

# Staff Summary Report



Council Meeting Date: 07/22/08

Agenda Item Number: \_\_\_\_\_

**SUBJECT:** Request award of a Construction Manager at Risk Construction Phase contract to Haydon Building Corporation, approval of a construction management contract with HDR Construction Control Corporation, and approval of a project contingency for a multi-use path at the Western Canal from Arizona Mills Mall to the Price Freeway.

**DOCUMENT NAME:** 20080722PWDR12 **SIDEWALK UPGRADING-MAINT-CONSTRUCTION (0809-12) PROJECT NO. 6000421**

**SUPPORTING DOCS:** Yes.

**COMMENTS:** Total cost for the construction services contract is \$9,524,228, total cost for the construction management contract shall not exceed \$200,088, and the project contingency shall not exceed \$500,000.

**PREPARED BY:** Donna Rygiel, Engineering Contract Administrator (x8520)

**REVIEWED BY:** Andy Goh, Deputy PW Manager/City Engineer (x8896)

**APPROVED BY:** Glenn Kephart, Public Works Manager (x8205)

**LEGAL REVIEW BY:** Andrew B. Ching, City Attorney (x8575)

**FISCAL NOTE:** Sufficient funds are available in Capital Improvement Fund No. 6000421.

**RECOMMENDATION:** Award construction services contract, approve construction management contract and approve project contingency. Authorize the Mayor to execute all necessary documents.

**ADDITIONAL INFO:** The scope of work includes construction of 5.5 miles of multi-use pedestrian pathway along the Western Canal from Arizona Mills Mall to the Price Freeway frontage road. The project includes a concrete path, landscaping, irrigation, lighting, pedestrian protection at the Ken McDonald Golf Course, and connection nodes at Kiwanis Park and Stroud Park. The project also includes pedestrian crossings at Rural Road and McClintock Drive.

The construction manager at risk construction contract was negotiated by staff and is considered reasonable for the scope of services. Haydon Building Corporation was selected by a review committee as the most qualified firm for these services using a qualification based process set forth in Title 34 of the Arizona Revised Statutes.

HDR Construction Control Corporation will provide construction management services, including daily inspections, assisting in weekly construction meetings, tracking of construction correspondence and assisting in project close-out.

The design fee was negotiated by staff and is considered reasonable for the scope of services. HDR Construction Control Corporation was selected from our consultant on-call list based on a process set forth in Title 41 of the Arizona Revised Statutes.



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**CITY OF TEMPE, ARIZONA  
PUBLIC WORKS DEPARTMENT  
ENGINEERING DIVISION**

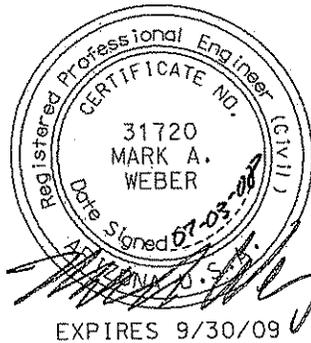
**CONTRACT DOCUMENTS**

**FOR**

**WESTERN CANAL MULTI-USE PATH**

**PROJECT NO. 6000421**

**ADOT TRACS NO. 0000 MA TMP ss57101C  
ADOT PROJECT NO. CM-TMP-0(026)A**



**CONSTRUCTION MANAGER AT RISK  
CONSTRUCTION SERVICES**

**CITY COUNCIL MEMBERS**

Mayor – Hugh Hallman

P. Ben Arredondo  
Shana Ellis  
Mark Mitchell

Joel Navarro  
Onnie Shekerjian  
Corey D. Woods

City Manager – Charles W. Meyer  
City Engineer – Andy Goh, P.E.

2008

## CONTRACT

THIS CONTRACT is made and entered into this 22nd day of July, 2008, by and between the City of Tempe, a Municipal Corporation, organized and existing under and by virtue of the laws of the State of Arizona hereinafter designated the "City", and Haydon Building Corporation, of the City of Phoenix, County of Maricopa, and State of Arizona, hereinafter designated as the "CM@RISK."

The City intends to have constructed the Western Canal Multi-use Path, hereafter the "Project", as described in the Plans and Specifications and the General Provisions attached.

To undertake the construction administration of said Project, the City will utilize a "Construction Manager Professional". The name of the Construction Manager Professional will be provided at the preconstruction meeting.

The CM@Risk has represented to the City the ability to provide construction management services and to construct the Project and based upon this representation the City engages Haydon Building Corporation, to provide these services and construct the Project.

A Design Phase Services agreement has been executed previously between the City and the CM@Risk to perform Design Phase services. Those services may continue during the duration of this contract.

All work done under this contract shall be accomplished in accordance with the "MAG Specifications" except as may be modified in the Contract Documents. In the event of any conflict between these Contract Documents and the requirements of the MAG Specifications, these Contract Documents shall prevail.

The CM@Risk, for and in consideration of the sum to be paid to the CM@Risk by the City, in the manner, amount and at the time provided in the Proposal and of the other covenants and agreements herein contained, and under the penalties expressed in the bonds hereto attached, hereby agrees, for itself, its heirs, administrators, successors, and assigns as follows:

### **1. TERMS AND DEFINITIONS**

In the event of any conflict between the terms and definitions set out below and the terms and definitions found in either the "MAG Specifications" or in Contract # C2006-173, the terms and definitions set out below shall prevail in interpreting these Contract Documents unless the context requires otherwise.

- 1.1. Addendum – A written modification of the Contract Documents after the Contract Documents have been issued by the City Engineer but ten (10) days prior to City Council Award of this Contract. This definition replaces the MAG Specification definition of Addendum.
- 1.2. Alternate Systems Evaluations – Alternatives for design, means and methods or other scope considerations that are evaluated using value engineering principles and have the potential to reduce construction costs while delivering a quality and functional Project that meets City requirements.

- 1.3. Amendment – A written modification of the terms of this Construction Services Contract.
- 1.4. Award – The formal action of the City Council to accept this Contract.
- 1.5. Business Day – Any day except Saturdays, Sundays and holidays observed by the City.
- 1.6. City – The City of Tempe, a public body or authority and Municipal Corporation, with whom the CM@Risk has entered into this Contract and for whom the services are to be provided pursuant to this Contract. The City is the Agency or Owner or Contracting Agency for purposes of this contract. This definition replaces the MAG Specification definition of City.
- 1.7. City's Contingency – A fund to cover cost growth during the project used at the discretion of the City usually for costs that result from City directed changes or unforeseen site conditions. The amount of the Owner's contingency will be set solely by the City and will be in addition to the project costs included in the CM@Risk's GMP Proposal.
- 1.8. Construction Fee – The CM@Risk's administrative costs, home office overhead, and profit, whether at the CM@Risk's principal or branch offices. Examples of the administrative costs and home office costs and any limitations or exclusions are included in the General Conditions of the construction phase.
- 1.9. "Construction Manager At Risk" Or "CM@Risk" – The person, firm, corporation or other approved legal entity with whom the City has entered into this Contract. The "CM@Risk" is the same entity as defined as "Contractor" in MAG Specifications.
- 1.10. CM@Risk's Contingency or Contractor's Contingency – A fund to cover non-general conditions cost growth during the Project used with the City's approval, usually for costs that result from project circumstances. The CM@Risk Contingency or Contractor's Contingency cannot be used for General Conditions Costs. The amount of the CM@Risk's contingency will be negotiated as a separate line item in each GMP package and will not have markups at the time of the GMP proposal. The CM@Risk will inform the City at the time of use of the contractor's contingency funds by making the appropriate changes to the schedule of values with the next regular progress payment request by deducting the amount of contingency funds used from the contingency line item and adding the same amount to the line item on the schedule of values where the increased funds were used. If the contingency funds are used for a new line item that was not given with the original Schedule of Values, that will be so indicated. At the time that contingency funds are used by the CM@Risk, the appropriate markups for overhead and profit will be applied at that time. When all funds in the CM@Risk's contingency are expended, the CM@Risk then is at risk to cover any additional increases in project costs for the scope of work described in the Contract Documents and GMP proposal.
- 1.11. Construction Manager Professional – The person, firm or corporation named as such in this Contract who has the rights, duties, responsibilities, and limits of authority as set forth in this Contract and in the Construction Manager Professional's Contract with the City.

- 1.12. Contract – This written document, including its exhibits and attachments signed by the City and CM@Risk covering the Construction Services phase of the Project and including other documents (the “Contract Documents”) itemized and referenced in or attached to and made part of this Contract. This definition replaces the MAG Specification definition of Contract.
- 1.13. Contract Documents – This Contract, exhibits, attachments, ”General Provisions”, “Special Provisions”, “Technical Specifications”, “Maricopa Association of Governments Uniform Standard Specifications and Details for Public Works Construction” as amended by the City of Tempe, “Plans”, “Performance Bonds”, “Payment Bonds”, all Written Amendments, Addendums and Change Orders to this Contract and any other documents so designated in this Contract. This definition replaces the MAG Specification of Contract Documents.

In case of a discrepancy or conflict, the order in which the Contract Documents govern is as follows from the highest to lowest: Special Provisions, Technical Specifications, Plans, General Provisions, Tempe Supplement to the M.A.G. Specifications, Tempe Supplement to the M.A.G. Details, M.A.G. Standard Specifications and Standard Details.

- 1.14. Cost of the Work – The direct costs necessarily incurred by the CM@Risk in the proper performance of the Work. The Cost of the Work shall include direct labor costs, subcontract costs, costs of materials and equipment incorporated in the completed construction, costs of other materials and equipment, temporary facilities, building permit fees, materials testing, and related items. The Cost of the Work shall not include the CM@Risk’s construction fee, general conditions fee, taxes, bonds, or insurance costs.
- 1.15. Cost Model – A breakdown of the scope of the Project that is initially developed by the CM@Risk during the conceptual design phase and based on information from the Project Team and the CM@Risk’s records of similar projects. The model will evolve as the design progresses and be maintained by the CM@Risk throughout the design phase and will include any assumptions and clarifications made by the CM@Risk. The model will support any cost estimates, Alternative Systems Evaluations and eventually any GMP Proposals, when required by the Project Team.
- 1.16. Day – Calendar day(s) unless otherwise specifically noted in the Contract Documents.
- 1.17. Deliverables – The work products prepared by the CM@Risk in performing the scope of work described in the Design Phase Services Contract. Some of the major deliverables to be prepared and provided by the CM@Risk during the design phase include but are not limited to: Construction Management Plan, Cost Model, Project Schedule of Values, Alternative System Evaluations, Procurement Strategies and Plans, Cost Estimates, Construction Market Surveys, Cash Flow Projections, GMP Proposals, Subcontractor Procurement Plan, Subcontractor Contracts, Subcontractor Bid Packages, Supplier Contracts, and others as indicated in this Contract or required by the Project Team.
- 1.18. Design Engineer – The person, firm or corporation having a contract with the City to furnish design services for this project.

- 1.19. Design Engineer's Consultant – A person, firm, or corporation having a contract with the Design Engineer to furnish services required of the Design Engineer, as the Design Engineer's independent professional associate or consultant with respect to the Project.
- 1.20. Design Phase Contract – The Contract between the City and CM@Risk for the Services provided by the CM@Risk during the design phase which may have included the following: design recommendations, project scheduling, constructability reviews, alternate systems evaluation, cost estimate, GMP preparation, and subcontractor bid phase services.
- 1.21. Effective Date of this Contract – The date specified in this Contract on which the Contract becomes effective, but if no such date is specified, the date on which the last of the two parties signs this Contract.
- 1.22. Engineer – The City Engineer acting directly or through his duly authorized representative. This definition replaces the MAG Specification definition for Engineer.
- 1.23. General Conditions Costs – Includes, but is not limited to, the following types of costs for the CM@Risk during the construction phase: payroll costs for the project manager or construction manager (but not both) for Work conducted at the site; payroll costs for the superintendent and full-time general foremen; payroll costs for management personnel resident and working on the site; workers not included as direct labor costs engaged in support functions ( e.g., loading/unloading, clean-up); costs of offices and temporary facilities including office materials, office supplies, office equipment, minor expenses, utilities, fuel, sanitary facilities and telephone services at the site; costs of liability insurance premiums not included in labor burdens for direct labor costs; costs of bond premiums; costs of consultants not in the direct employ of the CM@Risk or subcontractors; taxes on the Work and for which the CM@Risk is liable; and fees for permits and licenses. Certain limitations and exclusions are described in the General Conditions for the construction phase.
- 1.24. Guaranteed Maximum Price (GMP) Proposal – The offer or proposal of the CM@Risk which sets forth the GMPs for the entire Work or portions of the Work to be performed during the construction phase. The GMP Proposal(s) are to be developed pursuant to Exhibit "A" of this Contract. The "GMP Proposal" is interchangeable with the term "Bid" as it is used in the MAG Specifications.
- 1.25. Laws and Regulations – Any and all applicable laws, rules, regulations, ordinances, codes and orders of any and all governmental bodies, agencies, authorities and courts having jurisdiction.
- 1.26. "MAG Specifications" – Maricopa Association of Governments Uniform Standard Specifications and Standard Details for Public Works Construction, latest edition, and the City of Tempe Supplement thereto.
- 1.27. Notice of Award – The written notice by the City to the CM@Risk stating that upon compliance by the CM@Risk with the conditions precedent enumerated therein, within the time specified, the City will sign and deliver this Contract. This definition replaces the MAG Specification definition for Notice of Award.

