

## ENGINEERING/ARCHITECTURAL SERVICES AGREEMENT

THIS AGREEMENT is made in Johnson County, Kansas, by and between the City of Overland Park, Kansas, hereinafter "City," and Brungardt Honomichl & Company, P.A., hereinafter "Consulting Engineer/Architect." City intends to construct an improvement project in Overland Park, Kansas, described as follows:

### **75<sup>TH</sup> STREET FROM SWITZER ROAD TO EAST FRONTAGE ROAD (BR-1551)**

(hereinafter the "Project")

City hereby contracts with Consulting Engineer/Architect for the furnishing of professional engineering/architectural services in connection with the Project, for the furnishing of such engineering/architectural services more particularly described herein Exhibit A in consideration of these premises and of the mutual covenants herein set forth. By executing this Agreement, the Consulting Engineer/Architect represents to City that Consulting Engineer/Architect is professionally qualified to do this Project and is licensed to practice engineering/architecture by all public entities having jurisdiction over Consulting Engineer/Architect and the 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.

"Consulting Engineer/Architect" means the company or individual identified above. Consulting Engineer/Architect 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 Consulting Engineer/Architect's fee, or other payments to the Consulting Engineer/Architect 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 Engineering/Architectural 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.

"Engineering/Architectural 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.

"Engineering/Architectural Services" means the professional services, labor, materials, supplies, testing, surveying, title work, inspection, if applicable, and all other acts, duties, and services required of Consulting Engineer/Architect 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**

### **A. TOTAL FEE**

City agrees to pay Consulting Engineer/Architect an amount not to exceed Three Hundred Twenty Thousand Eight Hundred Fifty and no/100 Dollars (\$320,850.00), including reimbursables. The fee is based on the performance of the scope of services outlined in this Agreement, and shall be billed using hourly rates and equipment charges as set forth in Exhibit B attached herewith, plus direct expenses. All work shall be completed on or before March 28, 2014. Payment to Consulting Engineer/Architect shall not exceed the following percentages without prior written consent of City:

Preliminary Design Phase	49.6%
Final Design Phase	39.5%
Bidding Phase	3.1%
Construction Phase	7.8%
TOTAL	100.0%

### **B. REIMBURSABLE EXPENSES**

The Consulting Engineer/Architect shall be reimbursed at the actual cost, not to exceed

Thirty Three Thousand Eight Hundred Eighty Five and no/100 Dollars (\$33,885.00), for the following: (a) expense of transportation in connection with the Project; (b) expenses in connection with authorized out-of-town travel; (c) long-distance communications; (d) expenses of printing and reproductions; (e) postage and facsimile transmissions; (f) expenses of renderings and models requested by City, and (g) other costs as authorized by City.

**C. ADDITIONAL SERVICES**

Consulting Engineer/Architect 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. Prior to commencing any additional services, Consulting Engineer/Architect must submit a proposal outlining the additional services to be provided, estimation of total hours, completion date, and a maximum fee based upon the hourly rate schedule attached hereto as Exhibit B. 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 Consulting Engineer/Architect, providing services necessitated in the event the Engineering/Architectural Services shall be suspended or abandoned, if such suspension or abandonment is not the result of a breach of this Agreement by the Consulting Engineer/Architect, and providing any other special services not otherwise covered by this Agreement which may be requested by City. Payment to Consulting Engineer/Architect, as compensation for these services, shall be in accordance with the hourly rate schedule attached as Exhibit B. 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.

**D. SPECIAL SERVICES**

Consulting Engineer/Architect may be called on to serve as a consultant or witness in any litigation, arbitration, legal or administrative proceeding arising out of this Project. Consulting Engineer/Architect shall not be paid extra by City if its appearance is to defend its professional Engineering/Architectural Services. Consulting Engineer/Architect 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. If Consulting Engineer/Architect is requested, in writing, by City, to appear as a general witness, it will be paid its hourly fee as reflected on the hourly rate schedule attached hereto as Exhibit B.

