

## AGREEMENT

THIS AGREEMENT is made in Johnson County, Kansas, by and between the City of Overland Park, Kansas, hereinafter referred to as “City,” and Charlesworth and Associates, L.C., hereinafter referred to as “Consultant.”

WHEREAS, the City desires to utilize the services of the Consultant to provide professional and timely advice and consulting services relating to claims, insurance and other risk management services, and

WHEREAS, Consultant by reason of training, knowledge, reputation and experience has expertise in the area of consulting services relating to claims, insurance and other risk management services, and

WHEREAS, Consultant by execution of this Agreement represents itself as being capable, experienced and professionally qualified to undertake and perform the services described herein, and

WHEREAS, the City is authorized and empowered to contract with Consultant for the furnishing of professional consulting services in connection with the services described herein, and

WHEREAS, Consultant agrees to perform the services described herein as an independent contractor and not as an employee of the City, and

NOW THEREFORE, In consideration of the premises and mutual covenants herein set forth the parties agree as follows:

### **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.

“Agreement” means this Agreement and any attachments, amendments or supplements hereto, including the Exhibits attached hereto.

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

"City Representative" means the City’s Deputy City Manager or other person designated by the Deputy City Manager to coordinate the services provided by the Consultant and act as liaison to the Consultant. Consultant’s primary contact with the City shall be the Deputy City Manager.

"Consultant" means Charlesworth and Associates, L.C., and includes all of its employees, agents and assignees.

"Risk Management Services” means the total scope of the services to be performed by the Consultant in providing professional and timely consulting services relating to claims, insurance and other matters relating to risk management within the City, and as more fully outlined herein.

## **SECTION II. SCOPE OF SERVICES**

The parties agree and intend that the scope of “Risk Management Services” that is the subject of this Agreement shall consist of the following:

### **A. Services**

Services will include, but not necessarily be limited to, Risk Management activities in the following areas of risk.

- 1) Property
  - 2) Liability
  - 3) Net Income
  - 4) Workers’ Compensation
- Identification of risk and exposure to loss created by all activities of the City, operational and contractual.
  - Serve as consultant to the Safety Committee, providing assistance in the development and implementation of effective loss control programs with respect to injuries to employees and damage to City property. Periodically attend Safety Committee meeting and functions.

- Upon request, review certificates of insurance for any written agreement in which the City has interest, confirming compliance with ordinance requirements. Recommendations regarding deviations to specifications will be provided.
- Upon request, provide recommendations for insurance requirements on any contract in which the City is involved or is contemplating entry.
- Notification of all incidents or claims is to be submitted immediately to the Finance Department. The Consultant's involvement will include, but not be limited to, confirming insurance coverage, required accident investigation, handling of property damage claims, subrogation activity, negotiating settlements with third parties, reporting of losses to the appropriate insurance agent or insurer, internal loss reporting systems design/implementation and necessary follow-up activity.
- Prepare formal proposal specifications for marketing approved insurance coverages for the areas of risk defined herein. Make recommendations regarding the purchase or deletion of coverage and/or retention levels.
- Conduct all negotiations and communications with Property and Liability insurance agents and/or insurance companies.
- Order, receive, review and recommend for approval all Property and Liability insurance contracts.
- Prepare all necessary forms, handle all communications with the Kansas Insurance Department and present an annual State of the Plan report to the City regarding their self-funded workers' compensation program.
- Coordinate all activities for ancillary services provided by insurance companies, third party administrators or independent firms, including engineering, loss control, audit and appraisal.
- Provide a risk appraisal during the planning process for new ventures or activities. This would include, but not necessarily be limited to, the purchase of real or business personal property, the acquisition or involvement in proprietary interests or contract relationships with third parties.
- Assist the Law Department in the development of insurance specifications and improved terminology for each section of the Overland Park Municipal Code that requires evidence of loss funding documents.
- When requested to do so, train and assist City personnel in the implementation and operation of any aspect of the insurance or risk management program, including data input and exhibit capabilities. Assist in the monitoring process on a day-to-day basis, obtaining necessary information from insurance agents and/or insurers.
- Conduct analysis in the area of risk retention, challenging the cost efficiency of

insurance as a loss funding alternative. This would include, but not necessarily be limited to, associational pools and other viable loss funding techniques.