- 1.28. Notice to Proceed – A written notice given by City to the CM@Risk fixing the date on which the CM@Risk will start to perform the CM@Risk’s obligations under this Contract. This definition replaces the MAG Specification definition for Notice to Proceed.
- 1.29. Plans – Documents, which visually represent the scope, extent and character of the Work to be furnished and performed by the CM@Risk during the construction phase and which have been prepared or approved by the Design Engineer and the City.

This definition includes Plans that have reached a sufficient stage of completion and have been released by the Design Engineer solely for the purposes of review and/or use in performing constructability or biddability reviews and in preparing cost estimates (e.g., conceptual design Plans, preliminary design Plans, detailed design Plans at 30%, 60%, 90% or 100%, but “NOT FOR CONSTRUCTION”). Shop drawings are not Plans as so defined. This definition replaces the MAG Specification definition for Plans.

- 1.30. Project – The total design and construction of which the design phase services and construction phase Work to be provided may be the whole or a part. This definition replaces the MAG Specification definition for Project.
- 1.31. Project Team – Construction services team consisting of the Design Professional, CM@Risk, the City (Water Utilities Department representatives, Design Project Manager, Construction Project Manager), and Construction Manager Professional and other stakeholders who are responsible for making decisions regarding the Project. The other stakeholders will be identified in the preconstruction conference.
- 1.32. Samples – Physical examples of materials, equipment or workmanship representative of a part of the construction phase Work and which establish the standards by which that portion of the construction phase Work will be evaluated.
- 1.33. Shop Drawings – All drawings, diagrams, illustrations, schedules and other data or information specifically prepared or assembled by or for the CM@Risk and submitted by the CM@Risk to illustrate some portion of the Work. This definition replaces the MAG Specification definition for Shop Drawings.
- 1.34. Specifications – The part(s) of the Contract Documents labeled as Technical Specifications for the construction phase consisting of written technical descriptions of materials, equipment, construction systems, standards and workmanship as applied to the Work and certain administrative details applicable thereto. This definition replaces the MAG Specification definition for Specifications.
- 1.35. Subcontractor – An individual, firm, entity or corporation having a direct contract with the CM@Risk who undertakes to perform a part of the design phase services or construction phase Work at the site for which the CM@Risk is responsible. This definition replaces the MAG Specification definition for Subcontractor.
- 1.36. Substantial Completion – When the Work, or when an agreed upon portion of the Work, is sufficiently complete so that the City, at the City’s discretion, can occupy and use the Project or a portion thereof for its intended purposes.

Generally, the City will not issue partial acceptance of buildings. If the City deems partial acceptance is necessary, such partial acceptance will be done at the sole discretion of the City. Partial acceptance of buildings shall include, as a minimum, (a) approval by City Fire Marshall and local authorities including issuance of the Certificate of Occupancy; (b) all systems in place, functional, and displayed to the City or it's representative; (c) all materials and equipment installed; (d) all systems reviewed and accepted by the City; and (e) Heating, Ventilation and Air Conditioning test and balance completed at least 30 days prior to projected substantial completion.

For buildings and other projects, partial acceptance may also include (a) elevator permit; (b) draft Operation and Maintenance manuals and record documents reviewed and accepted by the City; (c) City operation and maintenance training completed; (d) landscaping and site work; and (e) final cleaning.

- 1.37. Supplier – A manufacturer, fabricator, supplier, distributor, materialman or vendor having a direct contract with CM@Risk or with any Subcontractor to furnish materials or equipment to be incorporated in the construction phase Work by CM@Risk or any Subcontractor.
- 1.38. Total Float – Number of calendar days by which the design phase services or construction phase Work or any part of the same may be delayed without necessarily extending a pertinent schedule milestone in the Project Schedule.
- 1.39. Work – Any or all of the improvements as required by the Contract Documents, and the construction, demolition, reconstruction, and repair of all or any portion of such improvements, and all labor, services, incidental expenses, and material necessary or incidental thereto. This definition replaces the MAG Specification definition for Work.

## 2. SCOPE OF THE WORK AND LOCATION OF WORK

- 2.1. The CM@Risk shall furnish any and all plant, materials, labor, construction equipment, services and transportation (all applicable taxes included) required for performing all work for the installation of the

**WESTERN CANAL MULTI-USE PATH  
PROJECT NO. 6000421  
ADOT TRACS NO. 0000 MA TMP ss57101C  
ADOT PROJECT NO. CM-TMP-0(026)A**

as described in the Contract Documents for the sum of Nine Million Five Hundred Twenty Four Thousand Two Hundred Twenty Eight and 00/100 Dollars(\$9,524,228.00), which is the Guaranteed Maximum Price (GMP) as shown in Exhibit A, and to construct the same and install the material therein for the Owner in a good and workmanlike and substantial manner and to the satisfaction of the Owner or his properly authorized agents and strictly pursuant to and in conformity with the Specifications and Plans for the above referenced project(s) and other documents that may be made by the Owner through the Engineer or his properly authorized agents, as provided herein.

- 2.2. The full street or physical address of the construction Work location is approximately 5 miles along the Western Canal from Arizona Mills Mall to the Price frontage road. The CM@Risk Contractor shall list each Work location in any and all Contract Documents with each subcontractor at any level and each subcontractor shall include each Work location in any and all Contract Documents with its subcontractors at any level.

### 3. TIME OF COMPLETION

The CM@Risk further covenants and agrees at its own proper cost and expense, to do all work and furnish all plant, materials, labor, construction equipment, services and transportation for performing all of the work for the construction of said improvements and to construct the same and install the material therein, as called for by this Contract free and clear of all claims, liens, and charges whatsoever, in the manner and under the conditions specified within the time stated in the Notice to Construction Manager at Risk. See Section 4, IV., N., Completion of the Work, below.

### 4. GENERAL PROVISIONS

#### 4.1. CM@RISK REQUIREMENTS AND CONDITIONS

##### 4.1.1. LICENSES

- a. The Subcontractors must carry the appropriate State of Arizona Contractor's license for the proposed work at the time of bid. If the subcontractor does not have the appropriate license, the City reserves the right to reject its bid and to have the award made to the lowest bidder who has the appropriate license.
- b. Prior to execution of this contract, the CM@Risk must possess a valid City of Tempe Transaction Privilege License and shall provide the Permit Number of such for validation and must carry the appropriate State of Arizona Contractor License.

#### 4.2. EXAMINATION OF PREMISES

- 4.2.1. The CM@Risk shall visit the site of the project and shall fully acquaint itself with the conditions as they exist, so that it may fully understand the facility, difficulties and restrictions attending the execution of the work.
- 4.2.2. Subcontractor bidders shall also thoroughly examine and be familiar with the Specifications and other Contract Documents. The failure of the CM@Risk to obtain, receive or examine any addenda to the proposed Contract Documents, or to visit the site and acquaint itself with the conditions there existing, shall not relieve it from any obligation with respect to its proposal.
- 4.2.3. By submitting a proposal, the CM@Risk agrees that it has examined the site, Specifications and other Contract Documents and accepts, without recourse, all site conditions and the proposed Contract Documents, except for conditions that could

not have been reasonably foreseen or discovered upon examination of the site, specifications and other Contract Documents.

## 5. AWARD AND EXECUTION OF CONTRACT

### 5.1. EXECUTION OF CONTRACT AND BONDS

The form of the contract, which the CM@Risk will be required to execute and the form of bonds which it will be required to furnish, are included in the Contract Documents and should be carefully examined by the CM@Risk. The CM@Risk will be required to execute the bonds and the standard form of Contract in one (1) original counterpart within ten (10) calendar days after formal Notice of Award of Contract. Failure to execute this Contract and file satisfactory contract bonds as provided herein within 10 (ten) calendar days after the date of Notice of Award, shall be just cause for the cancellation of the award.

### 5.2. CM@RISK INSURANCE AND BOND RATING REQUIREMENTS

5.2.1. Personal or individual bonds are not acceptable.

5.2.2. Bonding companies and Liability and Excess insurance carriers shall be "Best Rated A-VII " or better as currently listed in the most recent "Best's Key Rating Guide (Property/Casualty)" published by the A.M. Best Company. This requirement does not apply to the Worker's Compensation/Employers Liability portion on the Certificate of Insurance.

5.2.3. Each such bond shall be executed by a surety company or companies duly licensed to do business in the State of Arizona. The bonds shall be written or countersigned by an authorized representative of the surety who is either a resident of the State of Arizona or whose principal office is maintained in this State, and the bonds shall have attached thereto a certified copy of Power of Attorney of the signing official.

### 5.3. INSURANCE REQUIREMENTS

The CM@Risk's attention is directed to Contractor's Insurance, MAG Specification 103.6. The insurance policies required by MAG Specification 103.6 shall additionally provide full coverage of indemnity to the City, including an increase in the minimum limits to \$5,000,000 combined single limit coverage for General Liability. Prior to execution of the contract, the CM@Risk shall furnish the City with a Certificate of Insurance as evidence that policies providing the required coverages, conditions, and limits are in full force and effect. Such certificates shall identify the Project Number and shall provide for not less than thirty (30) days advance written notice by Certified Mail of Cancellation or Termination. The Cancellation Clause shall not include the phrases "endeavor to" or "but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives." When the project includes construction of a new building addition to an existing building, Builders Risk Insurance shall be provided for the full amount of the contract, in accordance with MAG Specification 103.6C.

#### 5.4. HEALTH INSURANCE REQUIREMENTS

- 5.4.1. All CM@Risk who enter into a contract in excess of \$30,000.00 with the City of Tempe must certify that they offer, and all of its major subcontractors will offer, health insurance for all employees. Health insurance must be offered to eligible dependents of all such employees. An affidavit must be signed in the form included herein (Page AFF-2). Major subcontractors are defined as entities doing work in excess of \$30,000.00 as determined at the start of each project. All required health insurance must be maintained during the entire time of the contract with the City.
- 5.4.2. Health insurance is required for all contractor and major subcontractor employees who work more than one hundred and twenty (120) days in any calendar year. A "work day" consists of any time within a twenty-four hour period, regardless of number of hours that the individual is paid. At this time, health insurance is not required for temporary employees or students working part-time who are enrolled in a recognized educational institution.
- 5.4.3. The health insurance requirements shall apply to all employees directly involved with this City project including support and administrative personnel.
- 5.4.4. All complaints concerning violations of the health insurance requirements shall be filed, in writing, with the Public Works Department, within thirty (30) days from discovery of the violation. An administrative hearing will be held before the Public Works Manager, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal from the decision of the Public Works Manager may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Public Works Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.
- 5.4.5. In the event of a finding of violation of the insurance provisions, the company in violation of the provision shall be barred from bidding on, or entering into, any Public Works contract with the City for a period of three (3) years from the execution of the contract.
- 5.4.6. All Contractors subject to the health insurance requirements shall post, in English and Spanish, notice of the health insurance requirements at its office and at the job site. Signs for posting will be provided by the City at the Pre-construction Conference for Contractors and sent with the executed contract for Consultants.

#### 5.5. BONDS REQUIRED

Bonds in the following amounts will be required of the CM@Risk at the time of executing the formal contract and must meet the requirements of Arizona Revised Statutes Title 34, Chapter 6, as amended:

1. Performance bond, one hundred percent (100%) of the contract price.
2. Payment bond, one hundred percent (100%) of the contract price.

## 5.6. INDEMNIFICATION

- 5.6.1. To the fullest extent permitted by law, the CM@Risk, its successors, assigns and guarantors, shall defend, indemnify and hold harmless the City of Tempe, its agents, officers, officials and employees from and against all allegations, demands, proceedings, actions, claims, damages, losses, expenses, judgments, including but not limited to, attorney fees, court costs, and the cost of appellate proceedings, and all claim adjusting, relating to, arising out of, or resulting from any acts, errors, mistakes, omissions, work or services of the CM@Risk, its agents, employees, or any tier of CM@Risk's subcontractors in the performance of this Contract.
- 5.6.2. CM@Risk's duty to defend, indemnify and hold harmless the City of Tempe, its agents, officers, officials and employees shall arise in connection with any allegation, demand, proceeding, action, claim, damage, loss, expense or judgment that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of property including loss of use resulting there from, caused by CM@Risk's acts, errors, mistakes, omissions, work or services in the performance of this Contract including any employee of the CM@Risk, any tier of CM@Risk's subcontractors or any other person for whose acts, errors, mistakes, omissions, work or services the CM@Risk may be legally liable.
- 5.6.3. The amount and type of insurance requirements set forth herein will not be construed as limiting the scope of the indemnity provisions of this Contract.

## 6. **SCOPE OF WORK**

### 6.1. DESCRIPTION OF WORK

The proposed work to construct the Western Canal Multi-Use Path will consist of construction of approximately 5 miles of multi-use path along the Western Canal from Arizona Mills Mall to the Price frontage road together with associated work as described in the attached Specifications.

### 6.2. TRAFFIC CONTROL

- 6.2.1. All traffic shall be regulated in accordance with MAG; the City of Phoenix Barricade Manual, latest edition, with City of Tempe revisions, available through the City of Tempe Transportation Division (Transportation) at 480-350-8219; the Manual on Uniform Traffic Control Devices (MUTCD); and any Special Provisions included herein.
- 6.2.2. At the time of the pre-construction conference, the CM@Risk shall designate an American Traffic Safety Services Association (ATSSA) certified individual who is well qualified and experienced in construction traffic control and safety, to be responsible for implementing, monitoring, and altering traffic control measures as necessary to insure that traffic is carried through the work area in an effective manner and that motorists, pedestrians, bicyclists, and workers are protected from hazard and accidents. At the same time, the City shall designate a representative

who will be responsible to see that all traffic control and traffic control alterations are implemented per these traffic control specifications.