**E. BILLING**

Consulting Engineer/Architect shall bill City monthly for all completed services and reimbursable expenses. The bill submitted by Consulting Engineer/Architect shall itemize the

services and reimbursable expenses for which payment is requested. Except as provided in Section II F, below, City agrees to pay Consulting Engineer/Architect within thirty (30) days of receipt of an undisputed invoice.

**F. CITY'S RIGHT TO WITHHOLD PAYMENT**

In the event City becomes credibly informed that any representations of Consulting Engineer/Architect provided in its monthly billing, are wholly or partially inaccurate, City may withhold payment of sums then or in the future otherwise due to Consulting Engineer/Architect 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 Consulting Engineer/Architect immediately. Consulting Engineer/Architect will help effect resolution and transmit a revised invoice, if necessary. Amounts not questioned by City shall be paid to Consulting Engineer/Architect in accordance with the contract payment procedures.

**G. PROGRESS REPORTS**

A progress report must be submitted with each monthly pay request indicating the percentage of design tasks completed to date. This report will serve as support for payment to Consulting Engineer/Architect.

**H. CHANGE IN SCOPE**

For substantial modifications in authorized Project scope, and/or substantial modifications of drawings and/or specifications previously accepted by City, when requested by City and through no fault of Consulting Engineer/Architect, the Consulting Engineer/Architect shall be compensated for time and expense required to incorporate such modifications at Consulting Engineer/Architect's standard hourly rates per Exhibit B; provided, however, that any increase in contract price or contract time must be approved through a written change order. Consulting Engineer/Architect shall correct or revise any errors or deficiencies in its designs, drawings or specifications without additional compensation when due to Consulting Engineer/Architect's negligence or other actionable fault.

**I. CHANGE ORDERS**

This Agreement may be amended to provide for additions, deletions and revisions in the Engineering/Architectural 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 Engineering/Architectural 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 Consulting Engineer/Architect as a requirement of this Agreement, the giving of such notice shall be the

Consulting Engineer/Architect's responsibility.

### **SECTION III - RESPONSIBILITIES OF CONSULTING ENGINEER/ARCHITECT**

Consulting Engineer/Architect 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:

#### **A. PRELIMINARY DESIGN PHASE**

1. Services: The services to be provided during this phase are set out in Exhibit A attached hereto and incorporated herein by reference.
2. Preliminary Design Documents: Consulting Engineer/Architect shall furnish the City six (6) copies of the above preliminary design documents, unless otherwise noted in Exhibit A.
3. Preliminary Cost Estimate: Consulting Engineer/Architect shall furnish City an estimate of probable Construction Cost based on the preliminary design. Consulting Engineer/Architect's estimate of probable Construction Cost is to be made on the basis of Consulting Engineer/Architect's experience and qualifications and represent Consulting Engineer/Architect's best judgment as an experienced and qualified design professional, familiar with the construction industry.
4. Budget: Consulting Engineer/Architect shall advise City if, in its opinion, the amount budgeted for construction is not sufficient to adequately design and construct the improvement as requested.

#### **B. FINAL DESIGN PHASE**

1. Services: The services to be provided during this phase are set out in Exhibit A attached hereto and incorporated herein by reference.
2. Final Design Documents: Consulting Engineer/Architect shall furnish City six (6) copies, unless otherwise noted in Exhibit A, of the above final design plans and shall also prepare the necessary plans and applications for permits for submission to and approval of local, county, state and federal authorities having proper jurisdiction as may be required for initiation, prosecution and construction of the Project.
3. Contract Documents: Consulting Engineer/Architect shall prepare for City, contract agreement forms, final design plans, general conditions and supplementary conditions, bid forms, invitations to bid and instructions to bidders and assist in the preparation of other related documents, unless such documents are provided by City.
4. Final Cost Estimate: Consulting Engineer/Architect shall furnish City an estimate

of probable Construction Cost based on final design. This estimate is commonly known as the "Engineer/Architect's Estimate" and will be used as the basis for construction contract award.

5. Budget: Consulting Engineer/Architect shall advise City if, in its opinion, the amount budgeted for the Project is not sufficient to cover all Project costs, including but not limited to, construction, Right-of-Way and Easement acquisition, inspection and testing.