- Confirm compliance with insurance protection requirements for special event activities, i.e., firework displays, etc. When necessary, recommend new or revised contract conditions related to the risk generated by the activity.
- Develop various statistical exhibits to be utilized for planning and future decision making.
- Assist City personnel on Risk Management matters in any way possible including assistance in preparation and presentment of an annual risk management status report to the Finance, Administration and Economic Development Committee in April or May of each year.
- Support the implementation and updating of COP 222, the City's Risk Management Policy Statement.

B. Objectivity Standards.

To insure objectivity, as well as professional competency and reliability, the Consultant agrees to act solely in an advisory capacity, **NO INSURANCE IS TO BE SOLD** by the Consultant or any firm with whom the Consultant is affiliated. The Consultant will not participate in commissions from any insurance company, agent or broker; nor will the Consultant accept income from anyone other than clients served on a consulting basis. Further, the Consultant shall always employ competent and professional personnel to provide Risk Management Services to the City.

**SECTION III. CITY'S RELIANCE ON CONSULTANT'S EXPERTISE, THE LEGAL DEFENSIBILITY OF CONSULTANT'S WORK, PERFORMANCE STANDARDS**

The Consultant agrees and acknowledges that the City has entered into this Agreement based on Consultant's knowledge, reputation, experience and expertise in the area of consulting services related to Risk Management Services. Further, the parties acknowledge that Consultant has represented itself as being capable, experienced and qualified to undertake and perform the services required of it herein. The parties agree and acknowledge that the Consultant is responsible for insuring that its performance shall produce professional advice that the City can rely upon.

Consultant shall not subcontract any of the work or services required by this Agreement without the prior written approval of the City. Should Consultant request and the City agree to work being subcontracted, the Consultant shall be as fully responsible to the City for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by said subcontractors , as Consultant is for the acts and omissions of the persons it directly employs.

#### **SECTION IV. CONSIDERATION AND PAYMENT TERMS**

A. Consideration. The City agrees to pay Consultant for professional services as required by this Agreement, the sum of \$60,000 per year.

B. Payment Terms

Consultant is to remit a monthly invoice for one-twelfth (1/12) of the annual consideration as set forth in Paragraph A above, to the City and shall provide a monthly report indicating the services provided and hours expended. Payments for services rendered by Consultant are due and payable by City within 30 days of receipt of invoice from Consultant.

C. Cash Basis Law

The City is obligated only to make payments under this Agreement as may be lawfully made from funds budgeted and appropriated for the purposes as set forth in this Agreement during the City's current budget year. In the event the City does not so budget and appropriate the funds, the parties shall be relieved from all obligations, without penalty, under this Agreement.

#### **SECTION V. REPORTS AND DOCUMENTS**

A. Property and Possession

All reports, studies, analysis, memoranda and related data and material as may be developed during the performance of this Agreement shall be submitted to and be the exclusive

property of the City, which shall have the right to use the same for any purpose without any further compensation to Consultant.

B. Confidentiality

All of the aforementioned reports and documents prepared, assembled or compiled by Consultant pursuant to the terms of this Agreement are to be considered confidential and Consultant agrees that it will not, without prior written approval by the City submit or make the same available to any individual, agency, public body or organization other than the City, except as may be otherwise herein provided, subject to the provisions of the Kansas Open Records Act.

C. Status of Documents Upon Termination For Cause

If this Agreement is terminated for cause or for any other reason, all finished or unfinished documents or materials prepared pursuant to this Agreement shall be immediately transmitted to the City by Consultant.

**SECTION VI. COMPLETION AND PERFORMANCE TIME**

The Consultant hereby agrees to diligently perform and complete all work required by this Agreement and specifically understands that time is of the essence.

**SECTION VII. DISPUTE RESOLUTION**

The City and Consultant agree that disputes relative to performance required by this Agreement 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 work as per this Agreement as if no dispute existed and unless the City indicates in writing it does not want the Consultant to

continue with the work; and provided further that no dispute will be submitted to arbitration without the City's express written consent.

### **SECTION VIII. PROHIBITION AGAINST CONTINGENT FEES**

A. Consultant warrants that it 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 it 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, the 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.