- 6.2.3. The CM@Risk shall have the full responsibility and liability for traffic control for this project. The CM@Risk shall submit a Traffic Control Plan to the Transportation Division for approval one week prior to beginning work under this contract. It shall be noted that traffic under this contract shall include all motor vehicles, bicyclists, and pedestrians.
- 6.2.4. During construction it may be necessary to alter traffic control as approved by the Transportation Division. Alterations to traffic control shall be in accordance with the latest edition of Part VI of the Manual on Uniform Traffic Control Devices: "Traffic Control for Streets and Highway Construction and Maintenance Operations"; the latest edition of the ADOT Traffic Control Manual; or the City of Phoenix Barricade Manual, latest edition, with revisions as adopted by the City of Tempe. The most restrictive manual shall apply.
- 6.2.5. No measurement will be made for traffic control. No payment will be made for traffic control. The cost thereof shall be included in the GMP Proposal for the construction or installation of the items to which such traffic control is incidental or appurtenant. Any revisions shall be submitted to the Transportation Division for review and approval.
- 6.2.6. In the event the CM@Risk damages any traffic signal equipment, traffic signal conduit, and/or circuits, it shall have them repaired immediately at its expense by an electrical contractor that has had traffic signal experience which is pre-approved by the City. Any damage repaired by the City will be billed to the CM@Risk at twice the City's cost.
- 6.2.7. The CM@Risk shall notify all adjacent or affected residents or businesses at least forty-eight (48) hours in advance of any street, alley, sidewalk, and driveway closures and make suitable arrangements to have all vehicles moved to a satisfactory location outside the closed area.
- 6.2.8. Pedestrian access shall be maintained along the length of the project at all times per the requirements of the ADA and as approved by the Transportation Division.
- 6.2.9. Speed limits shall be strictly enforced.
- 6.2.10. For more information, please contact the City of Tempe Transportation Division at (480) 350-8219.

### 6.3. CLEAN-UP

The CM@Risk shall, upon completion of the Work, remove all temporary construction facilities, debris, and unused materials provided for in the work, and put the work site of the work and public right-of-way in a neat and clean condition. No special payment will be made for this item.

6.4. ALTERATION OF WORK

- 6.4.1. In the event that significant changes in the scope of the work, and/or changes in the quantities due to contingencies of construction becomes necessary, such changes shall be made in accordance with Section 104.2 of General Conditions in the MAG Specifications.
- 6.4.2. The costs associated with any extra work as authorized by the contracting agency must be approved prior to the start of work. Extra work performed on an actual cost basis shall be submitted for approval within twenty-one (21) days after the completion of such work. The final costs for additional work shall also include any and all charges associated with extended general conditions or contract acceleration.

6.5. SUBSIDIARY WORK

All work called for in the Plans and Specifications shall be performed by the CM@Risk and unless a specific bid item is provided for the work, then such portion of the work will be considered subsidiary to other work for which payment is provided.

7. **CONTROL OF WORK**

7.1. INTERPRETATIONS OF DRAWING AND DOCUMENTS

If any Subcontractor submitting a bid for the proposed Work or any part thereof is in doubt as to the true meaning of part of the Contract Documents, or finds discrepancies in or omissions from the Contract Documents, such Subcontractor may submit to the Engineer a written request for an interpretation or correction thereof. The Subcontractor submitting the request will be responsible for its prompt delivery. Any interpretations or corrections of the proposed documents will be made by Addendum duly issued, and a copy of each addendum will be mailed or delivered to the CM@Risk who shall distribute the addendum to the appropriate Subcontractor(s). The City of Tempe will not be responsible for any other explanation or interpretations of the documents.

7.2. CM@RISK'S REPRESENTATIVE

The CM@Risk shall at all times be present at the work in person or represented by a foreman or other properly designated agent. Instructions and information given by the Engineer to the CM@Risk's foreman or agent on the Work shall be considered as having been given to the CM@Risk.

7.3. RELOCATION OF UTILITIES

All utilities in conflict with the new Work will be relocated by the City except as otherwise provided in the Plans and Specifications,

7.4. SUPERVISION BY CM@RISK

The CM@Risk will supervise and direct the work. It will be solely responsible for the

means, methods, techniques, sequences and procedures of construction. The CM@Risk will employ and maintain on the work a qualified supervisor or superintendent who shall have been designated in writing by the CM@Risk as the CM@Risk's representative at the site. The supervisor shall have full authority to act on behalf of the CM@Risk and all communications given to the supervisor shall be as binding as if given to the CM@Risk. The supervisor shall be present on the site at all times as required to perform adequate supervision and coordination of the work.

Nothing contained in this Contract shall be construed as establishing an employer/employee relationship, partnership or joint venture between the CM@Risk and the City.

7.5. CONSTRUCTION STAKING

Construction staking will be provided by the CM@Risk. Replacement of construction stakes that have been knocked out due to CM@Risk's work or lack of work, weather conditions, traffic, or vandalism will be at the CM@Risk's expense.

7.6. SURVEY CONTROL POINTS

Existing survey monuments shall be protected by the CM@Risk or removed and replaced under the direct supervision of the City Surveyor or the City Surveyor's authorized representatives. Prior to construction, it is the responsibility of the CM@Risk to notify the City Surveyor of any survey monuments which need to be referenced off of the monument. Any monuments which are lost and have not been referenced off due to the CM@Risk's negligence and/or lack of notification to the City Surveyor shall be replaced at the CM@Risk's expense. Lot corners shall not be disturbed without knowledge and consent of the property owner and only after such corner has been properly referenced for replacement.

7.7. AUTHORITY OF THE CONSTRUCTION MANAGER PROFESSIONAL

7.7.1. The Construction Manager Professional shall act as the City Engineer's designated representative during the construction period. Construction Manager Professional shall advise on questions concerning coordination with the City of Tempe, public safety, and quality and acceptability of materials and work performed. The Construction Manager Professional or the Construction Manager Professional's assigned inspector shall interpret the intent of the Contract Documents in an unbiased manner.

7.7.2. The Construction Manager Professional or Construction Manager Professional's assigned inspector shall be present on the site at times during construction to monitor the work and to maintain records for contract management. The Construction Manager Professional shall promptly make decisions relative to the interpretation of the Contract Documents so as to minimize delays in construction. The Construction Manager Professional will not be responsible for directing construction, control, techniques, sequence, or procedures, or for directing job safety.

## 7.8. SHOP DRAWINGS, SCHEDULES & SAMPLES

- 7.8.1. In time for each to serve its proper purpose and function, the CM@Risk shall submit to the Engineer such schedules, reports, drawings, lists, literature samples, instruction, directions, and guarantees as are specified or reasonably required for construction, operation, and maintenance of the facilities to be built and/or furnished under this Contract.
- 7.8.2. Shop drawings and data shall be submitted to the Engineer in such number of copies as will allow him to retain four (4) copies of each submittal. The submittal shall clearly indicate the specific area of the Contract Documents for which the submittal is made. The additional copies received by him will be returned to the CM@Risk's representative at the job site. The Engineer's notations of the action which he has taken will be noted on one (1) of these returned copies.
- 7.8.3. The above drawings, lists, prints, samples, and other data shall become a part of the Contract and a copy of the same shall be kept with the jobsite Contract Documents, and the fabrications furnished shall be in conformance with the same. However, the Engineer's review of the above drawings, lists, prints, specifications, samples, or other data shall not release the CM@Risk from its responsibility for the proper fulfillment of the requirements of this Contract nor for fulfilling the purpose of the installation nor from its liability to replace the same, should it prove defective or fail to meet the specified requirements.

## 7.9. AS-BUILT PLANS

The CM@Risk shall provide and maintain accurate field data on a red-lined set of contract Plans, which are to be kept current and submitted as complete at the conclusion of the construction. These record Plans will be used as documentation for progress payments, and upon project completion, for the preparation of 'as-built' file Plans by the architect/engineer. All 'as-built' information shall be on 3 ml double matte black line mylar and shall be 24" x 36" in size. Final payment will not be issued until all record Plans and as-built information are submitted by the CM@Risk, and certified to be complete by the architect/engineer of record.

## 7.10. UNDERGROUND UTILITIES

Underground utilities indicated on the Plans are in accordance with maps furnished by the City of Tempe and by each utility company. The locations are only approximate and require verification prior to construction as mandated by City of Tempe requirements for underground street crossings and potholing.

## 7.11. INSPECTION

The CM@Risk is responsible for complying with the Specifications and is hereby forewarned that final approval of any work will not be given until the entire project is completed and accepted. Prior to "final inspection" on any City facilities requiring a Building Permit, the CM@Risk must call for final inspections from the Development

Services and Public Works Departments of the City of Tempe. The final inspection must be completed prior to final acceptance and payment by the City Engineer.

7.12. SUBSTANTIAL COMPLETION

Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, City shall release to CM@Risk all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount up to two and one half times (2.5) the reasonable value of all remaining or incomplete items of Work as noted in a certificate of Substantial Completion.

7.13. BENEFICIAL OCCUPANCY

"Beneficial occupancy" is use of a facility or project, in whole or in part, by the owner for its intended purpose. This may occur even though some work of the contract remains undone. Prior to such use or occupancy, the owner will prepare a written agreement with the CM@Risk and accomplish a partial acceptance inspection. Beneficial occupancy will apply to general right of way projects only.

7.14. COMPLETION OF THE WORK

Completion of the Work is full completion of all construction associated with a contract, including, but not limited to punch list items, close out documentation, Operation and Maintenance manuals, warranties, and record Plans as certified by the Architect or Engineer of record.

7.15. FINAL ACCEPTANCE & GUARANTEE

"Final Acceptance" shall mean a written final acceptance of the Work. The City Engineer shall make the final acceptance promptly after the work has been completed in accordance with the Contract Documents and after inspection is made. The work performed under this contract shall be guaranteed for a period of one year from the date of final acceptance.

8. **CONTROL OF MATERIALS**

8.1. EXCESS MATERIALS

Excess or unsuitable material, broken asphaltic concrete and broken portland concrete shall be disposed of by the CM@Risk. The CM@Risk shall, prior to commencement of the work, submit a letter to the City Engineer stating the location of disposal site(s) for all excess material and certifying that it has obtained the property owner's permission for the disposal of all surplus material.

8.2. QUALITY CONTROL

8.2.1. All material shall be new and of the specified quality and equal to the accepted samples, if samples have been submitted. All work shall be done and completed in a thorough, workmanlike manner, notwithstanding any omission from these

Contract Documents; and it shall be the duty of the CM@Risk to call the Engineer's attention to apparent errors or omissions and request instruction before proceeding with the work.

8.2.2. The Engineer may, by appropriate instruction, correct errors and supply omissions, which instructions shall be as binding upon the CM@Risk as though contained in the original Contract Documents.

8.2.3. At the option of the Engineer, materials to be supplied under this Contract will be tested and/or inspected either at its place of origin or at the site of the work. The CM@Risk shall give the Engineer written notification well in advance of actual readiness of materials to be tested and/or inspected at point of origin. Satisfactory tests and inspections at the point of origin shall not be construed as a final acceptance of the material nor shall it preclude retesting or reinspection at the site of the work.

## 9. **LEGAL REGULATIONS AND RESPONSIBILITIES TO PUBLIC**

### 9.1. CONFLICT OF INTEREST

This contract is subject to cancellation under the provisions of ARS §38-511.

### 9.2. EMERGENCIES

In any emergency affecting the safety of persons and/or property, CM@Risk shall act, at its discretion, to prevent threatened damage, injury or loss. The MAG Specification 107.5 applies to this provision.

### 9.3. NON-DISCRIMINATION

9.3.1. In connection with the performance of work under this Contract, the CM@Risk agrees not to discriminate against any employee or applicant for employment because of race, religion, color, national origin, sex, age or disability. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

9.3.2. The CM@Risk agrees to post hereinafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Contracting officer setting forth the provisions of the Non-Discrimination clause.

### 9.4. HAUL PERMIT

9.4.1. In any operation where more than one-tenth of an acre of surface area is disturbed and/or when unpaved onsite haul roads are used, the CM@Risk will obtain a Maricopa County Earth Moving Permit as required under Rule 200 of the Maricopa County Division of Air Pollution Control Requirements. This permit will require

that a Control Plan to mitigate dust and tracking problems be submitted to the County for approval prior to issuance of the Earth Moving Permit. The Control Plan should be submitted to the City of Tempe for review prior to County submittal to ensure that all elements of the planned operation are covered. Please contact the Maricopa County Division of Air Pollution Control at 602-506-6700 for additional details.

- 9.4.2. In addition, all Contractors hauling fill or excavation materials, where the haul exceeds five thousand (5,000) cubic yards or when the duration of the haul is more than ten (10) working days, are required to obtain a City of Tempe haul permit before the hauling operation begins. Prior to receiving a hauling permit, the CM@Risk must submit the required certificate of insurance, a plan showing the proposed haul routes and a complete schedule of the hauling operation to the City of Tempe Transportation Division. Prior to submittal, the CM@Risk should contact Engineering Services for complete details for issuance of the City of Tempe haul permit.

## 9.5. ENVIRONMENTAL REQUIREMENTS

- 9.5.1. The CM@Risk shall comply with all Federal, State, and Municipal regulations, laws, and policies relating to air, ground water quality, and water conservation. In addition, the following requirements are applicable for City construction projects.
- 9.5.2. Non-pick up sweepers will not be allowed except as required to make joints during chip sealing operations.
- 9.5.3. Water flooding of trenches with potable water will not be permitted.
- 9.5.4. All paints applied by sprayers shall be of a water-based type.
- 9.5.5. Provisions shall be made to prevent the discharge of construction silt, mud, and debris into City storm drains or streets.
- 9.5.6. Spills of oil, gas, chemical, or any other hazardous materials must be reported and removed by approved procedures. Mitigation measures shall be taken to prevent contamination of construction storage sites.
- 9.5.7. Concrete waste must be disposed of in an approved location and at least twenty-five (25) feet from established landscaping.
- 9.5.8. City of Tempe refuse roll-off containers shall be used on City projects. Please contact the Sanitation Supervisor, at 480-350-8268 with any questions.
- 9.5.9. Hazardous wastes shall not be discharged into the City's sanitary sewers or storm drainage system. All waste products shall be disposed of in accordance with applicable regulations.

9.5.10. The discovery of archeological ruins or artifacts must be reported immediately, and excavation shall not resume in the identified area until approved by the Engineer.

9.5.11. All materials supplied by the CM@Risk shall be 100% asbestos free unless otherwise approved by the City of Tempe.

9.5.12. No additional payment will be made for compliance with the above items.

9.5.13. In addition to the above, the use of new products made with reclaimed material and meeting project Specifications are encouraged.

## 9.6. SAFETY REQUIREMENTS

The CM@Risk shall comply with all applicable federal, state and local health and safety laws, regulations, ordinances, and requirements. In addition, the following requirements are applicable for City of Tempe construction projects.

### 9.6.1. PRE-CONTRACT REQUIREMENTS

- a. The CM@Risk shall submit current loss history information from all its insurance carriers before this contract is executed. The information specific to workers' compensation insurance carriers must include a three (3) year history of both its Experience Modification Factor (EMOD) and its loss ratio.
- b. The CM@Risk shall provide upon request a copy of its written health and safety program and any required employee training records or certificates.
- c. Insurance Confirmation – The CM@Risk shall provide certificates of insurance and meet indemnification criteria.

### 9.6.2. CONTRACT REQUIREMENTS

The CM@Risk will be required to attend a City safety briefing. The safety briefing session shall address the following issues:

- a. City Safety Rules and Expectations.
- b. Contractor Tailgates – CM@Risk shall conduct tailgate safety meetings regularly to ensure that safety on the job is given priority.
- c. Accident/Injury/Illness Procedures – The City's Construction Manager and the Risk Management Division shall be contacted any time an accident, injury or illness occurs on the project.
- d. Unsafe Acts – Contractor employees shall be empowered to stop an unsafe act or condition at City facilities.

- e. Safety Audits – The City reserves the right to conduct safety audits at the job site at any time. In addition, the City shall be notified should an OSHA inspection occur at a City job site.
- f. Job and Site Specific Requirements – Site specific requirements such as lockout/tagout rules and evacuation plans shall be covered during the safety briefing as indicated by the project exposures.
- g. The CM@Risk may have the following additional safety requirements based on the exposures of the project:
  - i. The CM@Risk shall implement a permit-required confined space program as required under federal and state statutes and/or regulations, and amendments thereto, for all work that encompasses a space that 1) is large enough and so configured that an employee can bodily enter and perform assigned work; 2) has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and 3) is not designed for continuous employee occupancy.
  - ii. As a part of the CM@Risk implementing a confined space program, it is the responsibility of the CM@Risk to provide trained attendant(s) and all intrinsically safe confined space entry related equipment (example: ladders, gas detectors, safety harnesses, safety tripods, and electrical devices) as needed for safe entry of a confined space.
  - iii. When any City employee is required to enter a confined space during the construction phase of a project, such as for the purpose of inspection, it is the responsibility of the CM@Risk to provide a trained attendant and all necessary equipment required for safe entry of the City employee.
  - iv. Safety will be a part of the agenda for the weekly construction meetings. Items of discussion will be outstanding safety and health issues, current safety meeting topics, environmental issues and any accidents or injuries on the job. The City reserves the right to request the agendas, minutes of the meetings, and documentation of any safety tailgate meetings held on the job site.

#### 9.7. TEMPORARY BARRICADES

- 9.7.1. Temporary barricades shall be regulated in accordance with the City of Phoenix Traffic Control and Barricade Manual, latest edition, with City of Tempe revisions available through the City of Tempe Transportation Division at (480) 350-8219.

9.7.2. No additional payment will be made for temporary barricades. Temporary barricades will be considered subsidiary items to those items for which payment is made.

9.8. PROTECTION OF FINISHED OR PARTIALLY FINISHED WORK

9.8.1. The CM@Risk shall properly guard and protect all finished or partially finished work, and shall be responsible for the same until that phase is completed and accepted by the City Engineer.

9.8.2. Estimate or partial payment of work so completed shall not release the CM@Risk from such responsibility but he shall turn over the entire work in full accordance with these Specifications before final payment can be made.

9.9. BLUE STAKE

The CM@Risk is required to notify Blue Stake (602-263-1100) prior to the excavation of any material in accordance with A.R.S. §§ 40-360.21 through 40-360.32, as amended. The CM@Risk shall directly contact the City for the marking of electrical underground apparatus for traffic signals, sprinkler and irrigation facilities.

9.10. SALT RIVER PROJECT CONSTRUCTION CLEARANCE AGREEMENT

Salt River Project requires all contractors who will be working on its facilities to sign a standard form "Construction Clearance Agreement" prior to issuance of a license. This agreement sets forth the requirements to complete the proposed work in an allotted time frame or to pay full costs for others to complete. It also obligates the contractor to comply with all applicable federal, state, and local laws, rules, regulations, and ordinances including, but not limited to, the OSHA Permit Required Confined Space rules, as amended. The CM@Risk is responsible for executing a "Construction Clearance Agreement" with Salt River Project, if required, and furnishing a copy to the City of Tempe prior to proceeding with any construction on Salt River Project facilities.

9.11. NOTIFICATION OF PROPERTY OWNERS

All property owners that may be affected by the proposed construction activities shall be notified of scope and duration of the construction activities by the CM@Risk prior to start of construction.

9.12. ACCESS

Access shall be maintained to adjacent businesses at all times during construction. Where property has more than one point of access, no more than one access shall be restricted or closed at any one time. If only one driveway exists, then access shall be maintained to at least one-half of the driveway at a time. Access to adjacent private driveways shall be maintained during all non-working hours.

9.13. PROTECTION OF EXISTING FACILITIES

The CM@Risk is to protect all existing facilities during construction. Utility poles that may be affected by the construction activities shall be protected and/or braced by the CM@Risk. The CM@Risk shall notify the appropriate Utility Company or agency of any construction that may affect its facilities and state the course of action which will be taken to protect same.

9.14. STORM WATER POLLUTION PREVENTION PLAN AND AZPDES PERMIT

9.14.1. This project is subject to Arizona Pollutant Discharge Elimination System (AZPDES) General Permit requirements for discharge from construction activities to waters of the United States. Under provisions of that permit, the CM@Risk shall be designated as permittee, and shall be responsible for providing necessary material and taking appropriate measures to assure that all discharges authorized by the General Permit shall be consistent with the terms and conditions of the General Permit. The AZPDES Construction General Permit requirements for construction and Storm Water Pollution Prevention Plan can be downloaded from [www.adeq.state.az.us/enviro/water/permits/links.html](http://www.adeq.state.az.us/enviro/water/permits/links.html) or viewed at the City of Tempe Engineering Division.

9.14.2. The contractor shall complete and submit the following:

- a. Notice of Intent (NOI) for Coverage under AZPDES Permit No. AZG2003-001 for Construction Activity Discharges to Waters of the United States, including certification of the signature.
- b. Storm Water Pollution Prevention Plan (SWPPP) for the project.
- c. Notice of Termination (NOT) of coverage under the AZPDES Construction General Permit.

9.14.3. All subcontractors shall comply with all requirements of the AZPDES Construction General Permit and the project SWPPP. The SWPPP shall be kept on the project site at all times, and shall be retained by the permittee for three (3) years following project completion.

9.14.4. The contractor shall submit completed and signed NOI forms **PRIOR TO THE PROJECT PRECONSTRUCTION CONFERENCE** to the following address: **Stormwater Program – Water Permits Section/ NOI**, Arizona Department of Environmental Quality, 1110 West Washington, Phoenix 5415B-3, Arizona 85007. Copies shall be transmitted to the City's construction project manager at the time of the preconstruction meeting. The Contractor shall prepare a final SWPPP and submit it at the preconstruction meeting for discussion and approval.

9.14.5. Failure by the contractor (or any of its appropriate subcontractors) to submit the NOI forms within this time frame (or to promptly make revisions to those forms as requested by the City) which prevents **submittal** of the forms to the Arizona

Department of Environmental Quality within the mandated deadline of forty-eight (48) hours prior to start of construction will result in delay of the start of construction. The contractor will not be entitled to any claim for additional compensation for additional costs resulting from such a delay in the construction start date. The NOI shall be posted on the construction site along with the SWPPP.

9.14.6. It is the permittee's responsibility to perform inspections of all storm water pollution prevention control devices on the project on a monthly basis, and following each significant rainfall (0.50 inches or more). The contractor is responsible for maintaining those devices in proper working order, including cleaning and/ or repair.

9.14.7. All SWPPP reports required under this contract shall be available to the public in accordance with the requirements of the AZPDES Construction General Permit No. AZG2003-001. The contractor, as the permittee of construction activities with storm water discharges covered by the AZPDES Construction General Permit, shall make plans available to the public upon request through the Arizona Department of Environmental Quality.

9.14.8. No condition of the AZPDES Construction General Permit as well as the SWPPP shall release the contractor from any responsibilities or requirements under other environmental statutes or regulations.

9.14.9. Upon total project completion, acceptance, and de-mobilization, the contractor shall submit its completed, signed Notice of Termination (NOT) form to **Stormwater Program – Water Permits Section/ NOT**, Arizona Department of Environmental Quality, 1110 West Washington 5415B-3, Phoenix, Arizona 85007 with a copy to the City's construction project manager thereby terminating all AZPDES Construction General Permit coverage for the project.

9.14.10. The unit prices for the proposal items shall include all material, labor, and other incidental costs relating to the preparation and submittal of all AZPDES Construction General Permit related forms to Arizona Department of Environmental Quality; preparation, revision and maintenance of the SWPPP; and provision, installation, operation, and maintenance of all pollution control devices. The cost of the activities and items within this provision as provided by the contractor is considered incidental to other items and no extra payment will be made for these incidental costs. Such incidental costs shall include contractor costs in order to assure proper operation of the pollution control devices installed, including all maintenance, cleaning, and disposal costs associated with clean-up and repair following storm events or other runoff or releases on the project.

## 10. COMMENCEMENT, PROSECUTION AND PROGRESS

### 10.1. START OF WORK

Work shall start as soon as practical, and in no case later than seven (7) calendar days after the Notice to Proceed and shall be completed within three hundred sixty-five (365) calendar

days thereafter.

## 10.2. CONTRACT COMPLETION DATE

The date established in the Notice to Proceed is for completion of all or specified portions of the Work. This includes items of Work to be completed under an owner allowance or as part of a contingency item. The stated contract completion date will include weather conditions that are not unusually severe for the area and time of year. This date may be expressed as a calendar date or a number of calendar days after issuance of the Notice to Proceed.

## 10.3. CM@RISK'S CONSTRUCTION SCHEDULE

Prior to the start of work, a construction progress schedule shall be required for all projects and shall comply with the requirements of MAG Specification 108.4. In addition, a schedule update comparing actual progress with scheduled progress will be required with the submission of each monthly pay request.

## 10.4. HINDRANCES AND DELAYS

- 10.4.1. Except as provided in Section 10.4.2, no charge shall be made by the CM@Risk for hindrances or delays from any cause during the progress of any portion of the work embraced in this contract; but such delays, if due to no fault or neglect of the CM@Risk, shall entitle the CM@Risk to a time extension sufficient to compensate for the delays. The amount of the delay shall be determined by the Engineer provided the CM@Risk gives the Engineer immediate notice in writing of the cause of such delay.
- 10.4.2. The parties agree to negotiate for the recovery of actual costs related to expenses incurred by the CM@Risk for a delay under the following circumstance:
- 10.4.3. If the City is solely responsible for the delay which is unreasonable under the circumstances, and
- 10.4.4. Which delay was not within the contemplation of the parties to the contract at the time the contract was entered into, and
- 10.4.5. The CM@Risk can show the impact of the delay on the critical path of the construction activity as indicated in an approved Construction Progress Management schedule.
- 10.4.6. Unless specifically provided for in the Special Provisions (Section 5), the maximum compensation for delays, as described in Section 10.4.2, shall not exceed Contractor's actual cost.
- 10.4.7. This section shall not be construed to void any provisions of this contract, which require notice of delays, which provide for alternative dispute resolution or other procedures for settlement, or which provide for liquidated damages.

10.5. LIQUIDATED DAMAGES

Unless otherwise specified, liquidated damages will be applied in accordance with the MAG Specification 108.9. Completion of the Work as stated in this Contract is the same as completion of the work as stated in MAG Specification 108.9. Damages will be applied at the amounts specified in Table 108.1.

