

RESOLUTION NO. 4015

A RESOLUTION RELATING TO BENEFITS  
OBTAINABLE BY CITIES UNDER THE  
FEDERAL AND/OR STATE AID PROGRAM

Be it Resolved by the Governing Body of the City of Overland Park, Kansas:

That the Mayor and City Clerk are authorized and directed to execute for and on behalf of the City of Overland Park, Kansas (the "City"), Agreement No. 87-13 by and between the City and the Kansas Department of Transportation ("KDOT") for a project for the construction of the Johnson County Gateway at I-435, I-35, and K10; KDOT Project Numbers: 435-46 KA-1002-03; 435-46 KA-1002-04; and 435-46 KA-1002-05 (the "Agreement"). The Secretary of Transportation of the State of Kansas is hereby given authority to act for the City, and in its place and stead, for the sole purposes of obtaining for the City the benefits of Federal and/or State Aid and/or legislation for the City on the terms and conditions set forth in the Agreement. The agency arrangement set forth in this Resolution is for the purpose of obtaining Federal and/or State funding only and does not extend beyond that limited purpose.

Passed by the Council this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

(Approved) (Signed) \_\_\_\_\_  
Carl Gerlach, Mayor

ATTEST: \_\_\_\_\_  
Marian Cook, City Clerk

(SEAL)

APPROVED AS TO FORM: \_\_\_\_\_  
Tammy M. Owens, Deputy City Attorney

PROJECT NO. 435-46 KA-1002-03  
435-46 KA-1002-04  
435-46 KA-1002-05



## AGREEMENT

This Agreement is between **MICHAEL S. KING, Secretary of Transportation**, Kansas Department of Transportation (KDOT) (the “Secretary”) and the **City of Overland Park, Kansas** (“City”), **collectively**, the “Parties.”

### RECITALS:

- A. The Secretary has authorized a demonstration highway project in the nature of a Design-Build project in accordance with K.S.A. 68-2314b (b)(4), as further described in this Agreement.
- B. The conceptual plans prepared by the Secretary for the Design Build project described herein will be modified, expanded and ultimately finalized by the Contractor from time to time during the project.
- C. The Secretary and the City are empowered by the laws of Kansas to enter into agreements for the construction and maintenance of city connecting links of the State Highway System through the City.
- D. The Secretary desires to construct the Project on state highways within the city limits of the City, and the City agrees to the Project in the City.
- E. The Secretary and the City desire to enter into an Agreement to make improvements to the state highway system through the use of state or federal funds or a combination of state and federal funds.
- F. Under the terms of the Federal-Aid Highway Act and the rules and regulations of the Federal Highway Administration (FHWA), states and cities are, under certain circumstances, entitled to receive assistance in the financing of the construction and reconstruction of roads and streets, provided however, in order to be eligible for such federal aid, such work is required to be done in accordance with the laws of the State of Kansas and federal requirements.

**NOW THEREFORE**, in consideration of these premises and the mutual covenants set forth herein, the Parties agree to the following terms and provisions.

### ARTICLE I

**DEFINITIONS:** The following terms as used in this Agreement have the designated meanings:

1. **“Agreement”** means this written document, including all attachments and exhibits, evidencing the legally binding terms and conditions of the agreement between the Parties.
2. **“ATC”** means an alternative technical concept submitted by a Proposer during the Design Build procurement process as an alternative to an RFP requirement, which must be approved by the Secretary to be incorporated into the Design Build Contract.
3. **“City”** means the City of Overland Park, Kansas, with its place of business at 8500 Santa Fe Drive, Overland Park, KS 66612.
4. **“City Specifications”** means all requirements of a technical nature for the design and construction of City streets, including materials, equipment, construction requirements, permitting requirements, standards and workmanship, which the City has provided, and any special requirements or requests of the City with regard to permanent or temporary traffic control, signage, or traffic signaling devices or traffic communications systems, as incorporated into the RFP.
5. **“Construction”** means the work done on the Project, consisting of building, altering, repairing, improving or demolishing any structure, building or highway; or any drainage, dredging, excavation, grading or similar work upon real property.
6. **“Contract Modifications”** means any change orders to the Design Build Contract, which have been approved by the Secretary and incorporated into the Design Build Contract.
7. **“Contractor”** means the entity awarded the Design Build Contract for the Project and any subcontractors working for the Contractor with respect to the Project.
8. **“Design Build”** means a project for which the design and construction services are furnished under one contract.
9. **“Design Build Contract”** means the agreement entered into between the Contractor and the Secretary for the design and construction of the Project which incorporates the terms, specifications and conditions of the RFP and any ATC or Contract Modifications, which have been approved by the Secretary.
10. **“Design Plans”** means design plans, specifications, estimates, surveys, and any necessary studies or investigations, including, but not limited to, environmental, hydraulic, and geological investigations or studies necessary for the Project, including those prepared and supplied by the Secretary which are expressly incorporated into the Design Build Contract, and those prepared and supplied by the Contractor in accordance with the Design Build Contract.
11. **“Effective Date”** means the date this Agreement is signed by the Secretary or his designee.

12. **“Encroachment”** means any building, structure, farming, vehicle parking, storage or other object or thing, including but not limited to signs, posters, billboards, roadside stands, fences, or other private installations, not authorized to be located within the Right of Way which may or may not require removal during Construction pursuant to the Design Build Contract.
13. **“FHWA”** means the Federal Highway Administration, a federal agency of the United States.
14. **“KDOT”** means the Kansas Department of Transportation, an agency of the state of Kansas, with its principal place of business located at 700 SW Harrison Street, Topeka, KS, 66603-3745.
15. **“Non-Participating Costs”** means the costs of any items or services which the Secretary, acting on his own behalf and on behalf of the FHWA, reasonably determines are not Participating Costs.
16. **“Notice of Construction Completion”** means, with regard to a City street or facility, the Secretary’s notification to the Contract that there are no incomplete or non-conforming Construction work items for the specified work under the Design Build Contract.
17. **“Participating Costs”** means expenditures for items or services which are an integral part of highway, bridge and road construction projects, as reasonably determined by the Secretary.
18. **“Parties”** means the Secretary of Transportation and KDOT, individually and collectively, and the City.
19. **“Project”** means all phases and aspects of the Design Build endeavor to be undertaken by the Secretary for the design, construction, reconstruction, improvement, maintenance and operation of the I-435 / I-35 / K-10 interchange area and associated city streets in Johnson County, Kansas, some but not all of which aspects are within the City.
20. **“Proposed ROW Plan”** means the Right of Way identified as necessary and to be acquired for the conceptual design of the Project within the city limits of the City, as shown in Exhibit A and more fully described in Exhibit B, both exhibits being incorporated and made a part of this Agreement by this reference.
21. **“Proposer”** means the entity submitting a proposal to the Secretary during the Design Build procurement process in response to the RFP.
22. **“RFP”** means the request for proposal document issued by the Secretary, and as supplemented from time to time, seeking Design Build proposals for the Project from qualified bidders by which the Secretary will select the Contractor for the Project.

23. **“Right of Way” or “ROW”** means the real property and interests therein necessary for Construction of the Project, including fee simple title, dedications, permanent and temporary easements, and access rights, as shown on the Proposed ROW Plan and the Design Build Contract.
24. **“Secretary”** means Michael S. King, in his official capacity as Secretary of Transportation of the state of Kansas, and his successors.
25. **“Utilities” or “Utility”** means all privately, publicly or cooperatively owned lines, facilities and systems for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water, and other similar commodities, including fire and police signal systems which directly and/or indirectly serves the public.

## ARTICLE II

### SECRETARY RESPONSIBILITIES:

1. **Project.** The Secretary shall undertake and complete the Project in accordance with the Design Build Contract except as otherwise modified by this Agreement.
2. **Right of Way Acquisition.** In the name of the Secretary, the Secretary will perform appraisal and acquisition work including condemnation, if necessary, for Right of Way as shown on the Proposed ROW Plan and the Design Build Contract. All costs for Right of Way as shown on the Proposed ROW Plan and Design Build Contract will be paid for with state or federal funds or a combination of state and federal funds. The Secretary will receive and disburse all funds directly to the parties involved in acquisition of Right of Way.
3. **Consultation with City.** The Secretary shall provide the draft RFP to the City for its review of the City Specifications applicable to the Project. The Secretary will make any changes, additions, or corrections related to the City Specifications, which have been submitted to the Secretary in accordance with the provisions contained in Article III, paragraph 2 of this Agreement.
4. **Submission of ATC Proposals and Contract Modifications to City.**
  - (a) **Prior to Contract Award.** During the Design Build procurement process and prior to the award of the Design Build Contract, the Secretary shall consult with the City on any ATC that significantly affects a City street. If approved by the Secretary, such ATC shall be incorporated into the Design Build Contract provided: (i) the Proposer of such ATC is the selected Contractor and (ii) that Proposer has included such ATC in its proposal.
  - (b) **After Contract Award.** After the award of the Design Build Contract and during Construction, the Secretary shall consult with the City on Contract

Modifications that significantly affect a City street. If approved by the Secretary, such Contract Modifications shall be incorporated into the Design Build Contract.

5. **Design Build Procurement and Administration.** The Secretary will procure a Contractor and administer the Project as required by the FHWA, negotiate with and report to the FHWA, and administer the payments due the Contractor. Except as otherwise provided, all Project costs shall be paid for with state or federal funds or a combination of state and federal funds.

6. **General Indemnification.** To the extent permitted by law and subject to the Kansas Tort Claims Act, including but not limited to the exceptions and maximum liability provisions, the Secretary shall defend, indemnify, hold harmless, and save the City and its authorized representatives from any and all costs, liabilities, expenses, suits, judgments, damages to persons or property or claims of any nature whatsoever arising out of or in connection with the provisions or performance of this Agreement by the Secretary, the Secretary's employees, or subcontractors. The Secretary shall not be required to defend, indemnify, hold harmless, and save the City for negligent acts or omissions of the City or its authorized representatives or employees.

7. **Indemnification by Contractors.** The Secretary will require the Contractor to indemnify, hold harmless, and save the Secretary and the City from personal injury and property damage claims arising out of the act or omission of the Contractor, the Contractor's agent, subcontractors (at any tier), or suppliers (at any tier). If the Secretary or the City defends a third party's claim, the Contractor shall indemnify the Secretary and the City for damages paid to the third party and all related expenses either the Secretary or the City or both incur in defending the claim.

8. **Utilities.**

(a) **Utility Relocation.** The Secretary will move or adjust, or cause to be moved or adjusted, and will be responsible for such removal or adjustment of all existing Utilities necessary to construct the Project in accordance with the conceptual design prepared by the Secretary, in accordance with the Design Build Contract, or in accordance with a combination thereof. Relocation of Utilities on City-owned Right of Way or easements shall be determined in consultation with the City in advance of the Utility relocation schedule. New or existing utilities that have to be installed, moved or adjusted will be located or relocated in accordance with the current version of the KDOT Utility Accommodation Policy (UAP), as amended or supplemented.

(b) **Cost of Relocation.**

(i) [Intentionally deleted.]

(ii) If the City has a population of more than 2,500 (based on the U.S. Bureau of Census-2010 Census), the Utility owners shall be responsible for the expense

to remove or adjust all Utility facilities on public Right of Way as necessary to construct the Project in accordance with the final Design Plans. The expense of removal or adjustment of Utilities located on private easements shall be reimbursed to the Utility owners. The payment of such expense shall be by separate Utility adjustment agreement with the Utility owners.

9. **Removal of Encroachments.** The Secretary shall initiate and proceed with diligence to remove or require the removal of all Encroachments either on or above the limits of the Right of Way as shown on the Proposed ROW Plan. If Design Plans expand the right of way limits set forth in the Proposed ROW Plan, the Secretary will proceed with diligence to remove or have removed any Encroachments within the City's jurisdiction on such Right of Way.

### ARTICLE III

#### CITY RESPONSIBILITIES:

1. **Legal Authority.** The City shall, by resolution or other official act, authorize the Secretary to undertake and complete the Project within the corporate limits of the City. The City further agrees to adopt all necessary ordinances and/or resolutions and to take such administrative or legal steps as may be required to give full effect to the terms of this Agreement.

2. **City Specifications; Review of RFP.** The City has furnished or will furnish or otherwise make available to the Secretary for inclusion in the RFP, City Specifications for the design, construction or both, of improvements to City facilities. Any City requests for changes, additions, or corrections to the draft RFP with regard to City Specifications or City facilities must be submitted in writing to the Secretary within fourteen (14) days of the City's receipt of the draft RFP, otherwise such RFP provisions will be deemed approved by the City.

3. **Right of Way.**

(a) **Use of City Right of Way.** The Secretary shall have the right to utilize any land owned or controlled by the City, lying inside or outside the limits of the City as shown on the Proposed ROW Plans and reflected in the Design Build Contract, for the purpose of constructing and maintaining the Project. Neither the Secretary nor the FHWA shall participate in the cost of the City's Right of Way or easements, unless the Secretary determines the City will incur an unnecessary hardship. The City shall execute the appropriate deeds and easements transferring its property rights to the Secretary. Further, the City acknowledges the execution and transferring of the deeds and easements by the City to the Secretary is an obligation of the City for this Agreement and construction of the Project.

(b) **Cooperation in KDOT Right of Way Acquisition.** The City acknowledges the Secretary will be performing appraisal and acquisition work including condemnation, if necessary, for Right of Way as shown on the Proposed ROW Plan and the Design Build Contract. The City will cooperate in that purpose, as necessary, for completion of the Project.

4. **Noise Waiver.** The City will allow the Contractor to work anytime during a twenty-four (24) hour period. The City agrees to grant all permits and licenses necessary to allow sound or noise levels in excess of those set forth in local ordinances.

5. **Permits.** The City shall not unreasonably withhold approval or issuance of any permits (such as demolition, debris removal, environmental, or land disturbance), which may be required for Construction of the Project.

6. **Future Encroachments.** Except as provided by state and federal laws, the City agrees it will not in the future permit Encroachments upon the ROW shown in the Proposed ROW Plan, and specifically will require any gas and fuel dispensing pumps erected, moved or installed along the Project be placed a distance from the Right of Way line no less than that permitted by the National Fire Code.

7. **Use of Right of Way.** Except as otherwise shown in the Design Plans, Right of Way provided for the Project shall be used solely for public highway purposes, including relocation of public utilities required for the Project.

8. **Trails and Sidewalks on KDOT Right of Way.** With regard to any bike or pedestrian paths or sidewalks ("Trail/Sidewalk") constructed pursuant to the Design Plans, the City agrees as follows:

(a) **City Responsible for Repairs and Providing Alternative Accessible Routes.** The City agrees that the primary purpose of KDOT Right of Way is for the construction and maintenance of I-435, I-35, and K-10. If, after completion of the Project, the construction or maintenance of I-435, I-35, and K-10 reasonably requires the Trail/Sidewalk on KDOT Right of Way to be damaged or removed, the City shall be responsible for all repairs to the Trail/Sidewalk made necessary as a result of I-435, I-35, and K-10 construction or maintenance. In the event the Trail/Sidewalk on KDOT Right of Way is temporarily closed or removed for any reason and for any length of time after completion of the Project, the City will be wholly responsible for providing an alternative accessible path and for compliance with all laws and regulations relating to accessibility.

(b) **Interference with KDOT Right of Way.** If the Secretary, in his or her sole judgment, determines that continued use of the Trail/Sidewalk is or will interfere with KDOT use of its Right of Way or is otherwise rendered impractical, inconvenient, or unsafe for use by the traveling public, the City will remove the Trail/Sidewalk and restore the KDOT Right of Way location to its original condition prior to the Construction of the Trail/Sidewalk.

(c) **Incorporation of Trail/Sidewalk into Local Transportation System.** The City agrees to take all steps necessary to designate the Trail/Sidewalk component of the Project as an integral part of its local transportation system, being primarily



for transportation purposes and having only incidental recreational use for purposes of 49 U.S.C. § 303 and 23 C.F.R. 771.135.

(d) **Maintenance.** When the Project is completed and final acceptance or other approval is issued, the City, at its own cost and expense, will maintain, including snow removal, the Trail/Sidewalk on KDOT Right of Way and make ample provision each year for such maintenance. If notified by the State Transportation Engineer of any unsatisfactory maintenance condition, the City will begin the necessary repairs within a reasonable period and will prosecute the work continuously until it is satisfactorily completed. Any notification by the State Transportation Engineer, however, is not intended to and shall not be construed to be an undertaking of the City's absolute duty and obligation to maintain the Trail/Sidewalk.

9. **Parking Control.** The City shall prohibit parking of vehicles on the city connecting link and on the acceleration and deceleration lanes of all connecting streets and highways and on additional portions of the connecting streets and highways as the Secretary may deem necessary to permit free flowing traffic throughout the length of the Project covered by this Agreement.

10. **Access Control.** The City will maintain the control of access rights and prohibit the construction or use of any entrances or access points along the Project within the City other than those shown in the Design Build Contract, unless prior approval is obtained from the Secretary.

11. **Maintenance.** When the Secretary issues a Notice of Construction Completion to the Contractor with regard to a City street or facility, the City will, at its own cost and expense, maintain city streets under its jurisdiction located within the Project limits and will make ample provision each year for such maintenance. Maintenance will include, but is not limited to, replacing damaged signs and posts, pavement markings, lighting and traffic signal equipment, repairing damaged pavement, curb and sidewalk, and operating lighting and traffic signal installations. If notified by the State Transportation Engineer of any unsatisfactory maintenance condition, the City will begin the necessary repairs within thirty (30) days and will prosecute the work continuously until it is satisfactorily completed.

12. **Accounting.** Upon request by the Secretary and in order to enable the Secretary to report all costs of the Project to the legislature, the City shall provide the Secretary an accounting of all actual Non-Participating Costs which are paid directly by the City to any party outside of the Secretary and all costs incurred by the City not to be reimbursed by the Secretary for preliminary engineering, right of way, utility adjustments, construction, and construction engineering work phases, or any other major expense associated with the Project.

**ARTICLE IV****GENERAL PROVISIONS:**

1. **Incorporation of Design Plans.** The Design Plans, including any alterations, revisions, or other modifications thereto, will be incorporated and made a part of this Agreement, upon their completion by the Contractor without the need for written amendment of this Agreement. During the Project the City may request the Secretary make available the current Design Plans for the City's inspection and information.

