's property insurance shall be adjusted with Owner and Design-Builder and made payable to both of them as trustees for the insureds as their interests may appear, subject to any applicable mortgage clause. All insurance proceeds received as a result of any loss will be placed in a separate account and distributed in accordance with such agreement as the

interested parties may reach. Any disagreement concerning the distribution of any proceeds will be resolved in accordance with Article 10 of the General Conditions of the Contract.

- .5 Owner and Design-Builder waive against each other and Owner's separate contractors, Design Consultants, Subcontractors, agents and employees of each and all of them, all damages covered by property insurance provided herein, except such rights as they may have to the proceeds of such insurance. Design-Builder and Owner shall, where appropriate, require similar waivers of subrogation from Owner's separate contractors, Design Consultants and Subcontractors and shall require each of them to include similar waivers in their contracts.

11.3 Bonds and Other Performance Security. Design-Builder shall provide Performance Bond, Exhibit C, and Statutory Bond, Exhibit D, in the amount of one hundred percent (100%) of the Contract Price to cover the entire scope of design-build performance including planning, design, procurement, construction, and completion of the Project, and any other specific performance security that may be indicated in an Exhibit to this Agreement.

Article 12 **Indemnification**

12.1 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 work required hereunder.

12.2 Indemnity: For purposes of this Agreement, Design-Builder 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 Design-Builder, its affiliates, subsidiaries, employees, agents, design consultants, 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 Design-Builder's obligation hereunder shall not include amounts attributable to the fault or negligence of the City or any third party for whom the Design-Builder 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 Design-Builder, its 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 affiliates, subsidiaries, or assignees, under workers' compensation acts, disability benefit acts, or other employee benefit acts.

Article 13
Stop Work and Termination for Cause

See General Conditions Article 11.

Article 14
Affirmative Action

14.1 Equal Employment Opportunity: During the performance of this Agreement, the Design-Builder agrees as follows:

- .1** The Design-Builder shall comply with the Kansas Act against discrimination and shall not discriminate against any employee because of race, religion, color, sex or national origin and will abide by the provisions of the Age Discrimination in Employment Act of 1967, as amended. The Design-Builder will take affirmative action to ensure that applicants are employed and that applicants are treated during employment without regard to their race, religion, color, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment advertisement; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Design-Builder agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the requirements of these nondiscrimination provisions.
- .2** The Design-Builder will, in all solicitations or advertisements for employees placed by or on behalf of the Design-Builder, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex or national origin and shall include the phrase "equal opportunity employer" or a similar phrase approved by the Kansas Commission on Civil Rights.
- .3** 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 Agreement and it may be canceled, terminated or suspended, in whole or in part, by the City.
- .4** If the Design-Builder is found to have violated the Kansas Act against discrimination under a final decision or order of the Kansas Commission on Civil Rights, the Design-Builder shall be deemed to have breached the Contract, and it may be canceled, terminated or suspended, in whole or in part, by the City.
- .5** The Design-Builder will include all of Subsections A through D in every design subconsultant agreement, subcontract or purchase order, so that such provisions will be binding upon each subcontractor or vendor.

14.2. Other Laws: The Design-Builder agrees to abide by all other Federal, State of Kansas or 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 with same.

Article 15

Other Provisions

15.1 Appointment of Service Agent. Kansas Statutes Annotated 16-113 requires that non-resident contractors appoint an agent for the service of process in Kansas. The executed appointment must then be filed with the Secretary of State, Topeka, Kansas. Any successful bidder-contractor domiciled outside the State of Kansas must comply with these statutory requirements, see Exhibit E.

15.2 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 in accordance with this Agreement as if no dispute existed, and the Owner shall continue to make payment for Design/Builder completed Services; and provided further that no dispute will be submitted to mediation or arbitration without both parties' express written consent.

15.3 Assignment. Neither Design-Builder nor Owner shall without the written consent of the other party assign, transfer, or sublet any portion or part of its obligations under this Agreement.

15.4 Governing Law. It is the intention of the parties that this Agreement and the performance hereunder, and all suits and special proceedings under this Agreement, be construed in accordance with and under and pursuant to the laws of the State of Kansas and that, in any action, special proceeding or other proceeding that may be brought arising out of, in connection with, or by reason of this Agreement, the laws of the State of Kansas shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted. The Design-Builder agrees to abide by all other Federal, State of Kansas or 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 with same.

15.5 Severability. If any provision or any part of a provision of this Agreement shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to applicable laws by any authority having jurisdiction, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provisions or parts of the provision of this Agreement, which shall remain in full force and effect as if the unenforceable provision or part was deleted.

15.6 Amendments. This Agreement may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of both parties.

15.7 Entire Agreement. This Agreement forms the entire agreement between Owner and Design-Builder. And contains the complete agreement between the parties and shall, as of the effective date hereof, supersede all other agreements between the parties. No oral representations or other agreements have been made by the parties except as specifically

stated in this Agreement. The parties stipulate that neither of them has made any representation with respect to the subject matter of this Agreement except such representations as are specifically set forth in this document and each of the parties acknowledges that it has relied on its own judgment in entering into this Agreement.

15.8 Section Titles: The titles to sections of this Agreement are solely for the convenience of the parties and shall not be used to explain, modify, simplify, or aid in the interpretation of the provisions of this Agreement.

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

OWNER:

DESIGN-BUILDER:

City of Overland Park

McCownGordon Construction, LLC

Carl Gerlach
Mayor

Ramin R. Cherafat
Vice President

Date: _____

Date: _____

Attest:

Marian Cook
City Clerk

Approved as to Form:

Tammy M Owens
Senior Assistant City Attorney

CORPORATE ACKNOWLEDGMENT

STATE OF _____ }
COUNTY OF _____ } ss.

BE IT REMEMBERED, That on this _____ day of _____, 2008, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Ramin R. Cherafat, Vice President of McCownGordon Construction, LLC, a corporation duly organized, incorporated and existing under and by virtue of the laws of _____; who is personally known to me to be the same person who executed as such officer the within instrument on behalf of said Corporation, and such person duly acknowledged the execution of the same to be the act and deed of said Corporation.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal the day and year last above written.

Notary Public

My Commission Expires:
