



EL DORADO CITY COMMISSION - REGULAR MEETING AGENDA
CITY HALL – 220 E. FIRST AVENUE
May 1, 2023 - 5:30 PM

- 1. Call to Order**
- 2. Roll Call**
- 3. Invocation** - Mark Somerville, Family Worship Center
- 4. Pledge of Allegiance**

Proclamations and Recognition

Personal Appearances Personal appearances are opportunities for organizations or citizens to make special presentations before the City Commission. Such appearances are scheduled in advance of the meeting by calling City Clerk Tabitha Sharp at (316) 321-9100 by 5:00 pm the Tuesday preceding the meeting. Presentations are limited to ten minutes. Any presentation is for information purposes only; no action will be taken.

- 5.** Phil Benedict and Craig Yaryan (Downtown Sound System)
- 6.** Angie Johnston, Nick Hoefgen, and Linda Jolly (Moderate Income Housing Grant Application)

Public Comments Persons who wish to address the City Commission regarding items not on the agenda and that are under the jurisdiction of the City Commission may do so when called upon the Mayor. Comments on personnel matters and matters pending in court are not permitted. Speakers are limited to three minutes. Any presentation is for information purposes only; no action will be taken.

Consent Agenda *(Consent agenda items will be acted on by one motion unless a majority of the City Commission votes to remove an item for discussion and separate action.)*

- 7.** City Commission Meeting Minutes from April 17, 2023 and Special City Commission Meeting Minutes from April 26, 2023
- 8.** 2023 El Dorado Municipal Band Contract
- 9.** Acceptance of 1st Quarter Financial Report
- 10.** Acceptance of 1st Quarter Investment Report

Old Business

- 11.** 9th Avenue Improvement Project

New Business

- 12.** Kansas Gas Service Franchise Agreement

13. Design-Build Contract with Conco Construction for Restroom and Concession Facilities at East and Central Parks

Discussion Items

14. Butler Rural Electric Cooperative Request

Reports

15. City Commission and Advisory Board Updates
16. City Manager

Executive Session

17. Executive Session under the Attorney-Client Privileged Exception under K.S.A. 75-4319(b)(2)
18. Executive Session under the Non-Elected Personnel Exception under K.S.A. 75-4319(b)(1)

Adjournment

19. Consideration of a motion to adjourn

PUBLIC COMMENT POLICY:

Citizens are encouraged to address the City Commission during regularly scheduled meetings. This policy is intended to provide some guidelines to ensure that all El Dorado citizens have a chance to address the Commission.

1. Each citizen will state their name and address before making comments.
2. There are no residency requirements.
3. Each citizen will have 3 minutes to present his or her comments.
4. An extension of time, if necessary, may be approved but must be by a majority of the City Commission.
5. Comments or questions will be directed only to the City Commission.
6. Citizens will follow the decorum policy.
7. Debate or argument between parties in the audience will not be allowed.
8. Certain legal issues may not be discussed. (Examples include but are not limited to personnel issues, lawsuits, etc.)
9. Violation of this public comment policy will result in the citizen being directed to cease or resume sitting.

Approved by the Commission this 2nd day of May, 2005.

EL DORADO CITY COMMISSION MEETING

April 17, 2023

The El Dorado City Commission met in a regular session on April 17, 2023 at 5:30 p.m. in the Commission Room with the following present: Mayor Bill Young, Commissioner Kelly Tetrick, Commissioner Gregg Lewis, Commissioner Leon Leachman, Commissioner Kendra Wilkinson, City Manager David Dillner, City Engineer Scott Rickard and Administration Director Tabitha Sharp. Absent: City Attorney Ashlyn Lindskog

VISITORS

Phil Benedict	El Dorado Chamber of Commerce	El Dorado, KS
Brad Meyer	220 E 1 st Ave	El Dorado, KS
Mike Holton	220 E 1 st Ave	El Dorado, KS
Marlene Avery	Municipal Band	El Dorado, KS
Barbara Templin	Municipal Band	El Dorado, KS

CALL TO ORDER

Mayor Bill Young called the April 17, 2023 meeting to order.

INVOCATION

Isaac McNary opened the meeting with an invocation.

PLEDGE OF ALLEGIANCE

The City Commission led the Pledge of Allegiance.

PERSONAL APPEARANCES

Isaac McNary and Delane Butler, The Outreach Program, discussed the Outreach Program which has recently joined Numana. This program packages meals to feed people internationally and in the United States.

Mayor Bill Young asked if they were expecting growth in the number of packaging events.

Mr. McNary stated that they are working on expanding those events.

Marlene Avery, El Dorado Municipal Band, stated that they are beginning their 101st year in El Dorado. She stated that their first practice will be in May and anyone who has graduated 8th grade can participate. She stated that the first concert is June 1st with concerts each Thursday after throughout the summer.

Ms. Avery asked if they could speak to someone about the improvements at Forest Park before they are completed.

Mayor Young stated that the City Manager would be happy to speak to them about the scheduled improvements. He stated that the band is one of the many great things about El Dorado.

PUBLIC COMMENT

Mayor Bill Young opened the floor for public comments.

There were no comments.

CONSENT AGENDA

Approval of City Commission meeting minutes from March 20 and April 3, 2023 and Special City Commission meeting minutes from March 29, 2023.

Approval of the bid for the annual street maintenance program.

Commissioner Leon Leachman moved to approve the consent agenda as presented.

Commissioner Kendra Wilkinson seconded the motion.

Motion carried 5 – 0.

PUBLIC HEARING

There were no public hearings scheduled.

OLD BUSINESS

There was no old business.

NEW BUSINESS

KDOT PROJECT AGREEMENT FOR RESURFACING PROJECT ON NORTH MAIN STREET (6TH AVENUE TO MCCOLLUM ROAD)

City Engineer Scott Rickard stated that the City was selected to receive \$400,000 for a CCLIP grant. He stated that staff would like to get this to bid and get it completed this summer.

Commissioner Kelly Tetrick moved to authorize the Mayor to execute for and on behalf of the City of El Dorado, Agreement No. 54-23 between the City and the Kansas Department of Transportation.

Commissioner Kendra Wilkinson seconded the motion.

Motion carried 5 – 0.

REQUEST FOR SPECIAL USE PERMIT AT 1750 RYAN COURT FOR A PRIVACY FENCE EXCEPTION

City Engineer Scott Rickard stated that the property owner at 1750 Ryan Court would like to install an 8 foot privacy fence in their back yard. He stated that the Planning Commission voted in favor 9 – 0 to approve the application. There were no public comments either for or against the project.

Commissioner Kendra Wilkinson moved to approve an ordinance for Case No. 23-03-SUP requesting a Special use Permit for an eight-foot fence at 1750 Ryan Court.

Commissioner Leon Leachman seconded the motion.

Motion carried 5 – 0.

DISCUSSION ITEMS

None.

REPORTS

CITY COMMISSION AND ADVISORY BOARD UPDATES

Commissioner Kelly Tetrick stated that the library has a few events coming up including a trivia night and the book sale at the end of April.

Mayor Bill Young stated that El Dorado Inc. Director Sarah Hoefgen had the opportunity to attend a site selector conference and was able to get our information out to several site selectors throughout the nation.

Mayor Young reminded citizens that the Walnuts season would be beginning soon and encouraged them to be involved in the upcoming season.

CITY MANAGER REPORT

City Manager David Dillner stated that K254 met on Friday and KDOT has issued a notice to proceed on the K254 corridor study. He stated that KDOT and the KTA are about to finish the study for the intersection of the turnpike and K254. He stated that as El Dorado is garnering more attention, they are really thinking about how they can be ready to invest in infrastructure in the future.

EL DORADO CITY COMMISSION MEETING

April 17, 2023

City Manager Dillner stated that staff received five bids for turf at McDonald stadium last week.

City Manager Dillner stated that staff met with Conco construction to put together a plan for the concession and restroom facilities at the ball fields. He stated that staff hope to have an agreement for the Commission to approve at their next meeting.

City Manager Dillner stated that the sales tax committee is meeting and considering their options, they appear to be looking at a continuous sales tax, but have not come to a final decision at this time.

City Manager Dillner stated that the dump truck program has started, citizens can call Public Works to schedule a truck.

City Manager Dillner stated that we will be making a change to the spring clean-up program this year. He stated that each resident will be able to get two tickets representing a free trip to the landfill. He stated that additional fees depending on the material may be extra.

ADJOURNMENT

Commissioner Leon Leachman moved to adjourn the meeting at 5:56 p.m.

Commissioner Kendra Wilkinson seconded the motion.

Motion carried 5 – 0.

City Clerk Tabitha D. Sharp

Mayor Bill Young

EL DORADO CITY SPECIAL COMMISSION MEETING

April 26, 2023

The El Dorado City Commission met in special session on April 26, 2023 at 5:00 pm at 220 E 1st Avenue with the following present: Mayor Bill Young, Commissioner Kelly Tetrick, Commissioner Gregg Lewis, Commissioner Kendra Wilkinson, Commissioner Leon Leachman, City Manager David Dillner, City Engineer Scott Rickard and Administration Director Tabitha Sharp. Absent: City Attorney Ashlyn Lindskog.

VISITORS

Mike Holton
Jason Patty

128 N Vine
220 E 1st Ave

El Dorado, KS
El Dorado, KS

CALL TO ORDER

Mayor Bill Young called the April 26, 2023 Special City Commission meeting to order at 5:00 p.m.

WORK SESSION DISCUSSION ITEMS

9TH AVENUE PROJECT

City Engineer Scott Rickard reviewed the new options for 9th Avenue.

The Commission discussed the costs and benefits of the project.

City Manager David Dillner stated that staff need to know if the Commission is interested in proceeding with the project.

The City Commission did not have a consensus to move forward.

City Manager Dillner stated that because there was a project in existence, staff would bring it to a regular meeting for an official vote to end the project.

The Commission discussed moving forward with just the portion around the railroad tracks.

REGULAR AGENDA PREVIEW

The City Commission reviewed the upcoming agenda for May 1, 2023.

City Manager David Dillner stated that the Kansas Gas Franchise agreement will be on the next agenda, it is time for it to be renewed. He stated that the new agreement will increase the franchise fee from 5% to 6%.

Commissioner Gregg Lewis asked if the golf course would be discussed on the land bank agenda.

City Manager Dillner stated that it would not be on that agenda.

COMMISSION REPORTS

City Manager David Dillner stated that the Mayor's prayer breakfast was next Thursday.

Mayor Bill Young stated that Virginia Ball would be the speaker.

CITY MANAGER REPORT

There was no report.

ADJOURNMENT

Commissioner Leon Leachman moved to adjourn the meeting at 6:03 p.m.

Commissioner Kelly Tetrick seconded the motion.

Motion carried 5 – 0.

City Clerk Tabitha D. Sharp

Mayor Bill Young

AGREEMENT

THIS AGREEMENT made and entered into by and between the City of El Dorado, a municipal corporation, Party of the First Part, and the El Dorado Municipal Band, Party of the Second Part.

WITNESSETH: That in consideration of the mutual promises and agreements herein set forth, it is hereby agreed between the parties hereto, as follows:

The party of the Second Part hereby agrees to a minimum of ten (10) band concerts which shall be free entertainment to the citizens of El Dorado, Kansas, and for which no admission shall be charged. Said concerts shall be given at the Forest Park Bandshell or elsewhere as may be designated by the City Manager or by the Municipal Band Board. Any additional concerts shall be known as special concerts and shall be given at such time and place as mutually agreed upon between the Party of the Second Part and the City Manager. The Party of the Second Part agrees to cooperate with said City Manager to furnish music at public functions: such appearances shall be considered the same as a special concert.

The Party of the Second Part agrees to maintain its organization with a minimum of twenty-five (25) members and cooperate with the staff of the Party of the First Part in an effort to stimulate an interest in music, and to carry out the terms of this Agreement. In addition to the concerts herein provided for, said band shall hold sufficient rehearsals to reasonably prepare said band for the giving of concerts herein provided for.

Both Parties agree that they will make no agreements, or incur indebtedness or otherwise obligate the other party and each Party shall pay all its expenses, and hold the other Party free from any debt or obligation other than the payments hereinafter provided.

The Party of the First Part hereby agrees that the Party of the Second Part, and the members of said band shall have the right and privilege, without charge or expense, to store music, instruments, sound equipment, flags or any other equipment in the storage room at the Engineering Building, and music stands, chairs and any other equipment shall be stored in the basement of the Bandshell at Forest Park. The basement will also be used in connection with the giving of concerts with said band.

The Party of the First Part shall not be liable for the loss or damage to any property belonging to said band or any of its members. Any expense in connection with setting of lights,

chairs, or the use of the loud speaker, and any other service or expense in connection with the giving of concerts shall be paid by the Party of the Second Part. The Party of the First Part hereby agrees to pay any monies allocated to the Party of the Second Part, known as the “Band Fund”, on or before the 30th day of October 2023.

THIS AGREEMENT shall be considered as being in full force and effect from January 1, 2023 to December 31, 2023, on which last named date, it shall expire.

THE CITY OF EL DORADO

THE EL DORADO MUNICIPAL BAND

By: _____

By: _____

TO: City Commission
FROM: Alyssa Warner
SUBJ: Acceptance of 1st Quarter Financial Report
DATE: May 1, 2023

Background:

Per K.S.A 12-1608, the City of El Dorado is required to publish a quarterly treasurer's report in the newspaper within 30 days of a quarter ending. In addition to this statutorily required treasurer's report, the Finance Department creates a quarterly report that analyzes the activities of the City's major funds.

Attachments:

1. El Dorado 1st Qtr 2023 Report

Policy Issue:

N/A

Fiscal Impact:

N/A

Trade-offs:

N/A

Staff Recommendation:

Staff recommend accepting the First Quarter 2023 Financial Report as part of the consent agenda.

Commission Action:

Commissioner _____ moved to accept the First Quarter 2023 Financial report.

Commissioner _____ seconded the motion.

Quarterly Financial Report

2023

City of El Dorado, KS

For the period ended March 31, 2023

INTRODUCTION

DEPARTMENT OF FINANCE

APRIL 2023

City Commission,

The City of El Dorado financial report for the quarter ended March 31, 2023 is presented to you as a review of financial and operational information. This report is intended to inform you and the citizens of the financial condition of the city and to provide information that will assist you in making informed decisions. The information is unaudited and may not reflect all transactions and adjustments that apply to the activities through the fourth quarter.

Key information regarding the financial reports is presented in the following section titled *Overall Summary & Analysis*.

Respectfully submitted,

Alyssa Warner

Alyssa Warner
Finance Director



OVERALL SUMMARY & ANALYSIS

AS OF 03/31/2023

GOVERNMENTAL FUNDS

General Fund - Year-to-date, the General Fund is performing well. Revenues for the year are at 33% of budget at \$3,568,380. Expenditures are at 15% of budget at \$1,592,061. Revenues were bolstered by ad valorem collections -- which are at 57% of budget. Interest earnings have also exceeded budget by \$47,359 or 95%. Vacancy savings in the Police Department and Engineering Department have helped to keep expenses low.

Bond & Interest Fund - Activity in the Bond and Interest Fund is largely completed for the year by the end of the third quarter. Revenues are at \$1,010,900 or 55% of budget for the year largely due to favorable ad valorem tax collections. Expenditures are at 12% of budget or \$211,631. The bulk of this expense is from the first interest payment due in March. This number will change dramatically once the second payment of the year is made in September. This fund will have some excess this year due to a budgeted amount for cost of issuance that will not occur in 2023.

Tourism Tax Fund - This fund is performing as expected for the year. Revenues have not yet come in for events or transient guest tax. The first payment is anticipated in Early may for 1st quarter activity. Event revenues will commence as the summer months draw closer. Expenditures for this fund are at 22% of budget or \$49,177. There may be a small amount of savings in this fund at the end of the year due to the position paid out of this fund being vacant for a portion of the year.

OVERALL SUMMARY & ANALYSIS

AS OF 03/31/2023

PROPRIETARY FUNDS

Water Fund - Revenues are slightly low at 18% of budget for this fund. However, it should be noted that YTD performance is 43% higher than the first quarter of 2022. This is largely due to increased raw water sales in 2023 from 2022. The projections for this fund will be monitored closely. Expenditures in this fund came in below budget at 11% YTD or \$500,825. This is attributable to large transfers not being made yet, minimal costs in professional services, and low maintenance and repair costs YTD,

Sewer Fund - Revenues in this fund are currently at 16% of budget or \$457,101, which is in line with the first quarter of 2022. This is largely due to domestic sales and the readiness to serve fee. The projections for this fund will be monitored closely. Expenditures in this fund are under budget at 16% or \$461,163. This is attributable to large transfers not being made yet, minimal costs in professional services, and low maintenance and repair costs YTD,

Refuse Fund - Revenues in this fund are at 15% of budget or \$257,381. This is due to low performance on domestic, commercial, and industrial sales. Expenditures in this fund are at 17% of budget. This is attributable to large annual transfers not being made yet, minimal costs in professional services, and low maintenance and repair costs YTD, The projections for this fund will be monitored closely.

As of the first quarter of 2023, the City is building and reviewing long-range financial plans for each of its proprietary funds. This effort will inform any future rate increases, capital planning, and the accuracy of revenue projections.

KEY FINANCE DEPT UPDATES

2022 Audit Fieldwork is Complete

The 2022 audit fieldwork is complete as of March 16th, 2023. Demographic information, financial statements, and other disclosures are currently being compiled and will be presented to the governing body in June of 2023.

2024 Budget Process Conclusion

The Finance Department has begun the 2024 budget process by creating a budget simulation for residents to participate in and projecting revenues. The commission will begin having work sessions regarding the 2024 budget in May.

2024 Capital Improvement Process Improvements

The 2024 Capital Improvement Process has begun and departments have submitted their project information sheets to be proposed to the commission. These sheets will be compiled and formed in a way for the commission to review and vote on before ultimately being paired with the 2024 operating budget.



PROJECT UPDATES

- The City received three statements of qualifications for the Transportation Master Plan Project. The first submitting included TranSystems/Benesch, PEC, and JEO Consulting Group.
- The City is held a meeting with Conco Construction to finalize the project scope and agreement for the Concession/Restroom projects at East Park and Central Park baseball and softball complexes. The total estimated cost of the proposal was \$599,948. This will be paid from Excess Sales Tax proceeds.
- The City received two bids for the Airport Road Improvement Project. Pearson Construction submitted the low bid of \$542,685.
- The City received revised options for the 9th Avenue Improvement project and have scheduled a discussion about the project with the City Commission.
- Township Village Street Improvement Projects (5th, 2nd, Hunton, & Simpson) have been completed and final construction work is being done.

This report is intended to highlight quarterly financial data and not to analyze each individual City fund or transaction. As such, this report includes discussion of key funds and activity that demonstrates the overall financial health of the City.

City of El Dorado Finance Department

220 E 1st Avenue

El Dorado, KS 67042

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awarner@eldoks.com



EL DORADO

KANSAS

1st Quarter Treasurers Report

Date Range: 01/01/2023-03/31/2023

Fund	Beginning Cash Balance	Revenues	Expenses	Net Change Assets	Net Change Liabilities	Actual Ending Balance
001 - GENERAL FUND	\$ 2,373,742.48	\$ 3,568,380.20	\$ 1,592,061.31	\$ (5,039,114.31)	\$ 4,369,884.72	\$ 2,129,164.96
002 - EQUIPMENT RESERVE FUND	\$ (1,562,957.64)	\$ -	\$ 5,643.76	\$ -	\$ -	\$ (3,190,613.40)
003 - AIRPORT FUND	\$ (1,229,888.34)	\$ 95,445.24	\$ 36,963.45	\$ (79,514.65)	\$ 104,541.88	\$ (2,424,266.78)
004 - FAMILY LIFE MEMORIAL LIBRARY FUND	\$ 10,435.14	\$ 39,372.90	\$ 66,509.96	\$ (27,137.06)	\$ (13,989.51)	\$ 24,424.65
005 - EL DORADO SENIOR CENTER FUND	\$ 27,382.68	\$ 21,380.28	\$ 26,679.07	\$ -	\$ 4,808.69	\$ 17,275.20
006 - BRADFORD MEMORIAL LIBRARY FUND	\$ 20,631.76	\$ 325,138.17	\$ 325,138.17	\$ (549,713.00)	\$ 549,713.00	\$ 20,631.76
007 - MAJOR STREET FUND	\$ 321,717.15	\$ 18,190.34	\$ 223,253.37	\$ (125,602.18)	\$ 22,637.18	\$ 219,619.12
008 - CEMETERY FUND	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
009 - STORMWATER FUND	\$ (340,828.93)	\$ 202,517.78	\$ 37,773.20	\$ (323,363.66)	\$ 325,356.93	\$ (890,315.62)
010 - ECONOMIC DEVELOPMENT SALES TAX FUND	\$ 285,741.53	\$ -	\$ 1,000.00	\$ -	\$ -	\$ 284,741.53
011 - BRADFORD MEMORIAL LIBRARY	\$ 467,877.37	\$ 340,104.25	\$ 118,033.74	\$ -	\$ 13,442.29	\$ 676,505.59
012 - LAKE DEBT RESERVE FUND	\$ (196,455.69)	\$ -	\$ -	\$ -	\$ -	\$ (744,246.69)
013 - PRAIRIE TRAILS SALES TAX FUND	\$ 112,922.82	\$ 6,000.00	\$ -	\$ -	\$ -	\$ 118,922.82
014 - INDUSTRIAL MILL LEVY FUND	\$ 441,727.79	\$ 71,206.71	\$ 22,300.00	\$ (120,711.00)	\$ 122,711.00	\$ 488,634.50
015 - LIBRARY CAPITAL IMPROVMNT FUND	\$ 135,517.86	\$ -	\$ -	\$ -	\$ -	\$ 135,517.86
016 - SPECIAL PARKS & RECREATION FUND	\$ 85,951.04	\$ 12,528.24	\$ -	\$ -	\$ -	\$ 98,479.28
017 - SPECIAL ALCOHOL PROGRAM FUND	\$ 37,236.24	\$ 9,528.23	\$ -	\$ -	\$ -	\$ 46,764.47
018 - SELF INSURANCE RESERVE FUND	\$ 645,712.80	\$ 436,984.24	\$ 411,319.41	\$ -	\$ 11,163.53	\$ 660,214.10
019 - COMMUNITY DEVELOPMENT DISTRICT	\$ 139,889.10	\$ 13,286.97	\$ 29,257.99	\$ (35,367.95)	\$ 12,415.91	\$ 146,870.12
020 - SALES TAX FUND	\$ 1,730.34	\$ 3,670.94	\$ 1,801.16	\$ (1,795.04)	\$ 1,678.36	\$ 3,716.80
021 - CUSTOMER DEPOSIT FUND	\$ 49,108.16	\$ 21,620.00	\$ 10,896.00	\$ -	\$ -	\$ 59,832.16
022 - LAW ENFORCEMENT TRUST FUND	\$ 3,345.94	\$ (423.21)	\$ -	\$ -	\$ -	\$ 3,345.94
023 - POLICE DEPT SEIZED ASSETS	\$ 22,030.17	\$ -	\$ 1,585.52	\$ (735.52)	\$ -	\$ 21,180.17
024 - TOURISM TAX FUND	\$ 400,655.94	\$ -	\$ 49,176.86	\$ (66,147.04)	\$ (6,370.93)	\$ 423,997.05
025 - REVOLVING LOAN FUND	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
026 - ORDINANCE STREET SALES TAX	\$ 1,122,825.58	\$ -	\$ -	\$ -	\$ -	\$ 1,122,825.58
027 - EXPENDABLE TRUST FUND	\$ 1,271,337.81	\$ 38,669.91	\$ 23,210.22	\$ -	\$ 53.60	\$ 1,286,743.90
028 - EXCESS SALES TAX	\$ 741,546.63	\$ -	\$ -	\$ -	\$ -	\$ 741,546.63
029 - AMERICAN RESCUE PLAN	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
030 - CONSTRUCTION FUND	\$ 1,282,189.43	\$ -	\$ 946,247.68	\$ -	\$ (70,281.54)	\$ 406,223.29
031 - BUILDING DEMOLITION	\$ 85,279.70	\$ 812.18	\$ -	\$ -	\$ -	\$ 86,091.88
032 - GENERAL BUILDING RESERVE	\$ 150,000.00	\$ -	\$ 4,195.00	\$ -	\$ -	\$ 141,610.00
033 - UTILITIES BUILDING RESERVE	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
040 - BOND & INTEREST FUND	\$ 488,400.75	\$ 1,010,900.01	\$ 211,631.08	\$ (6,649,520.21)	\$ 6,650,150.21	\$ 1,287,039.68
041 - TIF W CENTRAL AVENUE GATEWAY	\$ -	\$ 52,514.23	\$ -	\$ 52,514.23	\$ -	\$ -
060 - WATER FUND	\$ 2,872,486.41	\$ 922,312.70	\$ 500,825.30	\$ (354,430.18)	\$ 85,434.33	\$ 3,562,969.66
061 - WATER EQUIPMENT RESERVE	\$ 227,934.79	\$ -	\$ -	\$ -	\$ -	\$ 227,934.79
063 - SEWER FUND	\$ 1,250,259.85	\$ 481,132.49	\$ 461,162.63	\$ (218,936.28)	\$ 22,970.39	\$ 1,466,195.60
064 - SEWER EQUIPMENT RESERVE	\$ 217,248.37	\$ -	\$ -	\$ -	\$ -	\$ 217,248.37
066 - REFUSE FUND	\$ 357,604.13	\$ 257,381.39	\$ 290,780.71	\$ (133,308.77)	\$ 65,231.24	\$ 392,282.34
067 - REFUSE EQUIPMENT RESERVE	\$ 465,605.58	\$ 5,163.05	\$ -	\$ -	\$ -	\$ 470,768.63
069 - COMPRESSED NATURAL GAS STATION FUND	\$ 10,029.36	\$ 7,684.19	\$ 7,342.20	\$ -	\$ 3,314.11	\$ 7,057.24
070 - PAYROLL LIABILITIES FUND	\$ 69,300.04	\$ -	\$ -	\$ (250.72)	\$ 59,473.02	\$ 10,077.74
071 - EXTERNAL STORES FUND	\$ 65,554.39	\$ 40,590.17	\$ 22,916.68	\$ -	\$ -	\$ 83,227.88
072 - DATA PROCESSING FUND	\$ 286,813.03	\$ 3,963.91	\$ 318,737.99	\$ -	\$ 36,534.26	\$ (64,495.31)
075 - OTHER POST-EMPLOYMENT BENEFITS FUND	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
099 - GENERAL FIXED ASSET FUND	\$ (1,266,104.68)	\$ -	\$ -	\$ -	\$ -	\$ (1,266,104.68)
999 - POOLED CASH FUND	\$ -	\$ -	\$ -	\$ 735.52	\$ -	\$ -
	\$ 11,951,536.88	\$ 8,006,055.51	\$ 5,746,442.46	\$ (13,672,397.82)	\$ 12,370,872.67	\$ 8,509,638.81

*Note: Negative balances in some key funds are a reflection of investment liabilities. The City pools its cash. While these funds show a negative balance on the Treasurer's Report (cash basis) these funds still have access to their calculated balances.

TO: City Commission
FROM: Alyssa Warner
SUBJ: Acceptance of 1st Quarter Investment Report
DATE: May 1, 2023

Background:

Per resolution No.2908, the Finance Director shall provide the City Manager with a report outlining the quarter's investment activity. The report shall contain sufficient information to evaluate the performance of the investment program and verify that investment officials have acted in accordance with the investment policy and written investment procedures. The City Manager provides the report to the City Commission to inform the governing body of the City's current investments and the performance thereof.

Attachments:

1. El Dorado 1st Qtr 2023 Investment Report

Policy Issue:

Fiscal Impact:

Trade-offs:

Staff Recommendation:

Staff recommend accepting the First Quarter 2023 Investment Report as part of the consent agenda.

Commission Action:

Commissioner _____ moved to accept the First Quarter 2023 Investment Report.

Commissioner _____ seconded the motion.

1ST QUARTER 2023
**INVESTMENT
REPORT**

In the fourth quarter of 2022, the city engaged Baker Tilly Wealth Management for investment advisory services. Baker Tilly reviewed the City's idle fund balances based on rolling averages over 18 months of cash on hand. All investments have been made in alignment with the City's Financial Policies, City Code, and all relevant state statutes.

To date, the city has invested in four Certificates of Deposit (CDs):

\$5,000,000 - 12 months

Invested Date: 10/11/2022

Maturity Date: 10/11/2023

Interest Rate: 4.28%

APY: 4.37% (\$218,500)

\$3,000,000 - 6 months (180 days)

Invested Date: 11/15/2022

Maturity Date: 05/14/2023

Interest Rate: 4.46%

APY: 4.56% (\$67,638)

\$4,000,000 - 12 months

Invested Date: 01/13/2023

Maturity Date: 01/13/2024

Interest Rate: 4.75%

APY: 4.86% (\$194,400)

\$3,000,000 - 24 months

Invested Date: 03/21/2023

Maturity Date: 03/21/2025

Interest Rate: 4.06%

APY: 4.14%

INTEREST RATE:

THE AMOUNT OF INTEREST DUE PER PERIOD, AS A PROPORTION OF THE AMOUNT LENT, DEPOSITED, OR BORROWED.

ANNUAL PERCENTAGE YIELD (APY):

THE REAL RATE OF RETURN EARNED ON AN INVESTMENT, TAKING INTO ACCOUNT THE EFFECT OF COMPOUNDING INTEREST.

All four CDs compound interest on a monthly basis. The city can expect \$286,138 minimum in investment income for 2023.

TO: City Commission
FROM: David Dillner, City Manager
SUBJ: Kansas Gas Service Franchise Agreement
DATE: May 1, 2023

Background:

The City approved the current franchise agreement with Kansas Gas Service, a division of ONEOK, Inc., on January 13, 2003, with the adoption of Ordinance No. S-1150. The agreement provided a twenty-year, non-exclusive right to Kansas Gas Service to use the City's public right-of-way for the purposes of constructing and maintaining underground infrastructure necessary to convey natural gas to commercial and residential customers in El Dorado. Franchise agreements set forth the terms and conditions for utility companies, such as Kansas Gas Service, to use the public right-of-way for its operations.

Attachments:

1. KGS Standard Franchise Agreement - El Dorado
2. 2003 KGS Franchise Agreement

Policy Issue:

Should the City adopt a multi-year franchise agreement with Kansas Gas Service?

Fiscal Impact:

The agreement provides compensation to the City for the company's use of the public right-of-way in the form of franchise fees. These fees are based on a percentage of gross cash receipts from the sale of natural gas for consumption in the City for all purposes. The current agreement set the franchise rate at 5% of gross cash receipts. These fees are considered a "pass-through" fee, whereby customers pay a franchise fee to Kansas Gas Service based on usage. Kansas Gas Service then pays the City per the agreement. In 2022, the City generated \$319,278 from franchise fees from Kansas Gas. The City averaged \$250,264 from Kansas Gas franchise fees over the prior four years. The proposed agreement will increase the franchise fee rate to 6% of gross cash receipts. The City anticipates the increased rate will generate about \$50,000 each year in new franchise fee revenue.

Trade-offs:

Providers of natural gas are subject to obtaining a franchise agreement from cities for the use of the public right-of-way. Kansas Gas Service has made a significant capital investment to extend its infrastructure to provide natural gas to customers in El Dorado. The City, and its residents, require natural gas as an essential energy source. Consequently, not renewing the franchise agreement would require the City to renegotiate terms with Kansas Gas Service to ensure the community continues to have a reliable provider of natural gas. As a utility provider, Kansas Gas Service serves the region as a regulated monopoly as there are no feasible alternative options for obtaining natural gas from another private provider without significant cost. Natural gas customers would likely be required to pay the cost necessary to either acquire the Kansas Gas Service infrastructure or extend the infrastructure to serve the community.

Staff Recommendation:

The City Manager recommends approval of the proposed franchise agreement with Kansas Gas Service to ensure both parties have a clearly defined agreement for the use of the public right-of-way for the provision of natural gas to customers within El Dorado.

Commission Action:

Commissioner _____ moved to approve and Ordinance granting to Kansas Gas Service, a Division of ONE Gas, Inc., and its successors and assigns, a natural gas franchise, providing terms and conditions for the use of public rights-of-way, and repealing all ordinances or parts of ordinances inconsistent with or in conflict with the terms hereof.

Commissioner _____ seconded the motion.

ORDINANCE NO. _____

AN ORDINANCE, granting to Kansas Gas Service, a Division of ONE Gas, Inc., and its successors and assigns, a natural gas franchise, providing terms and conditions for the use of public rights-of-way, and repealing all ordinances or parts of ordinances inconsistent with or in conflict with the terms hereof.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF EL DORADO, KANSAS:

SECTION 1. DEFINITIONS.

For purposes of this Franchise Ordinance the following words and phrases shall have the meanings given herein. When not inconsistent within the context, words used in the present tense include the future tense and words in the single number include the plural number. The word “shall” is always mandatory, and not merely directory.