### **C. BIDDING PHASE**

1. Services: The services to be provided during this phase are set out in Exhibit A attached hereto and incorporated by reference.
2. Bids Exceeding Cost Estimate: If all bids exceed Consulting Engineer/Architect's Final Cost Estimate, Consulting Engineer/Architect, at the request of City and for no additional cost, will prepare a report for City identifying why all the bids exceed the estimate. The City has four (4) options if all bids exceed Consulting Engineer/Architect's estimate. The City may: (1) give written approval of an increase in the Project cost up to a maximum of 7% of the authorized total; (2) authorize rebidding of the Project; (3) terminate the Project and this Agreement; or (4) cooperate in revising the Project scope or specifications, or both, as necessary to reduce the Construction Cost. In the case of (4), Consulting Engineer/Architect, without additional charge to City, shall consult with City and shall revise and modify the drawings and specifications as necessary to achieve compliance with the Consulting Engineer/Architect's Estimate.

### **D. CONSTRUCTION PHASE**

1. In-house Administration and Inspection: It is understood that City will provide in-house administration and inspection of the construction Agreement; however, Consulting Engineer/Architect shall consult with and advise City, when requested.
2. Services: The services provided during this phase are set out in Exhibit A attached hereto and incorporated herein.
3. Additional Drawings: If during construction, situations arise which require additional drawings or details, Consulting Engineer/Architect agrees to provide such additional drawings or details at no cost to City when the additional drawings or details are required to correct Consulting Engineer/Architect's errors or omissions or clarify Consulting Engineer/Architect's intent in the original design and preparation of construction drawings. If such situations occur through no fault of Consulting Engineer/Architect, or are beyond his/her control, both parties

- agree to negotiate an equitable payment to Consulting Engineer/Architect for his/her services rendered, which shall be accomplished through a change order.
4. Staking: Unless otherwise provided, staking shall be included in the bid specifications to be performed by the construction contractor.
  5. Notice of Defects: If, based on Consulting Engineer/Architect's involvement during the construction phase, Consulting Engineer/Architect observes or otherwise becomes aware of any defect in the work, he shall give prompt written notice to City of such defects and their approximate location on the Project. However, Consulting Engineer/Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions, inspections and programs in connection with the work, since these are solely the contractor's responsibility under the contract for construction. Consulting Engineer/Architect shall not be responsible for the contractor's schedules or failure to carry out the work in accordance with the Contract Documents. Consulting Engineer/Architect shall not have control over or charge of acts or omissions of the contractor, contractor's subcontractors, or their agents or employees.
  6. Shop Drawings: Consulting Engineer/Architect shall review and take appropriate action on contractor's shop drawings and samples, and the results of tests and inspections and other data which each contractor is required to submit for the purposes of checking for compliance with the design concept and conformance with the requirements of the Contract Documents. Such review shall not extend to means, methods, sequences, techniques or procedures of construction, or to safety precautions and programs incident thereto, unless an obvious deficiency exists wherein Consulting Engineer/Architect will advise City of such defect or deficiency so the same can be prevented.
  7. As Constructed Plans: The Consulting Engineer/Architect shall prepare final plan drawings which reflect change orders, minor design changes and which include changes made in the field and which are marked on the construction plan set. Because some of the data contained on the "As Constructed Plans" may be based on unverified information provided by others, the Consulting Engineer/Architect does not warrant the accuracy of information provided by others.

#### **E. GENERAL DUTIES AND RESPONSIBILITIES**

1. Responsibilities under the General Conditions of the Contract for Construction: In addition to the responsibilities herein set forth, Consulting Engineer/Architect

agrees to be responsible for those matters identified in the General Conditions as being responsibilities of the Consulting Engineer/Architect. Consulting Engineer/Architect specifically acknowledges receipt of a copy of the General Conditions and acceptance of the responsibilities as set forth therein.