10.6. NON-WAIVER PROVISION

The failure of either party to enforce any of the provisions of this Contract or to require performance by the other party of any of the provisions of this Contract will not be construed as a waiver of such provisions nor will it affect the validity of this Contract or any part thereof or the right of either party to thereafter enforce each and every provision.

10.7. JURISDICTION

This contract will be deemed to be made under and will be construed in accordance with and governed by the laws of the State of Arizona, without regard to the conflicts or choice of law provisions thereof. An action to enforce any provision of this Contract or to obtain any remedy with respect hereto will be brought in the Superior Court, Maricopa County, Arizona, and for this purpose, each party hereby expressly and irrevocably consents to the jurisdiction and venue of such court.

10.8. SURVIVAL

All warranties, representations and indemnifications by the CM@Risk will survive the completion or termination of this Contract.

10.9. MODIFICATION

No supplement, modification or amendment of any term of this Contract will be deemed binding or effective unless in writing and signed by the parties hereto and in conformation with provisions of this Contract except as expressly provided herein to the contrary.

10.10. SEVERABILITY

If any provision of this contract or the application thereof to any person or circumstance is held invalid, illegal or unenforceable to any extent, the remainder of this Contract and the application thereof will not be affected and will be enforceable to the fullest extent permitted by law.

10.11. INTEGRATION

This Contract contains the full agreement of the parties hereto. Any prior or contemporaneous written or oral agreement between the parties regarding the subject matter hereof is merged and superseded hereby.

10.12. TIME IS OF THE ESSENCE

Time of each of the terms, covenants and conditions of this Contract is hereby expressly made of the essence.

10.13. THIRD PARTY BENEFICIARY

This Contract will not be construed to give any rights or benefits in the Contract to anyone other than the City and the CM@Risk. All duties and responsibilities undertaken pursuant to this Contract will be for the sole and exclusive benefit of the City and the CM@Risk and not for the benefit of any other party.

10.14. COOPERATION AND FURTHER DOCUMENTATION

The CM@Risk agrees to provide the City such other duly executed documents as may be reasonably requested by the City to implement the intent of this Contract.

11. **MEASUREMENTS AND PAYMENTS**

11.1. CONTRACT PRICE ADJUSTMENTS

11.1.1. The increase or decrease in Contract Price resulting from a change in the City requested change in Work shall be determined by one or more of the following methods:

- a. Unit prices set forth in the Contract or as subsequently agreed to between the parties;
- b. A mutually accepted, lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by the City; and
- c. Costs, fees and any other markups.

11.1.2. The markups that shall be allowed on such changes shall be no greater than the markups delineated in the approved GMP as shown on Exhibit A.

11.1.3. If an increase or decrease cannot be agreed to as set forth in items 1 through 3, above, and the City issues a Change Order, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Contract. CM@Risk shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.

11.1.4. If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to the City or the CM@Risk because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted.

- 11.1.5. If the City and the CM@Risk disagree upon whether the CM@Risk is entitled to be paid for any services required by the City, or if there are any other disagreements over the scope of Work or proposed changes to the Work, the City and the CM@Risk shall resolve the disagreement pursuant to MAG Specification 110.
- 11.1.6. As part of the negotiation process, CM@Risk shall furnish City with a good faith estimate of the costs to perform the disputed services in accordance with City's interpretations.
- 11.1.7. If the parties are unable to agree and City expects the CM@Risk to perform the services in accordance with City's interpretations, CM@Risk shall proceed to perform the disputed services, conditioned upon City issuing a written order to CM@Risk (i) directing CM@Risk to proceed and (ii) specifying City's interpretation of the services that are to be performed.

## 11.2. RECORD KEEPING AND FINANCE CONTROLS

- 11.2.1. Records of the CM@Risk's direct personnel payroll, reimbursable expenses pertaining to this Project and records of accounts between the City and CM@Risk shall be kept on a generally accepted accounting basis.
- 11.2.2. The City, its authorized representative, and/or the appropriate federal agency, reserve(s) the right to audit the CM@Risk's records to verify the accuracy and appropriateness of all pricing data, including data used to negotiate Contract Documents and any change orders.
- 11.2.3. The City reserves the right to decrease Contract Price and/or payments made on this Contract if, upon audit of the CM@Risk's records, the audit discloses the CM@Risk has provided false, misleading, or inaccurate cost and pricing data.
- 11.2.4. The CM@Risk shall include a similar provision in all of its Contracts with Subconsultants and Subcontractors providing services under the Contract Documents to ensure the City, its authorized representative, and/or the appropriate federal agency, has/have access to the Subconsultants' and Subcontractors' records to verify the accuracy of cost and pricing data.
- 11.2.5. The City reserves the right to decrease Contract Price and/or payments made on this Contract if the above provision is not included in Subconsultant's and Subcontractor's contracts, and one or more Subconsultants and/or Subcontractors do not allow the City to audit it's records to verify the accuracy and appropriateness of pricing data.

## 11.3. MISCELLANEOUS REMOVAL AND RELOCATIONS

Miscellaneous removals and relocations shall be construed to mean the removal of all unsuitable materials whether designated or implied by the Plans and Specifications, and shall include but not be limited to the removal of such items as pipes, concrete, asphalt, block, brick, rock, metal, and other comparable items of every nature and description,

unless such items are specifically designated in a separate bid item. Also, certain items require temporary removal and reinstallation such as mail box stands, sign posts, survey monument frames and covers, and other comparable items, and are included in this category.

#### 11.4. APPROXIMATE QUANTITIES

11.4.1. It is expressly understood and agreed by the parties hereto that the quantities of the various classes of work to be done and material to be furnished under this Contract, which have been estimated, as stated in the Proposal, are only approximate and are to be used solely for the purpose of comparing, on a consistent basis, the proposals offered for the work under this Contract; and the CM@Risk further agrees that the City of Tempe will not be held responsible if any claim for damages or for loss of profits because of a difference between the quantities of the various classes of work as estimated and the work actually done.

11.4.2. If any error, omission, or misstatement is found to occur in the estimated quantities, the same shall not invalidate this Contract or release the CM@Risk from the execution and completion of the whole or any part of the work in accordance with the Plans and Specifications herein mentioned, and for the prices herein agreed upon and fixed therefore, or excuse him from any of the obligations or liabilities hereunder, or entitle him to any damages or compensation except as may be provided for in this Contract.

#### 11.5. MISCELLANEOUS WORK AND ALLOWANCES

11.5.1. The following items will be included in the work with no direct payment allowed. Payment shall be included in the payment for other items for which direct payment is made.

- a. CM@Risk's expenses for, but not limited to: mobilization, job site office, storage facilities, traffic control and public safety devices, sanitary facilities, utilities and telephone.
- b. Cleanup including day-to-day cleanup.
- c. Notification to residents adjacent to this project prior to start of construction which would affect them.
- d. Water required for compaction or dust control.
- e. Miscellaneous removals and relocations not otherwise specified in the Technical Provisions.
- f. Power pole bracing.
- g. Removal of trees twelve inches (12") or less in diameter.

- h. Removal, relocation and/or modification of existing walls and fences.
- i. Trimming of trees and bushes.
- j. Replacement of plant material and repair of irrigation equipment to meet or exceed conditions existing prior to CM@Risk beginning work.

**12. SPECIAL PROVISIONS**

**12.1. PERMITS**

The Contractor shall be required to obtain all permits and licenses for the project and pay all applicable fees, unless otherwise noted on the Plans and Specifications. The Contractor shall be paid for the actual costs of the permits and license fees upon submitting a receipt showing the fee paid. Excluded are items such as all costs incurred by the Contractor in securing the permit except for the actual permit fee established by the agency, cost for all shutdowns or outages, cost for pole bracing, cost for any additional insurance requirements, and other similar type costs. There will be no charge to the Contractor for any of the necessary City of Tempe permits and inspections. The Contractor shall abide by all stipulations of all license and permits issued for this project.

**12.2. PHONE NUMBERS**

City of Tempe Engineering (Project Manager)	Mark Weber	480-350-8526
City of Tempe Transit	Eric Iwersen	480-350-8810
EPG	Scott Peters	602-956-4370
Blue Stake		602-263-1100

**12.3. UNIFORMED POLICE OFFICERS**

During the course of construction, it may be required to have a uniformed police officer present to facilitate traffic control per the Tempe Barricade Manual and the Traffic Engineer's direction. Uniformed police officers will be paid for by the City.

**12.4. OPEN TRENCHING AND STEEL PLATES**

The maximum amount of open trench in any state of trenching or backfilling shall be limited to five hundred feet (500'). All trenches shall be completely backfilled or covered using steel plates at the end of each working day. The use of steel plates shall not exceed seventy-two (72) hours between completion of work in trench and final patch. Steel plates are to be installed according to Detail T-450 of the Tempe Supplement to the MAG Details. All steel plates installed will be recessed into the existing pavement by milling until the top of the plate is flush with the top of the pavement.

**12.5. CONFIDENTIALITY OF PLANS AND SPECIFICATIONS**

12.5.1. Any Plans or Specifications the CM@Risk receives regarding this project are for official use only. The CM@Risk may not share them with others except as required

to fulfill the obligations of its contract with the City.

12.5.2. All Record Documents, Shop Drawings and other plans or drawings prepared or submitted by the CM@Risk shall include the following language: "Per City of Tempe Guidelines, these Plans are official use only and may not be shared with others except as required to fulfill the obligations of the CM@Risk's contract with the City of Tempe".

#### 12.6. IRRIGATION AND LANDSCAPE REPAIR

The Contractor shall repair all sprinkler and irrigation systems that are disturbed in the course of the work. There will be no separate payment for irrigation and landscape repair, the cost of which will be incidental to other bid items. It is highly recommended that the Contractor meet with owner(s) of irrigation systems prior to construction and note existing operating systems to minimize impact and repair costs.

#### 12.7. CONSTRUCTION STAKING

Construction staking shall be provided by the Contractor.

#### 12.8. SEQUENCE OF CONSTRUCTION

The Contractor shall submit a project sequencing schedule to the City Engineer for review at the pre-construction conference. The Contractor is on notice that the City will review the proposed schedule to insure limited community impact.

#### 12.9. COORDINATION WITH OTHER CONTRACTORS

12.9.1. There may other construction in the area during the contract period. Coordination between contractors may be required.

12.9.2. Should the Contractor cause damage to the work or property of any separate contractor at the site, or should any claim arising out of or resulting from the Contractor's performance of the work at the site be made by any separate contractor against the Contractor, Design Engineer, or Construction Manager or any other person, Contractor shall promptly attempt to settle with such other contractor by agreement, or to otherwise resolve the dispute by mediation, arbitration, or at law.

12.9.3. Contractor shall, to the fullest extent permitted by Laws and Regulations, indemnify and hold Owner, Design Engineers and Construction Manager and the officers, directors, employees, agents and other consultants of each and any of them harmless from and against all claims, costs, losses and damages, (including, but not limited to, all fees and charges of engineers, architects, attorneys and other professionals, and all court arbitration or other dispute resolution costs) arising directly, indirectly or consequentially out of our resulting from any action, legal or equitable, brought by a separate contractor against Owner, Design Engineer or Construction Manager of the officers, directors, employees, agents or other consultants of each and any of them to the extent based on a claim caused by, arising out of, or resulting from

Contractor's performance of the work.

12.9.4. Should a separate contractor cause damage to the work or property of Contractor or should the performance of work by any separate contractor at the site give rise to any other claim, Contractor shall not institute any action, legal or equitable against Owner, Design Engineer, or Construction Manager or the officers, directors, employees, agents, or other consultants of each and any of them or permit any action against any of them to be maintained and continued in its name or for its benefit in any court or before any mediator or arbitrator which seeks to impose liability on or to recover damages from Owner, Design Engineer, or Construction Manager or the officers, directors, employees, agents, or other consultants of each and any of them on account of such damage or claim.

12.9.5. If Contractor is delayed at any time in performing or furnishing work by any act or neglect of a separate contractor and Owner and Contractor are unable to agree as to the extent of any adjustment in Completion Time attributed thereto, Contractor may make a claim for an extension of time. An extension of the Completion Time shall be Contractor's exclusive remedy with respect to Owner, Design Engineer, or Construction Manager or the officers, directors, employees, agents, or other consultants of each and any of them for activities that are its respective responsibilities.

12.9.6. Cooperation between Contractors shall be in accordance with MAG Specification 105.7.

### 13. FEDERAL PROVISIONS

#### 13.1. NOTIFICATION OF FEDERAL PARTICIPATION

To the extent required by law, in the announcement of any third party contract award for goods or services having an aggregate value of \$500,000 or more, the Recipient agrees to specify the amount of Federal assistance to be used in financing that acquisition of goods and services and to express that amount of that Federal assistance as a percentage of the total cost of that third party contract. This project is expected to have the following funding, federal 51% and local 49%.

#### 13.2. DISADVANTAGED BUSINESS ENTERPRISES

##### 13.2.1. Policy:

- a. The Arizona Department of Transportation has established a Disadvantaged Business Enterprise (DBE) program in accordance with the regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The Arizona Department of Transportation has received Federal financial assistance from the Department of Transportation and as a condition of receiving this assistance, the Arizona Department of Transportation has signed an assurance that it will comply with 49 CFR Part 26.