“City” shall mean the City of El Dorado, Kansas, and, where appropriate by the context, each of its departments, divisions and component units, including public trusts or authorities of which the City is a beneficiary.

“Company” shall mean Kansas Gas Service, a division of ONE Gas, Inc.

“Consumer” shall mean any Entity located within the municipal corporate limits of the City and serviced by the Company through any use of the Public Ways.

“Distribution” or “Distributed” shall mean all sales, distribution, or transportation of natural gas to any Sales Consumer or Transportation Consumer for use within the City by the Company or by others through the Distribution Facilities of Company in a Public Way.

“Distribution System” or “Distribution Facilities” shall mean a pipeline or system of pipelines, including without limitation, mains, pipes, boxes, reducing and regulating stations, laterals, conduits and services extensions, together with all necessary appurtenances thereto, or any part thereof located within any Public Way, for the purpose of Distribution or supplying natural gas for light, heat, power and all other purposes.

“Effective Date” shall mean the date the Company files its written acceptance with the City following the final passage and approval of this Franchise Ordinance by the City, as set forth in Section 10 of this Franchise Ordinance.

“Entity” shall mean any individual person, governmental entity, business, corporation, partnership, firm, limited liability corporation, limited liability partnership, unincorporated association, joint venture, trust, and any form of business enterprise not specifically listed herein.

“Facility” or “Facilities” refers to the Company’s Distribution System or Distribution Facilities.

“Franchise” shall mean the grant of authority, set forth in Section 2 of this Franchise Ordinance, by the City to the Company for the Distribution of natural gas to the inhabitants of the City and to operate a Distribution System or Distribution Facilities.

“Franchise Fee” shall refer to the charges as prescribed in Section 3 of this Franchise Ordinance.

“Franchise Ordinance” shall mean this Ordinance granting a natural gas Franchise to the Company.

“Gross Receipts” shall mean any and all compensation and other consideration derived directly by the Company from any Distribution of natural gas to Consumers within the City. Such term shall not include revenue from certain miscellaneous charges and accounts, including but not limited to: connection fees, disconnection and reconnection fees, temporary service charges, delayed or late payment charges, collection fees, bad debts, customer project contributions, meter test fees, revenues received by Company from Consumers as Franchise Fee reimbursement, and returned check charges. Additionally, Gross Receipts shall not include credit extended pursuant to the Cold Weather Rule (or substitute rule) of the Kansas Corporation Commission for natural gas sold within the corporate limits of the City, nor Volumetric Rate Fees collected by Company and remitted to City in accordance with Section 3 of this Franchise Ordinance.

“MCF” shall mean a measurement of natural gas equal to one thousand cubic feet. It is assumed for purposes of this Franchise Ordinance that one MCF equals one million British Thermal Units.

“Public Improvements” means any public facilities, buildings, or capital improvements, including, without limitation, streets, alleys, sidewalks, sewer, water, drainage, right-of-way improvements, and other Public Projects.

“Public Project” means any project planned or undertaken and financed by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or improvements, or any other purpose of a public nature paid for with public funds.

“Public Way” or “Public Ways” shall mean the area on, below or above the present and future public streets, avenues, alleys, bridges, boulevards, roads, highways, parks, parking places, and other public areas, and general utility easements, dedicated to or acquired by the City. The term does not include easements obtained by private entities providing utilities services or private easements in platted subdivisions or tracts.

“Sales Consumer” shall mean, without limitation, any Entity that purchases natural gas within the corporate City limits from Company for delivery to such Consumer within the City through the Company’s Distribution System or Distribution Facilities.

“Settlement Prices” shall mean the settlement prices for natural gas futures contracts traded on the New York Mercantile Exchange (NYMEX) on the fifteenth day of each month as published in nationally recognized publications such as the CME Group (CME) or S&P Global Platts (Platts) on the following business day (or the next day in which a Settlement Price is published).

“Transport Gas” shall mean all natural gas transported by Company pursuant to a Kansas Corporation Commission approved transportation tariff, arrangement, or by other agreement, but not sold by the Company, through Company’s Distribution Facilities to any Transportation Consumer.

“Transportation Consumer” shall mean without limitation, any Entity that transports Transport Gas pursuant to a Kansas Corporation Commission approved transportation tariff, arrangement, or by other agreement, within the City’s municipal corporate limits through Company’s Distribution Facilities for consumption within the City’s corporate limits.

“Volumetric Rate” is the rate applicable to each Mcf of Transport Gas distributed to Transportation Consumers. The Volumetric Rate shall be based on a twelve month average of Settlement Prices as calculated from July through June. Initially, the Settlement Price shall mean \$0.2500 per MCF for Transport Gas distributed to Transportation Consumers within the City as represented in “Attachment A,” which is incorporated herein and attached hereto. There shall be an annual recalculation of the Volumetric Rate which shall be effective each January 1. The recalculation shall be based on Settlement Prices for the previous twelve-month period. The average Settlement Prices for each of the twelve months shall be summed and divided by twelve and multiplied by five percent (5%) to obtain the Volumetric Rate to be effective January 1 of the next succeeding year. The Company shall calculate the Volumetric Rates in accordance with the procedures set out herein and then filed with the City Clerk by July 31 of each year for those rates to be effective on January 1 of the following year.

SECTION 2. GRANT OF NON-EXCLUSIVE FRANCHISE.

A. In consideration of the benefits to be derived by the City and its inhabitants, there is hereby granted to the Company (said Company operating a Distribution System in the State of Kansas), a non-exclusive Franchise for a period of twenty (20) years from the Effective Date, to construct, maintain, extend and operate its Distribution Facilities along, across, upon or under any Public Way; for the purpose of selling and distributing natural gas for all purposes to the City, and its inhabitants, and through said City and beyond the limits thereof; to obtain said natural gas, and/or comparable blends of combustible gasses, from any source available; and to do all things necessary or proper to carry on said business.

B. The grant of this Franchise by the City shall not convey title, equitable or legal, in a Public Way and shall give only the right to occupy the Public Way for the purposes and for the period stated in this Franchise Ordinance. This Franchise Ordinance does not:

- (1) Grant the right to use facilities or any other property, natural gas-related or otherwise, owned or controlled by the City or a third party without the consent of such party;
- (2) Grant the authority to construct, maintain or operate any Facility or related appurtenance on property owned by the City outside of a Public Way;
- (3) Excuse the Company from obtaining appropriate access or attachment agreements before locating its Facilities on property owned or controlled by the City (other than a Public Way) or a third party; or
- (4) Unless explicitly set forth herein, excuse the Company from obtaining and being responsible for any necessary permit, license, certification, grant, registration, or any other authorization required by any appropriate governmental entity, including, but not limited to, the City or the Kansas Corporation Commission.

SECTION 3. FRANCHISE FEE.

A. As further consideration for the granting of this Franchise, and in lieu of city occupation, license or permit fees, or revenue taxes, except as expressly provided herein, the Company shall pay to the City during the term of this Franchise, a Franchise Fee of: (i) five percent (5%) of the actual Gross Cash Receipts collected by the Company from the Distribution of natural gas to all Sales Consumers within the corporate limits of the City; and (ii) a sum equal to the Volumetric Rate multiplied by the number of MCF of Transport Gas for the distribution of Transport Gas for Transportation Consumers, all such payments to be made monthly for the preceding monthly period.

B. The Company's obligation for payments of the Franchise Fee shall commence with the first cycle of the monthly billing cycle following the Effective Date of this Franchise Ordinance. Prior to that date, payments shall continue to be calculated and be paid in the manner previously provided in Ordinance No. S-1150, and amendments thereto.

C. In the event a Consumer of Company does not pay a monthly bill from Company in full, Company shall prorate its payments of remissions to the City for sums due on that particular bill so that the amount actually paid by the Consumer to Company on the bill is distributed to Company and to the City for sums due on the bill in proportion to the percentage of the total bill actually paid by the Consumer. In the event Company actually collects any outstanding amounts due on a past due, unpaid, or partially paid monthly customer bill, the Company shall pay City its proportionate share of sums due to the City on such bill.

D. Upon written request by the City (but no more than once per quarter), the Company shall submit to the City a certified statement showing the manner in which the Franchise Fee was calculated. The City shall have the right to examine within the corporate limits of the City and during regular business hours, upon reasonable advance written notice to the Company, all books, papers and records kept by the Company in the ordinary course of business and pertaining to its

business carried on by it in or through the City, necessary to verify the correctness of the Franchise Fee paid by Company.

E. No acceptance by the City of any Franchise Fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise Fee payment be construed as a release of any claim of the City. Any dispute concerning the amount due under this Section shall be resolved in the manner set forth in K.S.A. 12-2001, and amendments thereto.

F. The Franchise Fee required herein shall be in lieu of all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001, K.S.A. 17-1902, and amendments thereto. From and after the date hereof, the permit fees required of the Company by any ordinance (presently in effect or hereafter adopted) for a permit to excavate in, or adjacent to, any Public Way shall be deemed a part of the compensation paid pursuant to this Franchise Ordinance and shall not be separately assessed or collected by the City; in no event, however, shall this provision be interpreted to waive the requirement of notice to the City and the procedural requirements of such ordinance. The Franchise Fee is compensation for use of the Public Way.

SECTION 4. USE OF PUBLIC RIGHT-OF-WAY.

A. Except as provided herein or as regulated by state or federal law, the use of any Public Way under this Franchise by the Company shall be subject to all laws, statutes, regulations and/or city policies (including, but not limited to those relating to the construction and use of the Public Way or other public property) now or hereafter adopted or promulgated. Unless specifically provided herein, the Company shall be subject to all rules, regulations and policies now or hereafter adopted or promulgated by the City relating to permits, sidewalk and pavement cuts, utility location, construction coordination, and other requirements on the use of a Public Way; provided however, that nothing contained herein shall constitute a waiver of or be construed as waiving the right of the Company to oppose, challenge, or seek judicial review of, in such manner as is now or may hereafter be provided by law, any such rules, regulation, or policy proposed, adopted, or promulgated by the City and, further provided other than the items enumerated in this Section 4 herein, that such rules, regulations or policies shall not require the payment of additional fees or additional costs for the use of a Public Way.

B. All mains, services, and pipe which shall be laid or installed under this Franchise shall be so located and laid as not to obstruct or interfere with any water pipes, drains, sewers, or other structures already installed. The Company shall provide, prior to commencing work, information to the City concerning work to be performed in the streets, avenues, bridges, parking areas, and public places of the City, as the City may from time to time require for purposes of record keeping. The City may require that the information be provided on its standard permit form, but without requiring approval, consent, or fees. In the event of an emergency, the Company shall have the right to commence work without having first provided such information or form(s).

C. The Company's use of any Public Way shall always be subject and subordinate to the City's use of the Public Way for any public purpose. The City may exercise its home rule powers in its administration and regulation related to the management of the Public Way; provided

that any such exercise must be competitively neutral and may not be unreasonable or discriminatory, nor in conflict with state or federal law.

D. The City reserves the right to lay or permit to be laid cables, electric conduits, water, sewer, gas or other pipelines, and to do or permit to be done any underground work deemed necessary and proper by the City, along, across, over, or under any Public Way. In permitting such work to be done, the City shall not be liable to the Company for any damage to the Company's Facilities unless the City or its agents or contractors are negligent in causing said damage.