2. Personnel: Consulting Engineer/Architect shall assign only qualified personnel to perform any service concerning the Project. At the time of execution of this Agreement, the parties anticipate that the following individual will perform as the principal on this Project: **Steven K. Bachenberg, P.E.** As principal on this Project, this person shall be the primary contact with the City's Project Manager and shall have authority to bind Consulting Engineer/Architect. So long as the individual named above remains actively employed or retained by Consulting Engineer/Architect, he/she shall perform the function of principal on this Project.
3. Subsurface Borings & Material Testing: If tests, additional to those provided for in Exhibit A, are required for design, Consulting Engineer/Architect shall prepare specifications for the taking of the additional borings. Such Subsurface Borings and Testing, as defined herein, shall be provided by Consulting Engineer/Architect or its subcontractors and compensated as an Additional Service.
4. Service By and Payment to Others: Any work authorized in writing by City and performed by anyone other than Consulting Engineer/Architect or its subcontractors in connection with the proposed Project shall be contracted for and paid for by City directly to the third party or parties. In addition to payments for professional services, this may also include necessary permits, licenses, ownership certifications, materials testing, advertising costs, and other special tests or other work required or requested by City or Consulting Engineer/Architect which is not defined within the scope of services of Consulting Engineer/Architect. Fees for such extra work shall be subject to negotiation between City and the third party. Fees shall be approved prior to the execution of any extra work. Although Consulting Engineer/Architect may assist City in procuring such services of third parties, Consulting Engineer/Architect shall in no way be liable to either City or such third parties in any manner whatsoever for such services or for payment thereof.
5. Subcontracting of Service: Consulting Engineer/Architect shall not subcontract or assign any of the Engineering/Architectural Services to be performed under this Agreement without first obtaining the written approval of City regarding the Engineering/Architectural Services to be subcontracted or assigned and the



consulting firm or person proposed to accomplish the subcontracted/assigned portion of the Project. Unless otherwise stated in the written consent to an assignment, no assignment will release or discharge the assignor from any obligation under this Agreement. Any person or firm proposed for subcontracting Engineering/Architectural Services under this Agreement shall maintain throughout the duration of the Agreement, insurance as provided in Section V D (8) herein, and shall additionally maintain Professional Liability insurance in a minimum amount of \$1,000,000 and provide the City with certification thereof.

6. Endorsement: Consulting Engineer/Architect shall sign and seal all final plans, specifications, estimates and engineering data furnished by him/her. Any review or approval by City of any documents prepared by the Consulting Engineer/Architect, including but not limited to the plans and specifications, shall be solely for the purpose of determining whether such documents are consistent with City's construction program and intent and shall not be construed as approval of same by City. No review of such documents shall relieve Consulting Engineer/Architect of its responsibility for the accuracy, adequacy, fitness, suitability and coordination of its work product.
7. Inspection of Documents: Consulting Engineer/Architect shall maintain all Project records for inspection by City during the contract period and for three (3) years from the date of final payment.

#### **SECTION IV - CITY OF OVERLAND PARK'S RESPONSIBILITIES**

##### **A. COMMUNICATION**

City shall provide to Consulting Engineer/Architect information and criteria regarding City's requirements for the Project; examine and timely respond to Consulting Engineer/Architect's submissions; and give written notice to Consulting Engineer/Architect, who shall respond promptly, whenever City observes or otherwise becomes aware of any defect in the Engineering/Architectural Services.

##### **B. ACCESS**

City will provide access for Consulting Engineer/Architect to enter public and private property as necessary and appropriate for the Consulting Engineer/Architect to provide the services contemplated herein.

##### **C. DUTIES**

City shall furnish and perform the various duties and services in all phases of the Project which are outlined and designated in Exhibit A as City's responsibility.

##### **D. 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.

**E. BONDS**

City shall furnish all bond forms required for the Project.

**F. PROJECT REPRESENTATIVE**

City shall designate a Project Manager to represent City in coordinating this Project with Consulting Engineer/Architect, 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 in whole or in part either for cause or for its convenience and without cause or default on the part of Consulting Engineer/Architect, by providing ten (10) days' written notice of such termination to Consulting Engineer/Architect. Upon receipt of such notice from City, Consulting Engineer/Architect shall, at City's option as contained in the notice: (1) immediately cease all Engineering/Architectural Services; or (2) meet with City and, subject to City's approval, determine what Engineering/Architectural Services shall be required of Consulting Engineer/Architect in order to bring the Project to a reasonable termination in accordance with the request of City. Consulting Engineer/Architect 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, Consulting Engineer/Architect is entitled to terminate this Agreement if the default is not remedied by the City after the City has been provided thirty (30) days' written notice of the default.