B. Consultant warrants that it will not accept any fee, commission, percentage, gift, bonus, or other consideration of any kind, directly or indirectly from any third party for recommending or placing the City's business with an insurance broker or company or the performance of any work under the Agreement.

### **SECTION IX. TERM**

The term of this Agreement shall commence on July 1, 2010, and shall continue in force through July 1, 2011, unless sooner terminated as provided below. The parties agree that the term of this Agreement may be extended for two additional one-year terms at the option of the City and the Agreement of the Consultant.

### **SECTION X. RIGHT TO TERMINATE AGREEMENT**

A. Termination for Cause (CITY)

Without in any manner limiting the right of the City to terminate this Agreement or declare the Consultant in default thereof for any reason set forth herein or in the Request for Proposal documents, if the work to be done under this Agreement shall be abandoned by Consultant; or if this Agreement shall be assigned by Consultant otherwise than as herein provided; or if the Consultant should be judged as bankrupt; or if a general assignment of its assets should be made for the benefit of its creditors; or if a receiver should be appointed for the Consultant or any of its property; or if at any time the City determines that the performance of the work under this Agreement is being unnecessarily delayed, that the Consultant is violating any of the conditions or covenants of this Agreement, that it is executing the same in bad faith or otherwise not in accordance with the terms of said Agreement; then, in addition to other rights the City may choose to exercise, the City may, at its option, serve written notice upon the Consultant of the City's intention to terminate this Agreement, and, unless within five (5) days after the serving of such notice upon the Consultant a satisfactory arrangement be made for the continuance thereof, this Agreement shall cease and terminate. In the event of such termination, the City shall immediately serve notice thereof upon the Consultant, and the City may take over the work 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; and in such event the City may take possession of, and utilize in completing the work, any and all documents and other materials as may be necessary therefor. 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.

B. Termination for Cause (Consultant)



If the City shall be judged as bankrupt; or if a general assignment of its assets should be made for the benefit of creditors; or if a receiver should be appointed for the City or any of its property; or if the Consultant determines that the City is violating any of the conditions or covenants of this Agreement, that it is executing the same in bad faith or otherwise not in accordance with the terms of said Agreement; then, in addition to other rights the Consultant may choose to exercise, the Consultant may, at its option, serve written notice upon the City of the Consultant's intention to terminate this Agreement, and, unless within five (5) days after serving of such notice upon the City a satisfactory arrangement be made for the continuance thereof, this Agreement shall cease and terminate. In the event of such termination, the City shall pay to Consultant all compensation due and owing to Consultant for services provided through the date of termination.

C. Termination for Convenience (CITY)

City reserves the right, in its sole discretion and for its convenience and without cause or default on the part of the Consultant, to terminate this Agreement by providing thirty days prior written notice of such termination to Consultant. Upon receipt of such notice from City, Consultant shall: (1) immediately cease all work; or (2) meet with City and, subject to City's approval, determine what work shall be required of Consultant in order to bring the Consultant's services to a reasonable termination in accordance with the request of the City. If City shall terminate for its convenience as herein provided, City shall compensate Consultant for all work completed to date of termination. Compensation shall not include anticipatory profit or consequential damages, neither of which will be allowed.

D. Any termination of the Agreement for alleged default by Consultant that is ultimately determined to be unjustified shall automatically be deemed a termination for convenience of the City.

**SECTION XI. INSURANCE**

The Consultant shall maintain throughout the duration of this Agreement, insurance in specific amounts, which shall at minimum meet or exceed the amounts specified below. All insurance, except professional liability, shall be written on an occurrence basis unless otherwise agreed to in writing by the City.

(1) General Liability Insurance

MINIMUM REQUIREMENTS

COMMERCIAL GENERAL LIABILITY POLICY

(Complete Certificate "Form B"):

General Aggregate: \$500,000.00

Products-Completed

Operations Aggregate: 500,000.00

Personal & Advertising

Injury: 500,000.00

Each Occurrence: 500,000.00

Policy must include Broad Form Contractual/Contractually Assumed Liability.

(2) Automobile Liability Insurance

Policy shall protect the Consultant against claims for bodily injury and/or property damage arising from the ownership or use of all owned, hired and/or non-owned vehicles and must include protection for either:

a) Any Auto

OR

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

Limits of liability protection required are the SAME as the limits for the General Liability section.

Policy shall insure the contractual liability assumed by the Consultant under this Agreement.