2. **Additional Agreements.** The Parties contemplate the need to supplement this Agreement and/or enter into other agreements during the course of the Project so as to establish or clarify the Parties' respective obligations and responsibilities concerning existing or additional aspects of the Project.

3. **Traffic Control.** The Parties agree to the following with regard to traffic control for the Project:

(a) **Temporary Traffic Control.** The Secretary has consulted with the City concerning the manner in which traffic may be handled on city routes during Construction, including road closures. Detour routes and road closings, if necessary, will be noted in the Design Build Contract. The Secretary or his authorized representative may act as the City's agent with full authority to approve the dates when any detours or road closings will commence and terminate. As traffic control plans are developed prior to and during Construction, the Secretary and/or the Contractor shall consult with the City prior to implementation.

(b) **Permanent Traffic Control.** The location, form and character of informational, regulatory and warning signs, of traffic signals and of curb and pavement or other markings installed or placed by any public authority, or other agency as authorized by K.S.A. 8-2005, must conform to the manual and specifications adopted under K.S.A. 8-2003 and any amendments thereto are incorporated by reference and shall be subject to the approval of the Secretary in consultation with the City.

4. **City Connecting Link.** The Parties have in the past entered into an agreement covering routine maintenance of the city connecting link and it is the Parties' intention that the agreement for routine maintenance shall remain in full force and effect and the mileage set out in the city connecting link agreement is not be affected by this Agreement. If necessary, the Parties will execute a new city connecting link agreement to include the Project.

5. **Civil Rights Act.** The "Special Attachment No. 1," pertaining to the implementation of the Civil Rights Act of 1964, is attached and made a part of this Agreement.

6. **Contractual Provisions.** The Provisions found in Contractual Provisions Attachment (Form DA-146a, Rev. 06-12), which is attached hereto, are hereby incorporated in this contract and made a part hereof.

7. **Termination.** If, in the judgment of the Secretary, sufficient funds are not appropriated to continue the function performed in this Agreement and for the payment of the charges hereunder, the Secretary may terminate this Agreement. The Secretary will participate in all costs approved by the Secretary incurred prior to the termination of the Agreement.

8. **Headings.** All headings in this Agreement have been included for convenience of reference only and are not be deemed to control or affect the meaning or construction or the provisions herein.

9. **Binding Agreement.** This Agreement and all contracts entered into under the provisions of this Agreement shall be binding upon the Secretary and the City and their successors in office.

10. **No Third Party Beneficiaries.** No third party beneficiaries are intended to be created by this Agreement and nothing in this Agreement authorizes third parties to maintain a suit for damages pursuant to the terms or provisions of this Agreement.

**IN WITNESS WHEREOF** the Parties have caused this Agreement to be signed by their duly authorized officers as of the Effective Date.

ATTEST:

THE CITY OF OVERLAND PARK, KANSAS

\_\_\_\_\_  
CITY CLERK (Date)

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

KANSAS DEPARTMENT OF TRANSPORTATION  
Michael S. King, Secretary of Transportation

(SEAL)

By: \_\_\_\_\_  
Jerome T. Younger, P.E. (Date)  
Deputy Secretary and  
State Transportation Engineer