E. Whenever by reason of establishing a grade or changing in the grade of any street, or the location or manner of construction of any Public Way, the City deems it necessary to alter, change, adapt, or conform any portion of the Company's Facilities located in the Public Way, the City shall provide reasonable notice and such alterations or changes shall be made within a reasonable time by the Company, as requested in writing by the City, without claim for reimbursement or compensation for damages against the City; provided, however, that this provision is not intended to require the Company to alter, change, adapt, or conform any portion of its Facilities without reimbursement or compensation where the right to locate the same, whether by private right-of-way grant, utility easement, or otherwise, was acquired prior to the designation of the location as a Public Way.

F. If the City shall require the Company to adapt or conform its Facilities or in any way to alter, relocate, or change its property to enable any other person, firm, corporation, or Entity (whether public or private), other than the City, to use the Public Way, the Company shall be reimbursed by the person, firm, corporation, or Entity desiring or occasioning such change for any and all loss, cost, or expense occasioned thereby. "Person," "Firm," "Corporation," and "Entity" as used in this paragraph shall not include regular departments of the City, or any trust or authority formed by or for the benefit of the City for public utility purposes, but shall include any other agency or authority of the City, whether acting in a governmental or non-governmental capacity, including, but not limited to, any urban renewal authority, or any other agency or authority, which as a part of its program clears whole tracts of land within the municipal corporate limits and relocates citizens for the purpose of urban development or similar aims.

G. The Company and the City shall participate in the Kansas One-Call utility location program. The Company shall cooperate promptly and fully with the City and take all reasonable measures necessary to provide accurate and complete information regarding the location of its Facilities located within a Public Way when requested by the City. Such location and identification shall be promptly communicated in writing to the City without cost to the City, its employees, agents or authorized contractors. The Company shall designate and maintain an agent familiar with the Facilities, who is responsible for providing timely information needed by the City for the design and replacement of Facilities in a Public Way during, and for the design of Public Improvements.

H. The Company shall be subject to the following fees and costs in connection with its use and occupancy of any Public Way: (i) in the event that the repairs or replacements set forth under Section 5 below, have not been timely completed by Company, the City may charge an excavation fee for each street or pavement cut to recover the costs associated with construction and repair activity; (ii) inspection fees to recover all reasonable costs associated with City inspection of the work of the Company in the Public Way when the Facilities are of such a scope

and magnitude so as to require the City to incur such inspection costs by an outside party; and (iii) the repair and restoration costs associated with repairing and restoring the Public Way because of damage caused by the Company, its assigns, contractors, and/or subcontractors in the Public Way.

SECTION 5. NOTICE OF WORK AND DUTY TO REPAIR.

A. Prior to commencing any activities related to the construction, maintenance, or extension of its Facilities along, across, upon or under the Public Way, the Company shall submit to the City written plans detailing all such activities in the manner required by the City by Ordinance. In the event of an emergency, Company shall have the right to commence work without providing such plans, provided such plans are submitted within five business days of commencement of the work. The Company's Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such Public Ways or unreasonably obstruct the legal use by other utilities.

B. Prior to beginning work, the Company will inspect existing pavement within and/or adjacent to the work area and will report any existing damage or concerns. All earth, materials, sidewalks, paving, crossings, utilities, Public Improvements, or improvements of any kind located within the Public Way that are damaged, displaced, or removed by the Company shall be fully repaired or replaced to their prior condition or to existing municipal standards as are then in existence, and in a manner satisfactory to the duly authorized representative of the City, after completing such activity as is permitted under this Franchise Ordinance and without cost to the City.

SECTION 6. INDEMNITY AND HOLD HARMLESS.

The Company, its successors and assigns, in the construction, maintenance, and operation of its Facilities, shall use all reasonable and proper precaution to avoid damage or injury to persons and property, and shall indemnify, defend, hold, and save the City harmless from any and all claims, damage, judgements, and reasonable expense, including attorney fees, caused by the negligence of the Company, its successors and assigns, or their agents or servants. The Company or the City shall promptly advise the other in writing of any known claim or demand against the Company or the City related to or arising out of the Company's activities in any Public Way.

SECTION 7. RULES AND REGULATIONS.

The Company shall have the right to make and enforce such reasonable rules and regulations as it may deem necessary for the extension of its Facilities, the sale of its gas, and the prudent conduct of its business, provided that such rules and regulations shall neither be in conflict with the laws of the State of Kansas, with the orders, rules, or regulations of the Kansas Corporation Commission or other regulatory authority having jurisdiction, nor with the ordinances and regulations of the City insofar as they are consistent with the jurisdiction of the Kansas Corporation Commission or such other regulatory authority.

SECTION 8. REVOCATION AND TERMINATION.

In case of failure on the part of the Company to comply with any of the provisions of this Franchise Ordinance, or if the Company should do or cause to be done any act or thing prohibited by or in violation of the terms of this Franchise Ordinance, the Company may be subject to forfeiture of all rights, privileges, and Franchise granted herein, and all such rights, privileges, and franchise hereunder be deemed ceased, terminated, null, and void, and this Franchise Ordinance shall be deemed revoked or terminated, provided that said revocation or termination shall not take effect until the City has completed the following procedures: Before the City proceeds to revoke and terminate this Ordinance, it shall first serve a written notice upon Company, setting forth in detail the neglect or failure complained of, and the Company shall have sixty (60) days thereafter in which to comply with the conditions and requirements of this Franchise Ordinance. If at the end of such sixty (60) day period the City determines that the neglect or failure complained of has not been cured, the City shall take action to revoke and terminate this Franchise Ordinance by an affirmative vote of the governing body present at a public meeting and voting, setting out the grounds upon which this Franchise Ordinance is to be revoked and terminated; provided, to afford the Company due process, the Company shall first be provided reasonable notice of the date, time, and location of the governing body's consideration and shall have the right to address the governing body regarding such matter; and further provided, if the nature of the default is such that it cannot be reasonably cured within the above said sixty (60) day period, and the governing body believes the Company has in good faith timely commenced its cure and is diligently pursuing the completion of the same, the Company may, in the City's sole discretion, be given a reasonable additional period of time to complete its cure. Nothing herein shall prevent either party from invoking any other remedy that may otherwise exist at law. Upon any determination by the governing body to revoke and terminate this Franchise Ordinance, the Company shall have thirty (30) days to appeal such decision to the District Court where the City is located or in the District Court of Johnson County, Kansas. This Franchise Ordinance shall be deemed revoked and terminated at the end of this thirty (30) day period, unless the Company has instituted such an appeal. If the Company does timely institute such an appeal, such revocation and termination shall remain pending and subject to the court's final judgment. Provided, however, that the failure of the Company to comply with any of the provisions of this Franchise Ordinance or the doing or causing to be done by the Company of anything prohibited by or in violation of the terms of this Franchise Ordinance shall not be a ground for the revocation or termination thereof when such act or omission on the part of the Company is due to any cause or delay beyond the control of the Company or to bona fide legal proceedings.

SECTION 9. RESERVATION OF RIGHTS.

A. In granting its consent hereunder, the City does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, applicable Federal laws or regulations as the same may be amended, its home rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.

B. In adopting and passing this Ordinance, neither the City's nor the Company's present or future legal rights, positions, claims, assertions or arguments before any administrative

agency or court of law are in any way prejudiced or waived. By the City's adopting and passing this Franchise Ordinance and the Company's acceptance hereof as provided in Section 10, neither the City nor the Company waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or the Company may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of any present or future laws, non-franchise ordinances and/or rulings.

SECTION 10. ACCEPTANCE OF TERMS.

A. This Franchise Ordinance shall take effect and be in force from and after its passage, approval by the City, acceptance by the Company, and publication in the official City newspaper. The Company shall have sixty (60) days after the final passage and approval of this Franchise Ordinance to file with the City Clerk its written acceptance of the provisions, terms, and conditions of this Franchise Ordinance and when so accepted, this Franchise Ordinance and acceptance shall constitute a contract between the City and the Company and such contract shall be deemed effective on the date Company files its acceptance with the City.

B. This Franchise Ordinance, when accepted as provided above, (i) shall constitute the entire agreement between the City and the Company relating to this Franchise, and the same shall supersede and cancel any prior understandings, agreements, or representations regarding the subject matter hereof, or involved in negotiations pertaining thereto, whether oral or written, (ii) shall be binding upon the parties, including their successors and assigns, and (iii) shall not be amended or further obligations imposed without mutual consent of the parties hereto.

SECTION 11. REOPENER PROVISION.

A. Upon written request of either the City or the Company, this Franchise may be reviewed once after five (5) years from the effective date of this Franchise Ordinance, and once every (5) five years thereafter, to review the Franchise Fee set forth in Section 3 above. Said request must be served upon the other party at least 120 days prior to the end of each period set forth above, and shall state specifically the amendment(s) to the Franchise Fee desired. The City and the Company shall negotiate in good faith in an effort to agree upon a mutually satisfactory amendment of the Franchise.

B. Upon written request of the Company, the Franchise shall be reopened and renegotiated at any time upon a change in federal, state, or local law, regulation, or order which materially affects any rights or obligations of the Company, including, but not limited to, the scope of the grant to the Company or the compensation to be paid to the City.

C. The Franchise Fee percentage rate set forth in Section 3 shall in no event exceed the percentage rate hereafter approved to calculate any fee paid to the City by any Entity for use of the Public Ways, if such fee is based in any way on the amount of revenues or gross receipts from the sale, transportation and/or distribution of natural gas or electric energy (excluding any municipally-owned electric utility) by such other Entity to customers within the City. If at any time after the Effective Date of this Franchise Ordinance, the fee or rate required to be paid by another Entity selling, transporting, and/or distributing natural gas or electric energy (excluding

any municipally-owned electric utility) is less than the Franchise Fee percentage rate set forth in Section 3, then this Franchise shall become automatically subject to reopen upon notice by the Company for purposes of negotiation of a new lower Franchise Fee percentage rate.

SECTION 12. NOTICE OF ANNEXATION.

The City shall promptly notify the Company in writing (to include a map) of areas newly annexed into or deannexed from the corporate limits of the City, and the Company shall update its records for the purpose of payment of Franchise Fees as soon as reasonably practicable after receiving such notice. Notwithstanding anything to the contrary in this Franchise Ordinance, the Franchise Fees provided for in Section 3 shall not become effective within any area annexed by the City until the beginning of the monthly billing cycle which begins no more than sixty (60) days after the date that the City provides the Company with a certified copy of the annexation ordinance, proof of publication as required by law and a map of the City detailing the annexed area.

SECTION 13. RELEVANT LAW.

This Franchise Ordinance is granted pursuant to the provisions of K.S.A. 12-2001 and amendments thereto. Any and all ordinances or parts of ordinances in conflict with the terms hereof are hereby repealed or considered as having no effect as of the first cycle of the monthly billing cycle as referenced in Section 3 of this Franchise Ordinance.

SECTION 14. TRANSFER AND ASSIGNMENT.