(3) Workers' Compensation and Employers' Liability

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 which, for any reason may not fall within the provisions of a Workers' Compensation law. The liability 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

There is no requirement that the City be named an additional insured on this policy.

(4) Professional Liability

The Consultant shall maintain throughout the duration of this Agreement Professional Liability Insurance in an amount not less than One Million Dollars (\$1,000,000.00), and shall provide the City with certification thereof, provided there is no requirement that the City be named an additional insured on this policy.

(5) Industry Ratings

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

- 1) Is licensed to do business in the State of Kansas;
- 2) a rating of A- or better; and
- 3) Carries at least a Class VIII financial rating, or

is a company mutually agreed upon by the City and Consultant.

Certification of insurance coverage in items (1), (2) and (3) above shall be on a standard Certificate of Insurance form. Certification of professional liability insurance shall be provided on a separate form provided by the Consultant's insurance carrier. Unless otherwise specified, the City shall be shown as an additional insured on the Consultant's General Liability and Automobile Liability policies of insurance for the purpose of covering the City's vicarious liability arising out of the Consultant's performance of the Services required by this Agreement.

## **SECTION XII. INDEMNITY**

### **A. Definitions**

For purposes of indemnification requirements, the following terms shall have the meanings set forth below:

1. "The Consultant" means and includes Consultant, all of its employees, agents and assignees, and all of its affiliates and subsidiaries, its subcontractors and/or assignees and their respective servants, agents and employees; and
2. "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, whether real or spurious, 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.

B. 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. 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. Nothing in this section shall be deemed to impose liability on the Consultant to indemnify the City for loss when the City's negligence or other actionable fault is the sole cause of loss. With respect to the City's rights as set forth herein, the Consultant expressly waives all statutory defenses, including, but not limited to, those under workers compensation, contribution, comparative fault or similar statutes to the extent said defenses are inconsistent with or would defeat the duty of the Consultant to indemnify the City.

**SECTION XIII. INDEPENDENT CONTRACTOR**

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

Consultant is responsible for any and all federal, state and local taxes.

**SECTION XIV. COMPLIANCE WITH EQUAL OPPORTUNITY LAWS, REGULATIONS AND RULES AND OTHER LAWS**

A. The Consultant agrees that:

1. The 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 Agreement because of race, religion, color, sex, national origin, ancestry or age;

2. 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 Kansas Human Rights Commission ("Commission");

3. 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 Agreement and it may be canceled, terminated or suspended, in whole or in part, by the contracting agency;

4. 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 Agreement and it may be canceled, terminated or suspended, in whole or in part, by the contracting agency; and

5. The Consultant shall include the provisions of paragraphs (1) through (4) above in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or vendor.

B. 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 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.

## **SECTION XV. ENTIRE AGREEMENT**

This Agreement and any exhibits, 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.

#### **SECTION XVI. 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.

#### **SECTION XVII. 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.

#### **SECTION XVIII. 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 the Agreement. Some terms are capitalized throughout the Agreement but the use of or failure to use capitals shall have no legal bearing on the interpretation of such terms.

#### **SECTION XIV. ASSIGNMENT OF AGREEMENT**

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

*The remainder of this page has intentionally been left blank.*

**SECTION XX. EXECUTION OF AGREEMENT**

The parties hereto have caused this AGREEMENT to be executed in triplicate this

\_\_\_\_\_ day of June, 2010.

ATTEST:

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

CITY

By: \_\_\_\_\_  
Carl Gerlach, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
Michael R. Santos  
Deputy City Attorney

Charlesworth and Associates, LC

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_



CORPORATE ACKNOWLEDGMENT

STATE OF \_\_\_\_\_ )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

BE IT REMEMBERED That on this \_\_\_\_\_ day of \_\_\_\_\_, 2010, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came \_\_\_\_\_ of Charlesworth and Associates, LC, a corporation duly organized, incorporated, and existing under and by virtue of the laws of \_\_\_\_\_ who is personally known to me to be such officer and who is personally known to me to be the same person who executed as such officer the above 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 Appointment Expires

\_\_\_\_\_

(If the AGREEMENT is not executed by the president of the corporation or general partner of the partnership, please provide documentation which authorizes the signatory to bind the corporation or partnership.)