**EXHIBIT A**

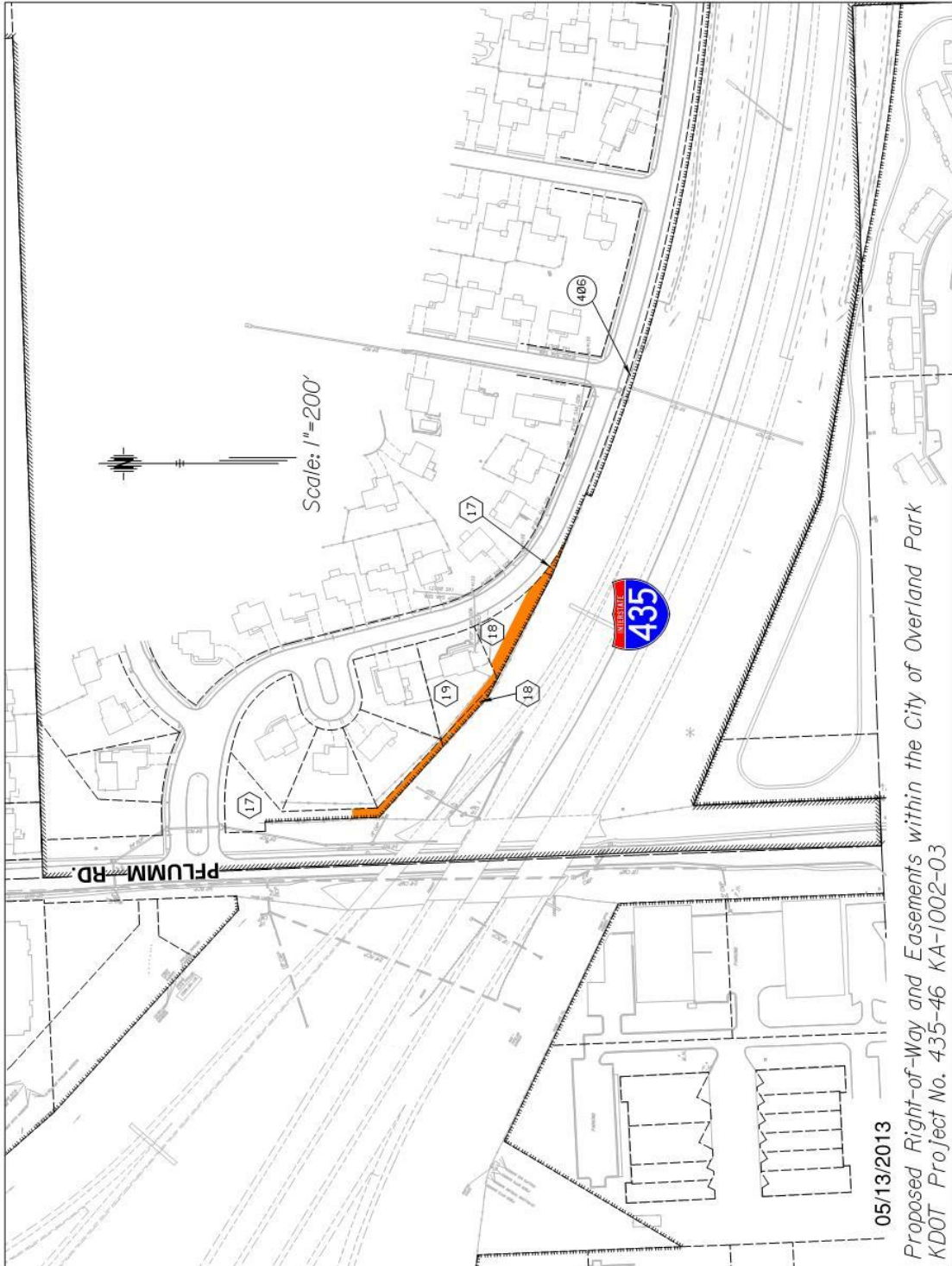


EXHIBIT B

**Johnson County Gateway**

**KDOT Prj. No. 435-46 KA-1002-03**

5/13/2013

Tract No.	Parcel No.	Owner Name	Proposed Taking Type						
			Access Control (Line)	Right-of-Way	Utility Easement	Drainage Easement	Flowage Easement	Sanitary Sewer Easement	Temporary Easement
17	037 A	Summerfield II, Inc.		X					
18	037 B	Terra Nova Development Corp.		X	X				
19	L	Christopher L. & Bridget M. Gordon							X

## KANSAS DEPARTMENT OF TRANSPORTATION

Special Attachment  
To Contracts or Agreements Entered Into  
By the Secretary of Transportation of the State of Kansas

NOTE: Whenever this Special Attachment conflicts with provisions of the Document to which it is attached, this Special Attachment shall govern.

THE CIVIL RIGHTS ACT OF 1964, and any amendments thereto,  
REHABILITATION ACT OF 1973, and any amendments thereto,  
AMERICANS WITH DISABILITIES ACT OF 1990, and any amendments thereto,  
AGE DISCRIMINATION ACT OF 1975, and any amendments thereto,  
EXECUTIVE ORDER 12898, FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY  
POPULATIONS AND LOW INCOME POPULATIONS 1994, and any amendments thereto,  
49 C.F.R. Part 26.1 (DBE Program), and any amendments thereto

### NOTIFICATION

The Secretary of Transportation for the State of Kansas, in accordance with the provisions of Title VI and Title VII of the Civil Rights Act of 1964 (78 Stat. 252), §504 of the Rehabilitation Act of 1973 (87 Stat. 355) and the Americans with Disabilities Act of 1990 (42 USC 12101), the Age Discrimination Act of 1975 (42 USC 6101), the regulations of the U.S. Department of Transportation (49 C.F.R., Part 21, 23, and 27), issued pursuant to such Act, Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations (1994), and the DBE Program (49 C.F.R., Part 26.1), hereby notifies all contracting parties that, the contracting parties will affirmatively ensure that this contract will be implemented without discrimination on the grounds of race, religion, color, gender, age, disability, national origin, or minority populations and low income populations as more specifically set out in the following "Nondiscrimination Clauses".