- b. It is the policy of the Arizona Department of Transportation to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also the policy of the Department:
- i. To ensure nondiscrimination in the award and administration of DOT assisted contracts;
  - ii. To create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
  - iii. To ensure that the DBE program is narrowly tailored in accordance with applicable law;
  - iv. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are counted as DBEs;
  - v. To help remove barriers to the participation of DBEs in DOT assisted contracts; and
  - vi. To assist in the development of firms that can compete successfully in the market place outside the DBE program.

13.2.2. Assurances of Non-Discrimination:

The contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, sex or national origin in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of contracts. Failure by the contractor 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 state deems appropriate.

13.2.3. Race Neutral DBE Participation:

The Arizona Department of Transportation has an annual DBE goal of 10.5 percent. The Department is using a race neutral program to work towards meeting this goal. Race neutral participation occurs where (1) a firm's DBE status is not considered when awarding subcontracts, or (2) a DBE is the prime contractor.

The Department has a DBE Supportive Services Program that works with both DBEs and prime contractors to facilitate DBE participation. Ralph "Gonz" Gonzales is the manager of the program. He can be reached at (602) 712-7761 or [rgonzales@azdot.gov](mailto:rgonzales@azdot.gov).

13.2.4. Reporting:

The Department is required to collect data on DBE participation to report to FHWA. Therefore, accurate reporting is needed to track DBE participation. The

contractor shall submit a report on a monthly basis indicating the amounts earned by and paid to all DBEs working on the project.

13.2.5. Definitions:

- a. Disadvantaged Business Enterprise DBE: a for-profit small business concern which meets both of the following requirements:
  - i. Is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of any publicly owned business, at least 51 percent of the stock is owned by one or more such individuals; and,
  - ii. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- b. Socially and Economically Disadvantaged Individuals: any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:
  - i. Any individual who is found to be a socially and economically disadvantaged individual on a case-by-case basis.
  - ii. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
    - 13.2.3.b.ii.1. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
    - 13.2.3.b.ii.2. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
    - 13.1.3.b.ii.3. "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
    - 13.2.3.b.ii.4. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
    - 13.2.3.b.ii.5. "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

13.2.3.b.ii.6 "Women;"

13.2.3.b.ii.7 Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

- c. Joint Venture: an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

13.2.6. Working with DBEs:

The Department works with DBEs and assists them in their efforts to participate in the highway construction program. All bidders should contact the Civil Rights Office at the address shown below for assistance in their efforts to use DBEs in the construction program of the Department:

Arizona Department of Transportation  
Civil Rights Office  
1135 N. 22nd Avenue (second floor), Mail Drop 154A  
Phoenix, AZ 85009  
Phone (602) 712-7761  
FAX (602) 712-8429

13.2.7. Applicability:

The provisions are applicable to all bidders including DBE bidders. As a prime contractor, a DBE shall perform a significant portion of the contract work with its own work force in accordance with normal industry practices and Subsection 108.01 - Subletting of Contract of the Standard Specifications.

13.2.8. Certification:

- a. Certification as a DBE shall be predicated on:
- i. The completion and execution of an application for certification as a "Disadvantaged Business Enterprise".
  - ii. The submission of documents pertaining to the firm(s) as stated in the application(s), including but not limited to a statement of social disadvantage and a personal financial statement.
  - iii. The submission of any additional information which the Department may require to determine the firm's eligibility to participate in the DBE program.

- b. Applications for certification may be filed with the Department at any time.
- c. Applications for certification are available at the Department's Civil Rights Office, 1135 N. 22nd Avenue (second floor), mail drop 154A, Phoenix, Arizona 85009, phone (602) 712-7761, or from the internet at [www.azdbe.org](http://www.azdbe.org).
- d. DBE firms and firms seeking DBE certification shall cooperate fully with requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial or removal of certification.
- e. Arizona is a member of the AZ Unified Certification Program (AZUCP). Only DBE firms that are certified by the AZUCP are eligible for credit on ADOT projects. A list of DBE firms certified by AZUCP is available on the internet at [www.azdbe.org](http://www.azdbe.org). The list will indicate contact information and specialty for each DBE firm, and may be sorted in a variety of ways. However, ADOT does not guarantee the accuracy and/or completeness of this information, nor does ADOT represent that any licenses or registrations are appropriate for the work to be done.
- f. The contractor bears the responsibility to determine whether the DBE possesses the proper contractor's license(s) to perform the work. If a DBE cannot complete its work due to failure to obtain or maintain its licensing, the contractor bears the responsibility to immediately replace the DBE with another DBE and notify the Department.
- g. The Department's certification is not a representation of qualifications and/or abilities. The contractor bears all risks that the DBE may not be able to perform its work for any reason.

13.2.9. General:

- a. Each contractor shall establish a program that will ensure nondiscrimination in the award and administration of contracts and subcontracts. Each contractor shall also designate a full time employee who shall be responsible for the administration of the contractor's DBE program.
- b. Agreements between the bidder and a DBE in which the DBE promises not to provide subcontracting quotations to other bidders are prohibited.

13.2.10. DBE Participation:

- a. A DBE may participate as a prime contractor, subcontractor, joint venture partner with either a prime contractor or a subcontractor, or as a vendor of materials or supplies. A DBE joint venture partner shall be responsible for a clearly defined portion of the work to be performed, in addition to meeting the requirements for ownership and control.

- b. The contractor may not credit second-tier subcontracts issued to DBEs by non-DBE subcontractors.

13.2.11. Crediting DBE Participation:

a. General:

- i. Once a firm is determined to be an eligible DBE in accordance with 49 CFR Part 26, only the value of the work actually performed by the DBE can be credited toward DBE participation. Credit is given only after the DBE has been paid for the work performed.
- ii. The dollar amount of work to be accomplished by DBEs, including partial amount of a lump sum or other similar item, shall be on the basis of subcontract, purchase order, hourly rate, rate per ton, etc., as agreed to between parties.
- iii. DBE credit may be obtained only for specific work done for the project, supply of equipment specifically for physical work on the project, or supply of materials to be incorporated in the work. DBE credit will not be allowed for costs such as overhead items, capital expenditures (for example, purchase of equipment), and office items.
- iv. When a DBE performs as a partner in a joint venture, only that portion of the total dollar value of the contract which is clearly and distinctly performed by the DBE's own forces can be credited.
- v. The contractor may not credit second-tier subcontracts issued to DBEs by non-DBE subcontractors.
- vi. A prime contractor may credit the entire amount of that portion of a construction contract that is performed by the DBE's own forces. The cost of supplies and materials obtained by the DBE for the work of the contract can be included so long as that cost is reasonable. Leased equipment may also be included. No credit is permitted for supplies purchased or equipment leased from the prime contractor or its affiliate(s).
- vii. When a DBE subcontracts a part of the work of its contract to another firm, the value of the subcontract may be credited towards DBE participation only if the DBE's subcontractor is itself a DBE and performs the work with its own forces. Work that a DBE subcontracts to a non-DBE firm does not count towards DBE participation.
- viii. A prime contractor may credit the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, provided the fees are reasonable and not excessive as

compared with fees customarily allowed for similar services.

b. Police Officers:

DBE credit will not be permitted for procuring DPS officers. For projects on which officers from other agencies are supplied, DBE credit will be given only for the broker fees charged, and will not include amounts paid to the officers.

c. Commercially Useful Function:

- i. A prime contractor can credit expenditures to a DBE subcontractor only if the DBE performs a commercially useful function on the contract. A DBE performs a commercially useful function when it is responsible for execution of the work of a contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the Department will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
- ii. A DBE will not be considered to perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the Department will examine similar transactions, particularly those in which DBEs do not participate.
- iii. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or if the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Department will presume that the DBE is not performing a commercially useful function.
- iv. When a DBE is presumed not to be performing a commercially useful function as provided above, the DBE may present evidence to rebut this presumption. Decisions on commercially useful function matters are subject to review by FHWA, but are not administratively appealable to U.S. DOT.

d. Trucking:

- i. The Department will use the following factors in determining whether a

DBE trucking company is performing a commercially useful function: the DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

- ii. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract on every day that credit is to be given for trucking.
  - iii. The contractor will receive credit for the total value of transportation services provided by the DBE using trucks it owns, insures and operates, and using drivers it employs.
  - iv. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services.
  - v. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees results in credit only for the fee or commission paid to the DBE as a result of the lease agreement.
  - vi. Example: DBE Firm X uses two of its own trucks on contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE firm Z. DBE credit would only be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.
- e. Materials and Supplies:
- i. The Department will credit expenditures with DBEs for material and supplies as follows. If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies is credited. A manufacturer is defined as a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract, and of the general character described by the specifications.

- ii. If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies is credited. A DBE regular dealer is defined as a firm that owns, operates, or maintains a store or warehouse or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A firm may be a DBE regular dealer in such bulk items as petroleum products, steel, cement, stone or asphalt without owning, operating, or maintaining a place of business, as provided above, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement, and not on an ad-hoc or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph and the paragraph above.
  
- iii. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, the Department will credit the entire amount of the fees or commissions charged by the DBE for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. The cost of the materials and supplies themselves may not be counted toward the DBE goal.
  
- iv. DBE credit for supplying paving grade asphalt and other asphalt products will only be permitted for reasonable hauling costs, and only if the DBE is owner or lessee of the equipment and trucks. Leases for trucks must be long term (extending for a fixed time period and not related to time for contract performance) and must include all attendant responsibilities such as insurance, titling, hazardous waste requirements, and payment of drivers.

**14. FORMS**

LIST OF SUBCONTRACTORS ..... SB-1

STATUTORY PERFORMANCE BOND .....B-1

STATUTORY PAYMENT BOND .....B-3

CONTRACTOR'S AFFIDAVIT REGARDING SETTLEMENT OF CLAIMS .....AFF-1

AFFIDAVIT OF GENERAL CONTRACTOR / PRIME CONSULTANT  
REGARDING HEALTH INSURANCE .....AFF-2

CITY OF TEMPE GUIDELINES FOR IMPLEMENTATION  
OF HEALTH INSURANCE..... AFF-3

**15. FEDERALLY REQUIRED FORMS**

CONTRACTOR'S MONTHLY STATEMENT OF DBE UTILIZATION ..... DBE-1

DISADVANTAGED BUSINESS ENTERPRISE ASSURANCES AFFIDAVIT .... DBE-2

DISADVANTAGED BUSINESS ENTERPRISE  
INTENDED PARTICIPATION AFFIDAVIT (SUMMARY) ..... DBE-3

DISADVANTAGED BUSINESS ENTERPRISE  
INTENDED PARTICIPATION AFFIDAVIT (INDIVIDUAL DBES) ..... DBE-4

CONFIRMATION OF PARTICIPATION BY DBE..... DBE-5

CERTIFICATE OF PAYMENTS TO DBE FIRMS ..... DBE-6

CERTIFICATE OF PAYMENTS TO DBE FIRMS (DISPUTED CLAIMS) ..... DBE-7

CERTIFICATE OF GOOD FAITH EFFORTS ..... GF-1

CERTIFICATION WITH REGARD TO THE PERFORMANCE OF PREVIOUS  
CONTRACTS OR SUBCONTRACTS SUBJECT TO THE EQUAL OPPORTUNITY  
CLAUSE AND THE FILING OF REQUIRED REPORTS ..... CP-1

AFFIDAVIT BY CONTRACTOR CERTIFYING  
NO COLLUSION IN BIDDING OF CONTRACT .....NC-1

CITY OF TEMPE, ARIZONA  
PUBLIC WORKS DEPARTMENT  
DIVISION OF ENGINEERING

**CONTRACT FOR PROFESSIONAL SERVICES**

This Contract is made and entered into on the 22nd day of July, 2008, by and between the City of Tempe, a municipal corporation, hereinafter called City, and HDR CONSTRUCTION CONTROL CORPORATION [an Arizona corporation] hereinafter called the Consultant.

The City engages the Consultant to perform professional services for a project known and described as WESTERN CANAL MULTI-USE PATH, Project No. 6000421, hereinafter called the "Project".

**1. SERVICES OF THE CONSULTANT**

The Consultant shall perform the following professional services to City in conformance with applicable professional standards and in accordance with the degree of care and skill that a registered professional in Arizona would exercise under similar conditions. Consultant's services shall include the following:

- 1.1. The Consultant shall provide construction management services consisting of daily inspection, assisting in weekly construction meetings, tracking of project correspondence, and assisting in project close out, as described in Exhibit "A" attached.
- 1.2. The Consultant has assigned Matthew Walkowiak as the Project Manager for this Contract. Prior written approval by the City is required in the event the Consultant needs to change the Project Manager. The Consultant shall submit the qualifications of the proposed substituted personnel to the City for approval prior to any substitution or change.
- 1.3. The Consultant shall obtain all necessary permits required for the performance of its work. Failure of Consultant to obtain said permits prior to the commencement of its work shall constitute a default of this Contract.
- 1.4. The Consultant shall perform the work in a manner and at times which do not impede or delay the City's operations and/or functions.
- 1.5. The Consultant shall be solely responsible for any repair, replacement, remediation and/or clean-up of any damage done by Consultant including any impairment of access to City or other lawful invitees, by such work performed on this Project.

**2. PERIOD OF SERVICE**

The Consultant shall complete all services within 425 calendar days of the "Notice to Proceed" date,

which shall be issued by the City. In the event delays are experienced beyond the control of the Consultant, period of service may be revised as approved by the City in its sole discretion.