Company shall not have the right to assign, sell, lease, or otherwise transfer in any manner whatsoever to any third party not affiliated with Company the rights and privileges granted under this Franchise Ordinance except as hereinafter provided. Any assignment, sale, lease, or other transfer by the Company of the Franchise granted herein to any third party not affiliated with Company shall be ineffective and void unless:

- (1) The proposed assignment, sale, lease, or transfer shall be in writing:
- (2) The prospective assignee, buyer, lessee, or other transferee shall agree in writing to accept and become responsible for full performance of all conditions, covenants, obligations, and liabilities contained in this Franchise Ordinance; and
- (3) Such writing shall be submitted to the City Clerk of the City.

SECTION 15. POINT OF CONTACT AND NOTICES.

The Company shall at all times maintain with the City a local point of contact who shall be available at all times to act on behalf of Company in the event of an emergency. Company shall provide the City with said local contact's name, address, telephone number, fax number, and e-mail address. Emergency notice by either party to the other may be made by telephone to the City's designee as listed below. All other notices between the parties shall be in writing and shall be made by personal delivery, depositing such notice in the U.S. Mail, Certified Mail (return

receipt requested), or via the email addresses provided below. Any notice served by U.S. Mail or Certified Mail (return receipt requested) shall be deemed delivered upon actual receipt unless otherwise provided. Other than emergencies, notices to the parties shall be to the following:

The City:

The City of _____
Attn: City Clerk _____
_____, Kansas _____

Phone: _____
Fax: _____
Email: _____

Company:

Kansas Gas Service, a Div. of ONE Gas, Inc.
Attn: Legal Department
7421 W. 129th Street
Overland Park, KS 66213-2713
Phone: (913) 319-8619
Fax: N/A
Email: kgsfranchises@onegas.com

Emergency Contact Information:

Emergency Designee: _____
Emergency Contact No.: _____
Emergency Email: _____

Natural Gas Emergency No: 888-492-4950
Local Contact Name.: _____
Local Contact Email: _____

(or to replacement addresses that may be later designated in writing).

SECTION 16. AGREEMENT TO RENEGOTIATE.

Should the Kansas Corporation Commission take any action with respect to this Franchise Ordinance and any amendment thereto which precludes Company from recovering from its customers any costs or fees provided for hereunder, the parties hereto shall renegotiate this Franchise Ordinance in accordance with or to conform to the Commission's ruling.

PASSED, ADOPTED AND APPROVED this _____ day of _____, 20__.

CITY OF _____, KANSAS

[seal]

_____, Mayor

ATTEST:

_____, City Clerk

ACCEPTANCE OF FRANCHISE ORDINANCE

To the Governing Body of the City of El Dorado, Butler County, Kansas.

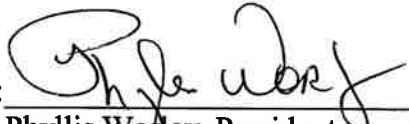
Kansas Gas Service, a division of ONEOK, Inc., for itself, its successors and assigns, hereby accepts in writing the Ordinance and all rights and privileges therein granted, passed by the Governing Body of the City of El Dorado, Kansas, on the 13th day of January, 2003, designated as Ordinance No. S-1150 and entitled:

AN ORDINANCE, granting to Kansas Gas Service, a division of ONEOK, Inc., its successors and assigns, a natural gas franchise, prescribing the terms thereof and relating thereto, and repealing all ordinances or parts of ordinances inconsistent with or in conflict with the terms hereof.

This acceptance is executed and filed as provided in Section 10 of said Franchise Ordinance No. S-1150, and said Company hereby agrees to all the terms and conditions of said Ordinance.

Dated at Overland Park, Kansas, this 23rd day of MAY, 2003

KANSAS GAS SERVICE,
A DIVISION OF ONEOK, INC.

By: 
Phyllis Worley, President

Attest:


John DeCoursey
Assistant Secretary

State of Kansas)
County of Butler)
City of El Dorado)

I, Shauna Johnson, City Clerk of the City of El Dorado, Kansas, do hereby certify that the foregoing is a true and correct copy of acceptance of Ordinance No. S-1150, of the City of El Dorado as therein described, the original of which acceptance was filed in the office of the Clerk of said City on the 30th day of May, 2003, and is now recorded among the original records thereof, and that I am the keeper of the same.

Witness my hand and the official seal of said City, this 30th day of May, 2003.


City Clerk

ORDINANCE NO. S-1150

AN ORDINANCE, granting to Kansas Gas Service, a Division of ONEOK, Inc., its successors and assigns, a natural gas franchise, prescribing the terms thereof and relating thereto, and repealing all ordinances or parts of ordinances inconsistent with or in conflict with the terms hereof.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF EL DORADO, KANSAS:

SECTION 1. That in consideration of the benefits to be derived by the City of El Dorado, Kansas, ("City"), and its inhabitants, there is hereby granted to Kansas Gas Service, a Division of ONEOK, Inc. ("Company"), said Company operating a system for the transmission and distribution of natural gas in the State of Kansas, the right, privilege, and authority for a period of twenty (20) years from the effective date of this ordinance, to occupy and use the several streets, avenues, alleys, bridges, parks, parking areas, and public places of said City, for the placing and maintaining of equipment and property necessary to carry on the business of selling and distributing natural gas for all purposes to the City, and its inhabitants, and through said City and beyond the limits thereof; to obtain said natural gas from any source available; and to do all things necessary or proper to carry on said business.

SECTION 2. As further consideration for the granting of this franchise, and in lieu of any city occupation, license, or permit fees, or revenue taxes, the Company shall pay to the City during the term of this franchise five percent (5 %) of the gross cash receipts from the sale of natural gas for consumption in the City for all purposes within the corporate limits of the City, such payments to be made monthly for the preceding monthly period. Gross cash receipts shall not include other operating revenues received by the Company, which are not related to the "sale of natural gas ". These include, but are not limited to, connection fees, disconnection and reconnection fees, temporary service charges, delayed or late payment charges, collection fees, and returned check charges as such terms are used in tariffs or in the natural gas industry.

SECTION 3. The payments and compensation herein provided shall be in lieu of all other licenses, taxes, charges, and fees, except that the usual general property taxes and special ad valorem property assessments, sales, and excise taxes or charges made for privileges which are not connected with the natural gas business, will be imposed on the Company and are not covered by the payments herein. From and after the date hereof, however, the permit fees required of the Company by any ordinance presently in effect or hereafter adopted for a permit to excavate in any unpaved street, alley, or other public place shall be deemed a part of the compensation paid in Section 2 and shall not be separately assessed or collected by the City; in no event, however, shall this provision be interpreted to waive the requirement of notice to the City and the procedural requirements of such ordinance.

SECTION 4. The use of Right of Way under this franchise by the Company shall be subject to all rules, regulations, policies, resolutions, and ordinances now or hereafter adopted or promulgated by the City in the reasonable exercise of its police power. In addition, the Company shall be subject to all laws, rules, regulations, policies, resolutions, and ordinances now or hereafter adopted or promulgated by the City relating to permits, sidewalk and pavement cuts, utility location, construction coordination, and other requirements on the use of the Right of

Way; provided, however, that nothing contained herein shall constitute a waiver of or be construed as waiving the right of the Company to oppose, challenge, or seek judicial review of, in such manner as is now or may hereafter be provided by law, any such rules, regulation, policy, resolution, or ordinance proposed, adopted, or promulgated by the City and, further provided, other than the items enumerated in Section 3 herein, that such laws, rules, regulations, policies, resolutions, or ordinances shall not require the payment of additional fees or additional costs for the use of the Right of Way. In any event, the Company is granted an offset for such fees and costs against the franchise fees required to be paid hereunder.

SECTION 5. All mains, services, and pipe which shall be laid or installed under this grant shall be so located and laid as not to obstruct or interfere with any water pipes, drains, sewers, or other structures already installed. Company shall provide, prior to commencing work, information to the City concerning work to be performed in the streets, avenues, bridges, parks, parking areas, and public places of the City, as the City may from time to time require for purposes of record keeping. The City may require that the information be provided on its standard permit form, but without requiring approval, consent, or fees. In the event of an emergency, Company shall have the right to commence work without having first providing such form(s).

SECTION 6. Company shall, in doing the work in connection with its said gas mains, pipes, and services, avoid, so far as may be practicable, interfering with the use of any street, alley, avenue, or other public thoroughfare. It shall, without expense to the City, and in a manner satisfactory to the duly authorized representatives of the City, replace such paving or surface in substantially as good condition as before said work was commenced.

SECTION 7. It is recognized that the natural gas to be delivered hereunder is to be supplied from a pipeline system transporting natural gas from distant sources of supply; and the Company, by its acceptance of this franchise as hereinafter provided, does obligate itself to furnish natural gas in such quantity and for such length of time, limited by the terms hereof, as the said sources and said pipelines are reasonably capable of supplying.

SECTION 8. Company, its successors and assigns, in the construction, maintenance, and operation of its natural gas system, shall use all reasonable and proper precaution to avoid damage or injury to persons and property, and shall hold and save harmless the City from any and all damage, injury, and expense caused by the negligence of said Company, its successors and assigns, or its or their agents or servants.

SECTION 9. Within twenty (20) days after the passage and approval of this Ordinance, Company shall file the same with the Kansas Corporation Commission for the Commission's approval.

SECTION 10. After the approval of this Ordinance by the Kansas Corporation Commission, Company shall file with the City Clerk of the City its written acceptance of this Ordinance. Said Ordinance shall become effective and be in force and shall be and become a binding contract between the parties hereto, their successors and assigns, on the 13th day of March, 2003, such date being at least sixty (60) days after the final passage and approval by the City. During said sixty day period, publication of this Ordinance shall be as required by law.

SECTION 11. This Ordinance, when accepted as above provided, shall constitute the entire agreement between the City and the Company relating to this franchise and the same shall supercede and cancel any prior understandings, agreements, or representations regarding the subject matter hereof, or involved in negotiations pertaining thereto, whether oral or written,

shall be binding upon the parties, including their successors and assigns, and shall not be amended or further obligations imposed without mutual consent of the parties hereto.

SECTION 12. I. Upon written request of either the City or the Company, this franchise may be reviewed after five (5) years from the effective date of this ordinance, and every five (5) years thereafter. Said request must be served upon the other party at least one hundred twenty (120) days prior to the end of every five years of the term of this Ordinance, and shall state specifically the amendments desired. The City and the Company shall negotiate in good faith in an effort to agree upon mutually satisfactory amendments.

Failure of the City and Company to successfully renegotiate the materially affected provisions of this franchise under this section shall give rise to dispute resolution as follows: When the parties determine that they are at an impasse, the City and the Company shall each select a representative who shall jointly select a third representative. The three representatives shall hear the positions of the City and the Company and shall determine the matters in disagreement by majority vote. Such decision shall be presented to City and the Company as the renegotiated language. Rejection of the dispute resolution by either the City or the Company shall give rise to the remedies provided by statute, or, at the option of the parties, the franchise shall remain in effect according to its then existing terms.

Amendments under this section, if any, shall be made by ordinance as prescribed by statute. Except as provided within this section the franchise shall remain in effect according to its terms pending completion of any review or renegotiation provided by this subsection.