### CLARIFICATION

Where the term "Consultant" appears in the following "Nondiscrimination Clauses", the term "Consultant" is understood to include all parties to contracts or agreements with the Secretary of Transportation of the State of Kansas.

### Nondiscrimination Clauses

During the performance of this contract, the Consultant, or the Consultant's assignees and successors in interest (hereinafter referred to as the "Consultant"), agrees as follows:

- 1) Compliance with regulations: The Consultant will comply with the regulations of the U.S. Department of Transportation relating to nondiscrimination in its federally-assisted programs and codified at Title 49, Code of Federal Regulations, Parts 21, 23 and 27, (hereinafter referred to as the "Regulations"). The Regulations are herein incorporated by reference and made a part of this contract.
- 2) Nondiscrimination: The Consultant, with regard to the work performed by the Consultant after award and prior to the completion of the contract work, will not discriminate on the grounds of race, religion, color, gender, age, disability, national origin or minority populations and low income populations in the selection and retention of subcontractors, including in the procurements of materials and leases of equipment. The Consultant will not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.
- 3) Solicitations for Subcontractors, including Procurements of Material and Equipment: In all solicitations, either competitive bidding or negotiation made by the Consultant for work to be performed under a subcontract including procurements of materials and equipment, each potential subcontractor or supplier shall be notified by the Consultant of the Consultant's obligation under this contract and the Regulations relative to nondiscrimination on the grounds of race, religion, color, gender, age, disability, national origin or minority populations and low income populations.

- 4) Information and Reports: The Consultant will provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and the Secretary of the Transportation of the State of Kansas will be permitted access to the Consultant's books, records, accounts, other sources of information, and facilities as may be determined by the Secretary of Transportation of the State of Kansas to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a Consultant is in the exclusive possession of another who fails or refuses to furnish this information, the Consultant shall so certify to the Secretary of Transportation of the State of Kansas and shall set forth what efforts it has made to obtain the information.
- 5) Employment: The Consultant will not discriminate against any employee or applicant for employment because of race, religion, color, gender, age, disability, or national origin.
- 6) Sanctions for Noncompliance: In the event of the Consultant's noncompliance with the nondiscrimination provisions of this contract, the Secretary of Transportation of the State of Kansas shall impose such contract sanctions as the Secretary of Transportation of the State of Kansas may determine to be appropriate, including, but not limited to,
  - (a) withholding of payments to the Consultant under the contract until the Consultant complies, and/or
  - (b) cancellation, termination or suspension of the contract, in whole or in part.
- 7) Disadvantaged Business Obligation
  - (a) Disadvantaged Business as defined in the Regulations shall have a level playing field to compete for contracts financed in whole or in part with federal funds under this contract.
  - (b) All necessary and reasonable steps shall be taken in accordance with the Regulations to ensure that Disadvantaged Businesses have equal opportunity to compete for and perform contracts. No person(s) shall be discriminated against on the basis of race, color, gender, or national origin in the award and performance of federally-assisted contracts.
  - (c) The Consultant, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Consultant shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of Federally-assisted contracts. Failure by the Consultant to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the recipient deems appropriate.
- 8) Executive Order 12898
  - (a) To the extent permitted by existing law, and whenever practical and appropriate, all necessary and reasonable steps shall be taken in accordance with Executive Order 12898 to collect, maintain, and analyze information on the race, color, national origin and income level of persons affected by programs, policies and activities of the Secretary of Transportation of the State of Kansas and use such information in complying with Executive Order 12898.
- 9) Incorporation of Provisions: The Consultant will include the provisions of paragraphs (1) through (8) in every subcontract, including procurements of materials and equipment, unless exempt by the Regulations, order, or instructions issued pursuant thereto. The Consultant will take such action with respect to any subcontract or procurement as the Secretary of Transportation of the State of Kansas may direct as a means of enforcing such provisions including sanctions for noncompliance: PROVIDED, however, that, in the event a Consultant becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Consultant may request the State to enter into such litigation to protect the interests of the State.

### CONTRACTUAL PROVISIONS ATTACHMENT

Important: This form contains mandatory contract provisions and must be attached to or incorporated in all copies of any contractual agreement. If it is attached to the vendor/contractor's standard contract form, then that form must be altered to contain the following provision:

"The Provisions found in Contractual Provisions Attachment (Form DA-146a, Rev. 06-12), which is attached hereto, are hereby incorporated in this contract and made a part thereof."