### **3. CONSULTANT'S COMPENSATION**

- 3.1. The method of payment for this Contract is payment by installments. Payment for this Contract shall be based on hourly rates established in the attached Exhibit "A". Total compensation for the services performed shall not exceed \$200,088.00, unless otherwise authorized by the City. This fee includes an allowance of \$17,613.00 for reimbursable expenses, which in no event will ever be more than actual cost.
- 3.2. The City shall pay the Consultant installments based upon monthly progress reports and detailed invoices submitted by the Consultant. If detailed invoice(s) are approved by the city, such payments shall be made within thirty (30) days after City's approval of the progress report and detailed invoice.

### **4. THE CITY'S RESPONSIBILITIES**

- 4.1. The City shall designate a project manager during the term of this Contract. The project manager has the authority to administer this Contract and shall monitor compliance with all terms and conditions stated herein. All requests for information from or a decision by the City on any aspect of the work shall be directed to the project manager.
- 4.2. The City shall review submittals by the Consultant and provide a prompt response to questions and rendering of decisions pertaining thereto, to minimize delay in the progress of the Consultant's work. The City will keep the Consultant advised concerning the progress of the City's review of the work. The Consultant agrees that the City's inspection, review, acceptance or approval of Consultant's work shall not relieve Consultant of its responsibility for errors or omissions of the Consultant or its subconsultant(s).
- 4.3. Unless included in the Consultant's services as identified in Section 1, the City may elect but is not required to furnish the Consultant, the following information or services for this Project, upon reasonable request:
  - 4.3.1. One copy of its maps, records, laboratory tests, survey ties, and benchmarks, or other data pertinent to the services. However, the Consultant shall be solely responsible for searching the records and requesting specific drawings or information and independently verifying said information.
  - 4.3.2. Available City data relative to policies, regulations, standards, criteria, studies, etc., relevant to the Project.

4.3.3. When required, title searches, legal descriptions, detailed ALTA Surveys, and environmental assessments.

## 5. TERMINATION AND DEFAULT

- 5.1. The City shall be entitled to terminate this Contract at any time, in its discretion. In addition, the City may terminate this Contract for default, non-performance, breach or convenience, or abandon any portion of the Project for which services have not been fully or properly performed by the Consultant. Termination shall be commenced by delivery of written notice delivered to Consultant, personally or by certified mail at 3200 E. Camelback Road, Suite 350, Phoenix, AZ 85018. Termination shall be effective upon fourteen (14) days of delivery of notice to Consultant. In addition, this Contract may be terminated pursuant to A.R.S. § 38-511.
- 5.2. Upon the occurrence of Consultant's default, non-performance or breach of the Contract, City may recover any and all damages permitted by law or in equity against Consultant, in addition to termination of the Contract, including but not limited to compensatory damages, together with all costs and expenses as set forth in Section 12 herein.
- 5.3. Immediately after receiving such notice, the Consultant shall discontinue advancing the services under this Contract and proceed to close said operations under this Contract. The Consultant shall appraise the services it has completed and submit a detailed appraisal to the City for evaluation. The City shall have the right to inspect the Consultant's work to analyze and appraise the services completed. Payment to Consultant shall be determined by City upon approval or disapproval of the services completed as of the date of delivery of notice of termination.
- 5.4. Within ten (10) days of receipt of notice of termination as set forth herein, the Consultant shall deliver to the City all drawings, special provisions, field survey notes, reports, estimates and any and all other documents or work product generated by the Consultant under the Contract, entirely or partially completed, together with all unused materials supplied by the City.
- 5.5. In the event of such termination or abandonment, the Consultant shall be paid only for those services performed in a good and workmanlike manner, in accordance with all plans, specifications and governmental requirements completed prior to receipt of said notice of termination, subject to approval by City. Such payment may include reimbursable expenses then incurred by Consultant, in City's sole discretion.
- 5.6. If the remuneration scheduled hereunder is based upon a fixed fee or definitely ascertainable sum, the portion of such sum payable shall be proportionate to the percentage of services completed by the Consultant as approved by the City based upon the scope of work set forth in Exhibit A, as determined by the City.

However, in no event shall the fee exceed that set forth in Section 3 of this Contract.

- 5.7. The City shall make a determination as to approval or denial of any requested final payment within sixty (60) days after the Consultant has delivered the last of the completed items and the final fee has been submitted to the City.

## 6. INSURANCE

Without limiting any obligations or liabilities, the Consultant, at its sole expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona, Department of Insurance, and with forms reasonably satisfactory to the City. Each insurer shall have a current A.M. Best Company, Inc. rating of not less than A-VII. Use of alternative insurers requires prior approval from the City.

### 6.1. General Clauses

- 6.1.1. Additional Insured. The insurance coverage, except workers' compensation and professional liability, required by this Contract, shall name the City, its agents, representatives, directors, officials, and employees, as additional insured, and shall specify that insurance afforded the Consultant shall be primary insurance, and that any self insured retention and/or insurance coverage carried by the City or its employees shall be excess coverage, and not contributory coverage to that provided by the Consultant.
- 6.1.2. Coverage Term. All insurance required herein shall be maintained in full force and effect until services required to be performed under the terms of this Contract are satisfactorily completed and formally accepted; failure to do so shall constitute a material breach of this Contract.
- 6.1.3. Primary Coverage. The Consultant's insurance shall be primary insurance as respects the City, and any insurance or self insurance maintained by the City shall be in excess of the Consultant's insurance and shall not contribute to it.
- 6.1.4. Claim Reporting. Consultant shall not fail to comply with the claim reporting provisions of the policies or cause any breach of a policy warranty that would affect coverage afforded under the policy to protect the City.
- 6.1.5. Waiver. The policies for workers' compensation and general liability shall contain a waiver of transfer rights of recovery (subrogation) against the City, its agents, representatives, directors, officers, and employees for any claims arising out of the work of the Consultant.

- 6.1.6. Deductible/Retention. The policies may provide coverage, which contains deductibles or self-insured retentions. Such deductible or self-insured retentions shall not be applicable with respect to the coverage provided to the City under such policies. The Consultant shall be solely responsible for deductible or self-insured retentions and the City may require the Consultant to secure the payment of such deductible or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit.
- 6.1.7. Policies and Endorsements. The City reserves the right to request and to receive, within ten (10) working days, information on any or all of the above policies or endorsements.
- 6.1.8. Certificates of Insurance. Prior to commencing services under this Contract, Consultant shall furnish the City with certificates of insurance, or formal endorsements as required by the Contract, issued by Consultant's insurer(s), as evidence that policies providing the required coverages, conditions, and limits required by this Contract are in full force and effect. Such certificates shall identify this Contract by referencing the project number and/or project name and shall provide for not less than thirty (30) days advance written notice by certified mail to City of cancellation or termination of insurance.
- 6.1.9. Subconsultants/Contractors. Consultant shall include all subconsultants and subcontractors as insured under its policies or shall furnish separate certificates and endorsements for each subconsultant and subcontractor.
- 6.2. Workers' Compensation. The Consultant shall carry workers' compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of Consultant's employees engaged in the performance of the services; and employer's liability insurance of not less than \$100,000 for each accident, \$100,000 disease for each employee, and \$500,000 disease policy limit.
- In case services under this Contract are subcontracted, the Consultant shall require all subconsultant(s) to provide workers' compensation and employer's liability to at least the same extent as provided by the Consultant.
- 6.3. Automobile Liability. The Consultant shall carry commercial/business automobile liability insurance with a combined single limit for bodily injury and property damages of not less than \$1,000,000 each occurrence regarding any owned, hired, and non-owned vehicles assigned to or used in performance of the Consultant services. Coverage will be at least as broad as coverage Code 1 "any auto" (Insurance Service Office policy form CA 0001 1/87 or any replacements thereof). Such coverage shall include coverage for loading and unloading hazards.
- 6.4. Commercial General Liability. The Consultant shall carry commercial general

liability insurance with a combined single limit of not less than \$1,000,000. The policy shall be primary and include coverage for bodily injury, property damage, personal injury, products, completed operations, and blanket contractual covering, but not limited to, the liability assumed under the indemnification provisions of this Contract, which coverage will be at least as broad as Insurance Service Office policy form CG 0002 1-11-88 or any replacement thereof.

In the event the general liability insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the services as evidenced by annual certificates of insurance.

Such policy shall contain a "severability of interests" provision (also known as "cross liability" and "separation of insured").

- 6.5. Professional Liability. The Consultant retained by the City to provide the engineering services required by the Contract will maintain professional liability insurance covering errors and omissions arising out of the services performed by the Consultant or any person employed by him, with an unimpaired limit of not less than \$1,000,000 each claim and \$1,000,000 all claims, or 10% of the construction budget, whichever is larger. In the event the insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of services as evidenced by annual certificates of insurance.
- 6.6. Property Coverage – Valuable Papers. The Consultant shall carry property coverage on all-risk, replacement cost, agreed amount form with valuable papers insurance sufficient to assure the restoration of any documents, memoranda, reports, or other similar data relating to the services of the Consultant used in the completion of this Contract.

## 7. HEALTH INSURANCE REQUIREMENTS

- 7.1. Consultant must certify that it has or will offer health insurance to all eligible employees working on services set forth in this Contract prior to the performance of any work or services. An affidavit certifying such offering must be signed in a form approved by the City. All required health insurance must be maintained during the entire time of the Contract with the City. Health insurance pursuant to this Section 7 is not required for temporary employees or students working part-time who are enrolled in a recognized educational institution.
- 7.2. The health insurance requirements herein shall apply to all of Consultant's eligible employees directly involved with the services set forth in this Contract, including support and administrative personnel.
- 7.3. Any and all complaints concerning violations of the health insurance requirements shall be filed, in writing, with the City's Public Works Department, within thirty (30) days from discovery of a potential violation. An administrative hearing will be

held before the Public Works Manager, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal from the decision of the Public Works Manager may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Public Works Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.

- 7.4. Penalties for failing to comply with this Section 7 include, but are not limited to the following: Consultant may be barred from bidding on, or entering into any Public Works contract with the City for a period of three (3) years from the execution of the contract.
- 7.5. All Consultants subject to the health insurance requirements shall post in English, notice of the health insurance requirements at their office and at the job site.

## **8. WORK FOR HIRE AND OWNERSHIP OF DELIVERABLES**

- 8.1. Consultant shall ensure that all the results and proceeds of Consultant's and any and all work on any projects, including that of all agents, employees, officers, and contractors, shall be owned by the City, including the copyright thereto, as work for hire. In the event, for any reason, such results and proceeds are not deemed work for hire, Consultant shall be deemed hereby to have assigned to City all of its right, title and interest in such results and proceeds and content to City, without limitation.
- 8.2. All work products (electronically or manually generated), including but not limited to plans, specifications, cost estimates, tracings, studies, design analyses, original mylar drawings, computer aided drafting and design (CADD) file diskettes which reflect all final drawings, and other related products which are prepared in the performance of this Contract, are the property of the City and are to be delivered to the City on the particular type of storage media on which they are stored (e.g. CD, thumb drive, etc.) before the final payment is made to the Consultant. The City shall retain ownership of these original works. If approved in writing by the City, the Consultant may retain the originals and supply the City with reproducible copies of the work.

## **9. CONFLICT OF INTEREST**

- 9.1. The Consultant agrees to promptly disclose any and all financial and/or economic interest in the property, or any property affected by the work, or the Project itself other than as set forth herein, existing prior to the execution of this Contract. Further, the Consultant agrees to promptly disclose any financial or economic interest in the Project property or any property affected by the work, if the Consultant gains such interest during the course of this Contract.
- 9.2. If the Consultant gains any financial or economic interest in the Project during the

course of this Contract, this may be grounds for terminating this Contract at the sole discretion of the City.

9.3. The Consultant shall not engage the services on this Contract of any present or former City employee who was involved as a decision maker in the selection or approval processes, or who negotiated or approved billings or contract modifications for this Contract.

9.4. The Consultant agrees that it shall not perform services on this Project for any other contractor, subcontractor, or any supplier, other than the City. In addition, Consultant shall not negotiate, contract, or make any agreement with a contractor, subcontractor, or any supplier with regard to any of the work under this Contract, or any services, equipment or facilities to be used on this Project other than with the City.

## **10. COVENANT AGAINST CONTINGENT FEES**

The Consultant affirms that he has not employed or retained any company or person, other than a bona fide employee working for the Consultant to solicit or secure this Contract, and that he has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of the Contract. For breach or violation of this clause, the City may terminate this Contract without liability, or in its discretion may deduct from the Contract price or consideration, or otherwise recover, the full amount of such fee, commission, percentage brokerage fee, gift, or contingent fee.

## **11. INDEMNIFICATION**

To the fullest extent permitted by law, the Consultant shall defend, indemnify and hold harmless the City, its agents, officers, officials, and employees from and against all claims, damages, losses, liability and/or expenses, relating to, arising out of, or alleged to have resulted from the negligent acts, errors, mistakes or omissions in the work, services, or professional services of the Consultant, its agents, employees, or any other person for whose negligent acts, errors, mistakes or omissions in the work, services, or professional services the Consultant may be deemed legally liable in the performance of this Contract, or any breach of the Contract. Consultant's duty to defend, hold harmless and indemnify the City, its agents, officers, officials, and employees shall arise in connection with any and all claims for damage, loss, liability and/or expenses that are attributable to bodily injury, sickness, disease, death, or injury to, impairment or destruction of any person or property including loss of use resulting therefrom, caused by any negligent acts, errors, mistakes, omissions, work, services, willful acts or professional services rendered in the performance of this Contract. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.