II. Upon written request of either the City or the Company, the franchise shall be reopened and renegotiated at any time upon any of the following events:

- (a) Change in federal, state, or local law, regulation, or order which materially affects any rights or obligations of either the City or Company, including, but not limited to, the scope of the grant to the Company or the compensation to be received by the City.
- (b) Change in the structure or operation of the natural gas industry which materially affects any rights or obligations of either the City or Company, including, but not limited to, the scope of the grant to the Company or the compensation to be received by the City.
- (c) Any other material and unintended change or shift in the economic benefit the City or the Company relied upon and anticipated upon entering into this franchise.

III. The compensation provision of this franchise shall be reopened and renegotiated if energy consumers within the City have access to alternative natural gas suppliers or other suppliers of energy through pipelines, and use the public rights of way or public property of the City without paying a franchise fee or other payment substantially equivalent to the franchise fee established herein, which results in a material and unfair disadvantage to the Company. The use of right of provision of this franchise shall be reopened and renegotiated if energy consumers within the City have access to alternative natural gas suppliers or other suppliers of energy through pipelines which use the public rights of way or public property of the City, and do not have requirements on the use of the public ways substantially equivalent to the requirements of this franchise, which results in a material and unfair disadvantage to the Company. Upon any such event, the City shall have up to ninety (90) days after written request of the Company to restore competitive neutrality. Following notice to the City, Company may suspend collection and payment of the franchise fee to the City for the affected customers until the City resolves the

competitive disadvantage. After the last above referred ninety (90) day period expires without resolution of the competitive disadvantage, the Company shall have no liability to the City for any uncollected franchise fees suspended as provided in this subsection.

SECTION 13. The City may by separate ordinance provide for the assessment and collection of franchise fees on all natural gas transported (transport gas) by the Company or by others, but not sold by the Company, to any consumer or user within the City through the facilities of the Company located in the public right of way. Said separate ordinance may also provide for the assessment and collection of franchise fees based upon the compensation paid by a consumer to the Company for the transportation of natural gas not sold by the Company using Company facilities located in public rights of way within the corporate limits of the City. In this event the Company may be granted the authority to collect on behalf of the City the total compensation to be made to the City by other parties using the Company's facilities for distribution of transport gas. The Company shall not be responsible for the nonpayment of such franchise fees, but under a satisfactory collection agreement between the City and the Company, agrees to collect such sums for the City and to submit such payments in a reasonable manner to be prescribed in the separate ordinance.

The City shall use the current method used by the Company to calculate the amount of the franchise fee to be charged to transport customers on a volume basis. Said method shall be fully delineated on the separate ordinance.

SECTION 14. The franchise is granted pursuant to the provisions of K.S.A. 12-2001 and amendments thereto.

SECTION 15. Any and all ordinances or parts of ordinances in conflict with the terms hereof are hereby repealed or considered as having no effect.

SECTION 16. Should the Kansas Corporation Commission take any action with respect to this franchise ordinance which precludes Company from recovering from its customers any costs or fees provided for hereunder, the parties hereto shall renegotiate this ordinance in accordance with the Commission's ruling.

PASSED AND APPROVED this 13th day of January, 2003.

(SEAL)

ATTEST:


Shauna Johnson
City Clerk

Connie Phillips
MAYOR

ORDINANCE NO. S-1149

AN ORDINANCE REQUIRING A FRANCHISE FOR TRANSPORTATION, DISTRIBUTION, AND SALE OF NATURAL GAS AND OTHER ENERGY THROUGH PIPELINES OR DISTRIBUTION SYSTEMS LOCATED IN THE CITY; AND PROVIDING FOR EXEMPTION FROM SUCH REQUIREMENT FOR CERTAIN PROVIDERS.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF EL DORADO, KANSAS:

SECTION ONE: Definitions

- a. “City” – shall mean the City of El Dorado, Kansas.
- b. “Consumer” or “User” – shall mean, without limitation, any individual person, business, corporation, company, partnership, firm, limited liability corporation, limited liability partnership, unincorporated association, joint venture, trust, municipality, or public corporation served by a Franchised Entity or Provider through a Distribution System.
- c. “Distribution System” or “Distribution Facilities” – shall mean a pipeline or system of pipelines, including without limitation mains, pipes, boxes, reducing and regulating stations, laterals, conduits, and services extensions, together with all necessary appurtenances thereto, or any part thereof, for the purpose of supplying natural gas or Other Energy for light, heat, power, and all other purposes.
- d. “Franchised Entity” – shall mean any entity that has a franchise granted by the City for the supplying of natural gas under the procedures and provisions of K.S.A. 12-2001, et seq., as amended; such entity at the effective date of this Ordinance is Kansas Gas Service, a Division of ONEOK, Inc.
- e. “Gross Receipts” – shall mean
 - 1. any and all compensation and other consideration derived directly or indirectly by the Provider from:
 - (a). any transportation, distribution or sale of natural gas to a consumer for any use, including domestic, commercial, and industrial purposes, and including without limitation interruptible, single and firm sales: and
 - (b). any operation or use of any or all of the Distribution Facilities in the Public Right-of-Way by the Provider or others including without limitation charges as provided in tariffs filed

and approved, and shall also include all fees or rentals received by the Provider for the lease or use of pipeline capacity within the corporate limits of the City.

2. Except that 'Gross Receipts' shall not include:

(a). connection and disconnection fees, reconnection fees, returned check charges, temporary service charges, and delayed or late payment charges as such terms are used in tariffs or in the natural gas industry;

(b). compensation from the sale of natural gas when:

(1). the Customer purchases the natural gas as a separate and identifiable commodity that is not subject to a regulated tariff rate, and

(2). on which the Volumetric Rate is applied; or

(c). compensation from the sale of natural gas when a franchise fee has been paid by another Franchised Entity on the same transaction.

f. "MCF" means a measurement of natural gas equal to one thousand cubic feet; a cubic foot is the quantity of natural gas occupying one cubic foot of space at a pressure of 14.73 PSIA and a temperature of 60 degrees Fahrenheit. It is assumed for the purposes of this Ordinance that one MCF is equal to 1,000,000 British Thermal Units (BTU's).

g. "Other Energy" means energy provided in a gaseous, liquid, or slurry mixture form through pipelines for light, heat, power, and all other purposes as an alternative to or replacement for natural gas, but specifically shall not include electrical energy.

h. "Provider" means any business, including any individual person, business, corporation, company, partnership, firm, limited liability corporation, limited liability partnership, unincorporated association, joint venture, trust, municipality, or public corporation providing the transportation, distribution, or sale of natural gas or Other Energy to a Consumer, whether through its own Distribution System, the Distribution System of a Franchised Entity or through the Distribution System of another, and shall also include a Consumer transporting natural gas or Other Energy for its own use.

i. **“Public Right-of-Way”** means any and all present and future streets, alleys, rights-of-way, and public easements, whether platted or otherwise dedicated, and located within the City.

j. **“Settlement Price”** means the settlement prices for natural gas futures contracts traded on the New York Mercantile Exchange on the 15th day of each month as published daily in the Wall Street Journal on the following business day (or the next day on which a Settlement Price is published).

k. **“Volumetric Rate”** means sixteen and two-tenths cents (0.162) per MCF, or such amount as may be hereafter calculated and filed with the City Clerk according to the provisions of this Ordinance.

SECTION TWO: Application of Ordinance.

From and after the effective date of this Ordinance, no natural gas or “Other Energy” shall be transported, distributed, or sold by any Provider to any Consumer for use within the corporate limits of the City through a Distribution System located in whole or in part in the Public Right-of-Way except in accordance with the provisions of this Ordinance. This Ordinance applies to any distribution to a Consumer within the City whether or not the portion of the Distribution System serving the Consumer is in the Public Right-of-Way, so long as any portion of the Distribution System of the Provider is in the Public Right-of-Way.

SECTION THREE: Franchise Required.

- a. Every Provider subject to this Ordinance shall obtain a franchise from the City under the provisions of K.S.A. 12-2001, et seq. for the use of Distribution Systems located in Public Right-of-Way. Any Provider which only uses the Distribution System of a Franchised Entity and which reports and pays a sum equal to the compensation calculated pursuant to Section Four (b) of this Ordinance to the City through such Franchised Entity shall be exempt from the requirement for a separate franchise. Any interstate pipeline transportation company which is otherwise a Provider under this Ordinance shall not be required to obtain a separate franchise under this section; provided, that all Users of such interstate pipeline transportation company who are located within the City shall obtain a franchise and shall report and pay a sum equal to the compensation calculated pursuant to Section Four (b) of this Ordinance and a sum equal to five per cent (5%) of the amount paid for the transportation of such natural gas or Other Energy.

b. The franchise required under this Ordinance shall contain the following substantive elements:

- 1. In consideration of and as compensation for the franchise, the Provider shall agree to pay to the City a sum equivalent to fees calculated in accordance with Section Four of this Ordinance.**
- 2. The payments and compensation paid by the Provider shall be in lieu of all other licenses, taxes, charges, and fees, except that the usual general property taxes and special ad valorem property taxes, sales and excise taxes, and any permit fees and charges for pavement cuts or other permit fees and charges based on restoring premises to their original condition, or charges made for privileges which are not in any way connected with the natural gas or Other Energy business, as such, will be imposed on the Provider and are not covered by the franchise fee payments.**
- 3. The Provider shall agree that the City shall have access to and the right to examine and audit all records reasonably necessary to verify the payment of the franchise fee. If any such payment is found to be incorrect, then payment shall be made upon a corrected statement. The Provider shall agree that for each and every month, or any part thereof, that franchise compensation remains unpaid after the same becomes due and payable by the Provider, there shall be added as a late charge a sum equal to the then current statutory rate of interest on the unpaid amount.**
- 4. Provider shall agree to hold the City harmless from any and all damages arising from the exercise of any right or privilege granted under this Ordinance and the franchise, and from any and all damages accruing from the neglect or mismanagement of its employees, agents or servants in the exercise of any right or privilege granted under this Ordinance and the franchise.**
- 5. Subject to the approval of the regulatory body having jurisdiction and control over rules and regulations of the Provider at the time in question, the Provider shall agree that the City has the right to make such reasonable rules and regulations for the protection of its property and for the distribution and sale of natural gas and Other Energy, and the appropriate conduct of business as the City may from time to time deem necessary.**
- 6. The franchise shall be non-exclusive.**

7. The franchise shall be for a term expiring no later than the earliest date of expiration of the franchise of any Franchised Entity and subject to reopening and renegotiation upon events materially affecting the rights or obligations of the City or the Provider.
8. In the event the Provider owns or maintains all or any portion of a Distribution System, it shall agree to limitations on the use of the Public Right-of-Way and the construction, location, and relocation of facilities, and the quality of and standards for service, all substantially equivalent to those of the Franchised Entities.
9. The Provider shall agree to file its written acceptance of the provisions, terms, and conditions of the franchise with the City Clerk within 60 days after final passage of the Franchise Ordinance.

SECTION FOUR: Calculation of Fees.

- a. **Natural Gas Fees Applicable to a Provider Required to Have a Separate Franchise.** In consideration of and as compensation for the franchise granted to the Provider by the City, the Provider shall make an accounting on a monthly basis to the City of all sales, distribution, or transportation to any Consumer or User for use within the City by the Provider or by others through the Distribution Facilities of the Provider. The Provider shall pay to the City a franchise fee calculated as follows:
 1. A sum equal to five per cent (5%) of Gross Receipts; and
 2. A sum equal to the Volumetric Rate multiplied by the number of MCF of natural gas transported or distributed by the Provider.