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

release Consulting Engineer/Architect from liability.

3. Compensation for Convenience Termination: If City shall terminate for its convenience as herein provided, City shall compensate Consulting Engineer/Architect for all Engineering/Architectural Services satisfactorily completed to date of its receipt of the termination notice and any additional Engineering/Architectural 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 Consulting Engineer/Architect, City shall compensate Consulting Engineer/Architect for the reasonable cost of Engineering/Architectural Services satisfactorily 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 Consulting Engineer/Architect including but not limited to its rights to sue for damages, interest and attorney fees.
5. Incomplete Documents: Neither Consulting Engineer/Architect, 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; Consulting Engineer/Architect having been deprived of the opportunity to complete such documents and certify them as ready for construction.

## **B. DISPUTE RESOLUTION**

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

## **C. OWNERSHIP OF ENGINEERING/ARCHITECTURAL DOCUMENTS**

All Engineering/Architectural Documents prepared in connection with this Project shall be the property of the Consulting Engineer/Architect, whether the Project for which they are made is executed or not, however, the Consulting Engineer/Architect will provide City a copy of all final documents, including but not limited to prints and reproductions. Reports, plans, specifications and related documents are Consulting Engineer/Architect's copyrighted

instruments, and Consulting Engineer/Architect at his/her option may so identify them by appropriate markings. Provided that Consulting Engineer/Architect is paid in full for its services, then City may subsequently reuse these final documents without any additional compensation or agreement of Consulting Engineer/Architect, however, such reuse without written verification or adaptation by Consulting Engineer/Architect for the specific purpose intended by City shall be at City's sole risk and without liability or legal exposure to Consulting Engineer/Architect whatsoever. City does not take any responsibility for the reuse of documents by others.

**D. INSURANCE**

1. General

The Consulting Engineer/Architect shall maintain, throughout the duration of this Contract, insurance (on an occurrence basis unless otherwise agreed to) of such types and in at least such amounts as required herein. Professional Liability may be written on a "claims made" basis. Consulting Engineer/Architect 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 Consulting Engineer/Architect 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 Consulting Engineer/Architect, 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 Consulting Engineer/Architect shall monitor and 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) if the Consulting Engineer/Architect's limits of protection shall have been impaired or reduced to such extent that the limits fall below the minimum amounts required herein. The Consulting Engineer/Architect shall promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the City.

3. Commercial General Liability

Limits -

General Aggregate:	\$ 2,000,000
Products / Completed Operations:	\$ 2,000,000
Personal & Advertising Injury:	\$ 1,000,000
Each Occurrence:	\$ 1,000,000

Policy MUST include the following conditions:

a. **Name City of Overland Park as "Additional Insured"**

4. Automobile Liability

Policy shall protect the Consulting Engineer/Architect 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.

Limits – (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 Consulting Engineer/Architect against all claims under applicable state workers' compensation laws. The Consulting Engineer/Architect 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. Professional Liability

The Consulting Engineer/Architect shall maintain throughout the duration of this Contract, Professional Liability Insurance in an amount not less than One Million Dollars (\$1,000,000.00).

7. Industry Ratings

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

- a. Is authorized to do business in the State of Kansas;
  - b. Carries a Best's policyholder rating of A- or better; and
  - c. Carries at least a Class VIII financial rating.
- OR

Is a company mutually agreed upon by the City and Consulting Engineer/Architect.