## **12. DISPUTE RESOLUTION**

In the event of a dispute concerning or in any way connected to the Contract or subject project, the

parties agree that the unsuccessful party shall pay to the prevailing party a reasonable sum for attorneys' fees, including taxable and non-taxable costs, fees, costs and disbursements of experts, professionals, paralegals, whether at trial, appeal and/or in bankruptcy court, all of which will be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment. In addition, should the City retain and/or utilize legal counsel as a result of a breach by Consultant of any term, covenant or provision of this Contract, in addition to paying any recovery owed to City and/or performing any obligation remaining to be performed, in order to fully cure such breach or default, Consultant shall reimburse the City for reasonable attorneys' fees, taxable and non-taxable costs and disbursements, incurred by the City in enforcing the Consultant's obligations, whether or not a legal action is commenced, including but not limited to the cost of preparing and presenting default notices, demand letters and similar non-judicial enforcement activities.

### **13. ADDITIONAL SERVICES**

Additional services which are outside the scope of basic services contained in this Contract shall not be performed by the Consultant without prior written authorization from the City, at the City's sole discretion. Additional services, when authorized by an executed contract or an Amendment to this Contract shall be compensated for by a fee mutually agreed upon between the City and the Consultant.

### **14. PROHIBITION ON ASSIGNMENT**

This Contract and all duties and obligations of Consultant set forth in this Contract shall not be assignable except by prior written consent of the City, and such prohibition shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the Consultant.

### **15. MISCELLANEOUS PROVISIONS**

- 15.1. The Consultant covenants for itself, its employees, agents, assigns and all persons claiming under or through it, that it shall comply with all applicable federal, state, and local laws and ordinances at the time of execution of this Contract and shall not discriminate against or segregate any person or group of persons any person on account of race, color, religion, gender, marital status, sexual orientation, national origin, ancestry, age, physical handicap or medical condition in the performance of this Contract and shall comply with the terms and intent of all applicable federal, state and local governance concerning nondiscrimination.

In addition, Consultant covenants that it will comply with any and all governmental restrictions, regulations and rules of duly constituted authorities having jurisdiction insofar as the performance of the work and all applicable safety laws, rules and regulations, including but not limited to the Fair Labor Standards Act, the Walsh Healey Act, the Fair and Legal Employment Act and Arizona law concerning employment practices and working conditions. Consultant shall indemnify, defend and hold City harmless for, from and against all losses and liabilities arising from any and all violations thereof.

The Consultant further agrees to include the foregoing provisions in any and all sub-contracts hereunder, except subcontracts for standard commercial supplies or raw materials. Any violation of such provisions shall constitute a material breach of this Contract.

- 15.2. This Contract shall be in full force and effect only when it has been approved by the City Council of the City of Tempe, Arizona and when executed by the duly authorized City officials and the duly authorized agent of the Consultant.
- 15.3. This Contract shall be governed and interpreted by the laws of the State of Arizona.
- 15.4. All Exhibits attached to this Contract are made a part of and are incorporated into, this Contract. If any inconsistencies exist between this Contract and any Exhibit hereto, the terms of this Contract shall govern.
- 15.5. Any prevention, delay or stoppage of this Project for a cause beyond the reasonable control of Consultant due to acts of God, acts of war or terrorism, fire or other casualty, shall, notwithstanding anything to the contrary contained herein, excuse the performance of Consultant, for a period equal to such prevention, delay or stoppage. For purposes of this Section 15.5, a cause shall not be deemed beyond a party's control if it is within the control of such party's agents, employees, assigns, contractors or subcontractors.
- 15.6. This Contract contains all of the agreements of the parties with respect to the Project and related matters, and no prior agreement, negotiations, postings, offerings, or understanding pertaining to any such matter shall be effective for any purpose unless expressly contained herein.
- 15.7. Consultant hereby warrants and represents that it is an Arizona corporation, licensed to do business in the state of Arizona and currently in good standing, and that it is not now in violation of any agreement, instrument, contract, law, rule or regulation by which Consultant is bound.
- 15.8. Nothing contained in this Contract shall be deemed or construed by the parties hereto or otherwise, to create the relationship of principal and agent, partnership, joint venturer, employer and employee, or any association between City and Consultant. Consultant is an independent contractor and shall be solely responsible for any unemployment or disability insurance payments, or any social security, income tax or other withholdings, deductions or payments that may be required by federal, state or local law with respect to any compensation paid to the Consultant hereunder or for any and all services or materials provided by or rendered to Consultant hereunder in connection with the work set forth in this Contract.
- 15.9. If any provision of this Contract shall, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Contract

shall not be affected thereby, and every other term and provision of this Contract shall be valid and enforceable to the fullest extent permitted by law.

15.10. Time is of the essence in this Contract and each and every provision herein, except as may expressly be provided in writing by the City.

15.11. No breach or default hereunder shall be deemed to have been waived the City, except by a writing to that effect signed on behalf of the City. No waiver of any such breach or default shall operate as a waiver of any other succeeding or preceding breach or default or as a waiver of that breach or default after written notice thereof and demand by the City for strict performance of this Contract. Acceptance of partial or delinquent payments or performance shall not constitute the waiver of any right of the City.

[SIGNATURE PAGE FOLLOWS]

The Consultant warrants that the person who is signing this Contract on behalf of the Consultant is authorized to do so and to execute all other documents necessary to carry out the terms of this Contract.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

CITY OF TEMPE, ARIZONA

By \_\_\_\_\_  
Mayor

By \_\_\_\_\_  
Public Works Manager

ATTEST:

Recommended By:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Deputy PW Manager/City Engineer

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

CONSULTANT  
HDR Construction Control Corporation

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Federal I.D. No. /Social Security No.

Certified to be a true and exact copy.

\_\_\_\_\_  
Karen M. Fillmore  
Records Specialist



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## EXHIBIT A

June 2, 2008

City of Tempe  
31 East Fifth Street  
Tempe, Arizona 85281

Attention: Thomas W. Wilhite, P.E.  
Principal Civil Engineer, Capital Improvements Construction

**RE: City of Tempe On Call Construction Management Services  
Western Canal Multi Use Pathway Project**

Dear Mr. Wilhite:

HDR Construction Control Corporation is pleased to submit, for your review and approval, our cost proposal for Construction Management Services. This proposal is being submitted for the City's Construction Management at Risk Western Canal Multi Use Pathway Project.

Based upon information provided regarding this project, the attached proposal has been prepared for a part-time staff for the specified 12 month construction duration and an additional two months for project closeout. The proposed staff consists of one Inspector at 30-hours per week, one Administrative Assistant at 5 hours a week and a Project Manager at 3 hours per week. Our staff will provide daily inspection and documentation services, assist the City in conducting weekly progress meeting, preparation and distribution of weekly meeting minutes, and tracking of all project submittals and contractor request for information. Our staff will also assist the City with the project administrative closeout process during the two months following construction completion. It is our understanding that construction survey staking and material testing will be provided by either the CM at Risk Contractor or the City of Tempe. These services have been excluded from our proposal.

We look forward to working for the City of Tempe on this project. HDR CCC remains committed to providing responsive services and qualified staff to meet your construction administration needs. We appreciate this opportunity to provide field inspections and contract administration services for the Capital Improvement Construction Department. If you have questions, please do not hesitate to contact our Construction Control Corporation Department Manager, Matthew Walkowiak, PE at (602) 474-3954 or (602) 768-5375 mobile.

Sincerely,

HDR CONSTRUCTION CONTROL CORPORATION

Laurie Roden  
Southwest Area Manager

HDR Construction Control Corp.

3200 East Camelback Road  
Suite 350  
Phoenix, AZ 85018-2311

Phone: (602) 522-7700  
Fax: (602) 522-7707  
www.hdrinc.com

TWW

Client: City of Tempe  
 Contract: City of Tempe On Call Construction Management Services  
 Project: Western Canal Multi Use Pathway Project

Construction Duration: 14 months  
 NTP: ?

Project Completion: ?  
 Project Closeout: ?

Month	Hours per week		No. of Months	
Average Calendar Days per Month			30	426
Average Working Days per Month			22	303
<b>Staff hours</b>				0
Project Manager	3	14	13	182
Inspector	30	14	130	1820
Admin. Asst.	5	14	22	308

**Direct And Outside Expenses\***

Mileage (Current Federal Rate) - \$0.505 per mile	195 days @ 90 miles per day @ \$0.505 =	\$8,862.75
Vehicle - To be reimbursed at actual cost. Current lease	\$560.00/mo 14 months =	\$7,840.00
Cell Phone - To be reimbursed at actual cost. Current monthly bill	\$65.00/mo 14 months =	\$910.00
Photo Copies - At cost		

All ODC above at estimated cost, per contract they will be billed at actual cost

Total HDR Hours		PM	Inspector	Admin. Asst.
Total Hours		182	1,820	308
HDR Hourly Rate*		\$57.00	\$30.00	\$22.00
HDR Labor Costs	\$ 71,750	\$10,374	\$54,600	\$6,776
Overhead @ 131.2%	94,136			
Total Labor and Overhead	\$ 165,886			
Profit @ 10%	\$ 16,589			
Subtotal	\$ 182,475			
Other Direct Costs				
Vehicle(actual invoice)	\$ 7,840			
Equipment	\$ 910			
Mileage	\$ 8,863			
Other Direct Costs Subtotal	\$ 17,613			
Total HDR Costs	\$200,088			

TWW

CITY OF TEMPE  
TEMPE, ARIZONA  
DEPARTMENT OF PUBLIC WORKS

AFFIDAVIT OF GENERAL CONTRACTOR / PRIME CONSULTANT  
REGARDING  
HEALTH INSURANCE

\_\_\_\_\_  
Arizona

Date \_\_\_\_\_

**Western Canal Multi-Use Path  
Project No. 6000421**

I hereby certify that \_\_\_\_\_ (name of company) currently has, and all of its major subcontractors/subconsultants, defined as doing work in excess of \$30,000.00, will have, during the course of this contract, health insurance for all employees working on this project and will offer health insurance coverage to eligible dependents of such employees, as defined in the accompanying Guidelines. The company's health insurance is as follows:

Name of Insurance Company: \_\_\_\_\_

Type of Insurance (PPO, HMO, POS, INDEMNITY): \_\_\_\_\_

Policy No.: \_\_\_\_\_

Policy Effective Date (MM/DD/YY): \_\_\_\_\_

Policy Expiration Date (MM/DD/YY): \_\_\_\_\_

Signed and dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
General Contractor/Prime Consultant

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

STATE OF ARIZONA            )  
  ) ss  
COUNTY OF MARICOPA        )

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
Notary Public

My commission expires:  
\_\_\_\_\_

## **City of Tempe**

### **Guidelines for Implementation of Health Insurance**

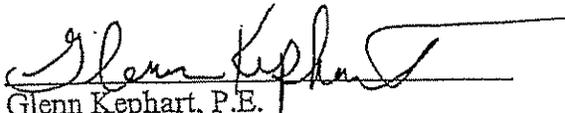
These Guidelines are provided for purposes of implementing Resolution No. 2000.73, which requires all employees of prime consultants, general contractors and major subconsultants and subcontractors to have health insurance and to offer health insurance to their eligible dependants, as determined at the start of each project. Questions regarding these guidelines should be directed to the City of Tempe Engineering Division at (480) 350-8200.

1. All Prime Consultants who enter into a Public Works contract or General Contractors who bid on Public Works projects that are advertised for bid and enter into a contract in excess of \$30,000 with the City of Tempe after January 1, 2001, are required to sign an affidavit in the form attached hereto. The prime consultant or general contractor shall require that all major subconsultants or subcontractors, defined as entities doing work in excess of \$30,000, comply with the health insurance requirements. In signing the affidavit, prime consultants and general contractors may refer to and rely upon these Guidelines for interpretation.
2. Health insurance is required for permanent employees who work for the consultant/contractor more than one hundred and twenty (120) days in any calendar year. A "work day" consists of any time within a twenty-four hour period, regardless of number of hours, that the individual is paid. This requirement excludes students working part-time who are enrolled in a recognized educational institution. Many companies have a grace period or a qualifying period prior to commencement of insurance coverage, which is acceptable so long as the employee coverage begins by the 120<sup>th</sup> day of contract signing. Temporary employees will be covered to the same extent as the City of Tempe covers temporary employees as determined at the start of each project.
3. If a contractor is a "Union" shop and withholds union dues from employees for health insurance coverage that is also offered to their eligible dependents and meets all City requirements, the Contractor may so note on the required affidavit.
4. The health insurance requirements herein apply to all employees that are directly involved with the City of Tempe project including support and administrative personnel.
5. Health insurance coverage must be maintained during the entire time of the contract, including any warranty periods, with the City.
6. All complaints concerning violations of the health insurance requirements shall be filed by an employee, in writing, with the Public Works Department, within thirty (30) days from discovery of the violation. An administrative hearing will be held before the Public Works Manager, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal from the decision

of the Public Works Manager may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Public Works Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.

7. In the event of a finding by the City of a violation of the insurance provisions, the company in violation of the provision shall be barred from bidding on, or entering into, any public works contract with the City for a minimum period of three (3) years.
8. All consultants and contractors subject to the health insurance requirements shall post, in English and Spanish, notice of the health insurance requirements at their office and at the job site. Signs for posting will be provided by the City.

These "Guidelines for Implementation of Health Insurance", issued and dated this 21st day of August, 2002, hereby amend all guidelines previously issued.

  
Glenn Kephart, P.E.  
Public Works Manager