The parties agree that the following provisions are hereby incorporated into the contract to which it is attached and made a part thereof, said contract being the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

- 1. Terms Herein Controlling Provisions:** It is expressly agreed that the terms of each and every provision in this attachment shall prevail and control over the terms of any other conflicting provision in any other document relating to and a part of the contract in which this attachment is incorporated. Any terms that conflict or could be interpreted to conflict with this attachment are nullified.
- 2. Kansas Law and Venue:** This contract shall be subject to, governed by, and construed according to the laws of the State of Kansas, and jurisdiction and venue of any suit in connection with this contract shall reside only in courts located in the State of Kansas.
- 3. Termination Due To Lack Of Funding Appropriation:** If, in the judgment of the Director of Accounts and Reports, Department of Administration, sufficient funds are not appropriated to continue the function performed in this agreement and for the payment of the charges-hereunder, State may terminate this agreement at the end of its current fiscal year. State agrees to give written notice of termination to contractor at least 30 days prior to the end of its current fiscal year, and shall give such notice for a greater period prior to the end of such fiscal year as may be provided in this contract, except that such notice shall not be required prior to 90 days before the end of such fiscal year. Contractor shall have the right, at the end of such fiscal year, to take possession of any equipment provided State under the contract. State will pay to the contractor all regular contractual payments incurred through the end of such fiscal year, plus contractual charges incidental to the return of any such equipment. Upon termination of the agreement by State, title to any such equipment shall revert to contractor at the end of the State's current fiscal year. The termination of the contract pursuant to this paragraph shall not cause any penalty to be charged to the agency or the contractor.
- 4. Disclaimer Of Liability:** No provision of this contract will be given effect that attempts to require the State of Kansas or its agencies to defend, hold harmless, or indemnify any contractor or third party for any acts or omissions. The liability of the State of Kansas is defined under the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.).
- 5. Anti-Discrimination Clause:** The contractor agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 et seq.) and the applicable provisions of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) (ADA) and to not discriminate against any person because of race, religion, color, sex, disability, national origin or ancestry, or age in the admission or access to, or treatment or employment in, its programs or activities; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements set out at K.S.A. 44-1031 and K.S.A. 44-1116; (d) to include those provisions in every subcontract or purchase order so that they are binding upon such subcontractor or vendor; (e) that a failure to comply with the reporting requirements of (c) above or if the contractor is found guilty of any violation of such acts by the Kansas Human Rights Commission, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration; (f) if it is determined that the contractor has violated applicable provisions of ADA, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration.

Contractor agrees to comply with all applicable state and federal anti-discrimination laws.

The provisions of this paragraph number 5 (with the exception of those provisions relating to the ADA) are not applicable to a contractor who employs fewer than four employees during the term of such contract or whose contracts with the contracting State agency cumulatively total \$5,000 or less during the fiscal year of such agency.

- 6. Acceptance Of Contract:** This contract shall not be considered accepted, approved or otherwise effective until the statutorily required approvals and certifications have been given.
- 7. Arbitration, Damages, Warranties:** Notwithstanding any language to the contrary, no interpretation of this contract shall find that the State or its agencies have agreed to binding arbitration, or the payment of damages or penalties. Further, the State of Kansas and its agencies do not agree to pay attorney fees, costs, or late payment charges beyond those available under the Kansas Prompt Payment Act (K.S.A. 75-6403), and no provision will be given effect that attempts to exclude, modify, disclaim or otherwise attempt to limit any damages available to the State of Kansas or its agencies at law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose.
- 8. Representative's Authority To Contract:** By signing this contract, the representative of the contractor thereby represents that such person is duly authorized by the contractor to execute this contract on behalf of the contractor and that the contractor agrees to be bound by the provisions thereof.
- 9. Responsibility For Taxes:** The State of Kansas and its agencies shall not be responsible for, nor indemnify a contractor for, any federal, state or local taxes which may be imposed or levied upon the subject matter of this contract.
- 10. Insurance:** The State of Kansas and its agencies shall not be required to purchase any insurance against loss or damage to property or any other subject matter relating to this contract, nor shall this contract require them to establish a "self-insurance" fund to protect against any such loss or damage. Subject to the provisions of the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.), the contractor shall bear the risk of any loss or damage to any property in which the contractor holds title.
- 11. Information:** No provision of this contract shall be construed as limiting the Legislative Division of Post Audit from having access to information pursuant to K.S.A. 46-1101 et seq.
- 12. The Eleventh Amendment:** "The Eleventh Amendment is an inherent and incumbent protection with the State of Kansas and need not be reserved, but prudence requires the State to reiterate that nothing related to this contract shall be deemed a waiver of the Eleventh Amendment."
- 13. Campaign Contributions / Lobbying:** Funds provided through a grant award or contract shall not be given or received in exchange for the making of a campaign contribution. No part of the funds provided through this contract shall be used to influence or attempt to influence an officer or employee of any State of Kansas agency or a member of the Legislature regarding any pending legislation or the awarding, extension, continuation, renewal, amendment or modification of any government contract, grant, loan, or cooperative agreement.