8. Subcontractors' Insurance

If a part of the Agreement is to be sublet, the Consulting Engineer/Architect shall either:

- a. Cover all subcontractors in its insurance policies, or



actionable fault of the Consulting Engineer/Architect, 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 Consulting Engineer/Architect's obligation hereunder shall not include amounts attributable to the fault or negligence of the City or any third party for whom the Consulting Engineer/Architect 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 Consulting Engineer/Architect, 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 Consulting Engineer/Architect, 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 Consulting Engineer/Architect agrees that:
  - a. Consulting Engineer/Architect 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 Consulting Engineer/Architect shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission ("Commission");
  - c. if the Consulting Engineer/Architect fails to comply with the manner in which the Consulting Engineer/Architect reports to the Commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Consulting Engineer/Architect 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;

- d. if the Consulting Engineer/Architect 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 Consulting Engineer/Architect 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; and
- e. the Consulting Engineer/Architect 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 Consulting Engineer/Architect:

- 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 Consulting Engineer/Architect further agrees that the Consulting Engineer/Architect 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. 12101 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 Consulting Engineer/Architect 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 Consulting Engineer/Architect is an independent contractor and as such is not an agent or employee of the City.

**L. WORK PRODUCT FORMAT**

1. Project Drawings: Project drawings which are developed by Consulting Engineer/Architect through the use of a Computer Aided Drafting (CAD) System shall be made available to City by providing a Microsoft compatible compact disc. However, due to the potential that the information set forth on the electronic media (disk) can be modified by City, or City consultants, unintentionally or otherwise, Consulting Engineer/Architect shall remove all indices of its ownership, professional corporation name, seal, and/or involvement from each electronic display. For documentation purposes, two sets of an original electronic media (disk) and two (11" x 17" size or larger) duplicate hard copy sets will be prepared. One set will be given to City and one set will be retained by Consulting Engineer/Architect. If City provides such electronic media (disk) to others for any purpose, City shall require the electronic media (disk) to be returned to City upon completion of such use. City recognizes that use of such electronic media (disk) will be at City's sole risk and without any liability risk or legal exposure by Consulting Engineer/Architect.
2. Project Documentation: All documentation provided to the City other than Project drawings shall be furnished on a Microsoft compatible compact disc.
3. "Record" Drawings: Following construction, City will provide copies of changes and alterations made in the field during construction to Consulting Engineer/Architect to provide "record" drawings, unless Consulting Engineer/Architect has provided a floppy disk to City on which City can make changes. Consulting Engineer/Architect has the right to rely on the information provided by the City in preparing such documents, and shall have no independent duty to verify its accuracy.

**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 Consulting Engineer/Architect 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**

Consulting Engineer/Architect warrants that he/she has not employed or retained any company or person, other than a bona fide employee working for Consulting Engineer/Architect, 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**

Consulting Engineer/Architect shall abide by all applicable federal, state and local laws, ordinances and regulations applicable to the Engineering/Architectural Services or the Project at the time Services are rendered. Consulting Engineer/Architect 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.

**R. CASH BASIS/BUDGET (*for multi-year agreements*)**

Notwithstanding anything contained in the Agreement to the contrary, it is understood and agreed by the parties hereto that City is obligated only to pay periodic payments or monthly installments under the Agreement as may lawfully be made from funds budgeted and appropriated for such purpose during the City's then current budget Year (i.e. January 1 to

December 31) or from funds made available from any lawfully operated, revenue producing source. Should City fail to budget, appropriate or otherwise make available funds for payments due under the Agreement in any budget year, the Agreement shall be deemed terminated on the last day of the then current budget year for which appropriations were received without penalty or expense to the City of any kind whatsoever, except as to the portions of the recurring charges herein agreed upon for which funds have appropriated and budgeted or are otherwise made available. City agrees to notify contractor of such termination, which shall not constitute a default under the Agreement, at least sixty (60) days prior to the end of the City's then current budget year.

**EXECUTION OF CONTRACT**

The parties hereto have caused this Agreement to be executed in triplicate this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

BRUNGARDT HONOMICHL & COMPANY, P.A.

By: \_\_\_\_\_  
Steven K. Bachenberg, P.E.  
Vice President

CITY OF OVERLAND PARK, KANSAS

\_\_\_\_\_  
Carl Gerlach, Mayor

ATTEST:

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

APPROVED AS TO FORM:

\_\_\_\_\_  
Tammy M. Owens  
Deputy City Attorney