Such sums shall be adjusted for uncollectible receivables and uncollectible receivables which are later collected. Such payments shall be made to the City within 30 days of the last day of the month to which such accounting shall apply, under procedures established by the City Clerk.

- b. **Natural Gas Fees Applicable to a Provider Through Another Franchised Entity.** In consideration of and as compensation for the use of Public Right-of- Way, any Provider which is not a Franchised Entity and which is using the Distribution System of a Franchised Entity shall pay the City through such Franchised Entity a fee calculated in the manner provided in subsection (a) 2 of this section. Such payments shall be made monthly under procedures established by such Franchised Entity.

- c. **Fees Applicable to Other Energy.** In consideration for the franchise Granted to the Provider by the City, the Provider shall make an accounting and provide compensation to the City for the transportation, distribution, and sale of Other Energy to any Consumer or User for use within the City by the Provider or by others through the Distribution Facilities of the Provider. The Provider shall pay to the City a franchise fee that is calculated in a manner provided in each franchise that is substantially equivalent to the fees paid by Providers of natural gas, taking into account the alternative form of the energy, its value per unit, and the amount of energy necessary for light, heat, power, or other purposes.

SECTION FIVE: Adjustment of Volumetric Rate.

The Volumetric Rate shall be recalculated annually by the City beginning in January 1, 2004, based upon the Settlement Price. The recalculation shall be based on Settlement Price for the twelve month period beginning in July of the preceding year and ending in June of the current year. For the 15th day of each month during said twelve month period, the Settlement Prices for the next twelve months will be summed and divided by twelve to determine an average Settlement Price. The average Settlement Prices for each of the twelve months shall be summed, divided by twelve and multiplied by five per cent (5%) to obtain the Volumetric Rate to be effective January 1 of the next succeeding year.

- a. The Volumetric Rate shall be calculated in July annually by the City and shall be effective upon January 1 next following filing of the completed Volumetric Rate Calculation Form with the City Clerk without the necessity of amendment of this Ordinance. The Volumetric Rate Calculation Form on file with the City Clerk and incorporated herein by reference shall be used for the recalculation of the Volumetric Rate.

SECTION SIX: Reporting and Collection Provisions.

- a. All Providers using the Public Right-of-Way for the transportation, distribution, or sale of natural gas or Other Energy, whether through their own Distribution Facilities, through the Distribution Facilities of a Franchised Entity, or through the Distribution Facilities of another, shall report or register such use with the City Clerk on forms prepared and furnished by the City Clerk, and subject to such administrative fees as are established by the City Clerk to cover the cost of effective administration of this Ordinance. Such registration shall include the name, address, and agent for the Provider and shall include such information on the method and means of transportation, distribution, or sale to Consumers as may be reasonably required by the City for

enforcement of this Ordinance. The City shall have access to and the right to examine and audit such records as necessary to verify the payment of compensation.

- b. A Franchised Entity may serve as the agent for Providers using the Distribution of such Franchised Entity for the purpose of reporting and collection under this Ordinance.
- c. Franchised Entities and Providers reporting and paying fees calculated in accordance with Section Four (b) of this Ordinance through a Franchised Entity shall be exempt from the separate reporting and registration requirements of this Ordinance.

SECTION SEVEN: Time Limits for Franchise Application.

- a. All Providers shall make application for a franchise within 30 days next following the effective date of this Ordinance, unless the Provider is exempt from the requirement of a separate franchise under the provisions of Section Three (a) hereof. It is the intent of this Ordinance that a Franchise Ordinance consistent with the requirements of Section Three hereof will be submitted to the Governing Body for consideration according to statutory procedure immediately upon receipt of an application therefore.
- b. All Providers exempted from the requirement for a separate franchise under Section Three (a) of this Ordinance shall be responsible for fees required by this Ordinance upon the effective date of the franchise Ordinance for the Franchised Entity which authorizes such Franchised Entity to collect payments from the Provider on behalf of the City.
- c. Any Provider hereafter becoming subject to this Ordinance shall immediately comply with the provision hereof prior to use of the Public Right-of-Way for the transportation, distribution, or sale of natural gas or Other Energy.
- d. The fees calculated under Section Four of this Ordinance shall be assessed and shall be effective on or before January 1, 2004.

SECTION EIGHT: Violations, Penalties and Other Relief.

- a. It shall be unlawful for a Provider to transport, distribute, or sell natural gas or Other Energy to a Consumer in violation of this Ordinance.

- b. Any person who violates any provision of this Ordinance shall, upon conviction, be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding \$2,500. Each and every day of operation in violation of this Ordinance shall constitute a separate offense.
- c. The City may seek such other relief as may be available at law or in equity, including but not limited to an injunction to halt any violation of this Ordinance or of any permit or other authorization granted hereunder, and shall have such other remedies as are or may in the future be provided by any law, Ordinance or regulation.

SECTION NINE: Invalidity of Part.

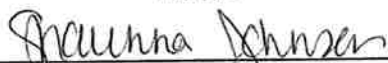
In the event any clause, sentence, or section of this Ordinance shall be held to be invalid, such invalidity shall not affect or impair the operation and enforcement of the remainder of this Ordinance.

SECTION TEN: Effective Date.

This Ordinance shall take effect and be in force after its publication once in the official City newspaper.

PASSED BY THE GOVERNING BODY of the City of El Dorado, this 13th day of January, 2003.




CITY CLERK


MAYOR

TO: City Commission
FROM: Kevin Wishart
SUBJ: Design-Build Contract with Conco Construction for Restroom and Concession Facilities at East and Central Parks
DATE: May 1, 2023

Background:

The City Commission directed staff to proceed with improvements to our ballfield facilities. The improvements will be conducted throughout the next several months. The first improvement project is the construction of new restroom and concession facilities at Central Park and East Park. Staff requested bids for the project and received one for consideration. If approved, the project is tentatively scheduled to begin in August with completion of both facilities to be completed by November. This schedule is subject to some change depending on supply chain and weather.

Attachments:

1. 0855 El Dorado Restrooms A141-2014 - Working Draft 05apr23 (COR)

Policy Issue:

Should the City Commission move to approve the contract with Conco Construction?

Fiscal Impact:

The funds allocated for this project are allocated through the excess sales tax; the City Commission previously authorized \$2,100,000.00 for improvements. This request is the first from this allocation.

Trade-offs:

The use of these funds complies with the Sales Tax Ordinance. The City Commission could choose to direct these funds to other projects.

Staff Recommendation:

Approve the bid from Conco Construction in the amount of \$599,948.00.

Commission Action:

Commissioner _____ moved to accept the bid from Conco Construction in the amount of \$599,948.00 for the construction of concession / restroom facilities at Central Park and East Park and direct the City Manager to sign the contract.

Commissioner _____ seconded the motion.

DRAFT AIA® Document A141™ – 2014

Standard Form of Agreement Between Owner and Design-Builder

AGREEMENT made as of the « 13th » day of « April » in the year « 2023 »
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status, address and other information)

« City of Eldorado, KS »
« 220 E. 1st Avenue »
« Eldorado, KS 67042 »
« »

and the Design-Builder:
(Name, legal status, address and other information)

« Conco » « Inc. »
« 3051 N. Ohio »
« Wichita, KS 67219 »
« »

for the following Project:
(Name, location and detailed description)

« East Park and Central Park Concession and Restroom Facilities »
« »
« »

The Owner and Design-Builder agree as follows.

ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Consultation with an attorney is also encouraged with respect to professional licensing requirements in the jurisdiction where the Project is located.

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TABLE OF ARTICLES

1	GENERAL PROVISIONS
2	COMPENSATION AND PROGRESS PAYMENTS
3	GENERAL REQUIREMENTS OF THE WORK OF THE DESIGN-BUILD CONTRACT
4	WORK PRIOR TO EXECUTION OF THE DESIGN-BUILD AMENDMENT
5	WORK FOLLOWING EXECUTION OF THE DESIGN-BUILD AMENDMENT
6	CHANGES IN THE WORK
7	OWNER'S RESPONSIBILITIES
8	TIME
9	PAYMENT APPLICATIONS AND PROJECT COMPLETION
10	PROTECTION OF PERSONS AND PROPERTY
11	UNCOVERING AND CORRECTION OF WORK
12	COPYRIGHTS AND LICENSES
13	TERMINATION OR SUSPENSION
14	CLAIMS AND DISPUTE RESOLUTION
15	MISCELLANEOUS PROVISIONS
16	SCOPE OF THE AGREEMENT

TABLE OF EXHIBITS

A	DESIGN-BUILD AMENDMENT
B	INSURANCE AND BONDS
C	SUSTAINABLE PROJECTS

ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Owner's Criteria

This Agreement is based on the Owner's Criteria set forth in this Section 1.1.

(Note the disposition for the following items by inserting the requested information or a statement such as "not applicable" or "unknown at time of execution." If the Owner intends to provide a set of design documents, and the requested information is contained in the design documents, identify the design documents and insert "see Owner's design documents" where appropriate.)

§ 1.1.1 The Owner's program for the Project:

(Set forth the program, identify documentation in which the program is set forth, or state the manner in which the program will be developed.)

« New restroom, concession and storage building for each of the East and Central Park facilities »

§ 1.1.2 The Owner's design requirements for the Project and related documentation:

(Identify below, or in an attached exhibit, the documentation that contains the Owner's design requirements, including any performance specifications for the Project.)

« The Owner's design requirements is the complete design and construction of (2) Concessions Stand facilities in general but not exact accordance with GravityWork's proposed schematic design dated June 25, 2021 (exhibit C attached hereto)»

§ 1.1.3 The Project's physical characteristics:

(Identify or describe, if appropriate, size, location, dimensions, or other pertinent information, such as geotechnical reports; site, boundary and topographic surveys; traffic and utility studies; availability of public and private utilities and services; legal description of the site; etc.)

« TBD »

§ 1.1.4 The Owner's anticipated Sustainable Objective for the Project, if any:

(Identify the Owner's Sustainable Objective for the Project such as Sustainability Certification, benefit to the environment, enhancement to the health and well-being of building occupants, or improvement of energy efficiency. If the Owner identifies a Sustainable Objective, incorporate AIA Document A141™-2014, Exhibit C, Sustainable Projects, into this Agreement to define the terms, conditions and Work related to the Owner's Sustainable Objective.)

« None »

§ 1.1.5 Incentive programs the Owner intends to pursue for the Project, including those related to the Sustainable Objective, and any deadlines for receiving the incentives that are dependent on, or related to, the Design-Builder's services, are as follows:

(Identify incentive programs the Owner intends to pursue for the Project and deadlines for submitting or applying for the incentive programs.)

« None »

§ 1.1.6 The Owner's budget for the Work to be provided by the Design-Builder is set forth below:

(Provide total for Owner's budget, and if known, a line item breakdown of costs.)

« \$600,000 »

§ 1.1.7 The Owner's design and construction milestone dates:

.1 Design phase milestone dates:

« 90% Drawings for Design-Build Amendment – May 12, 2023
Submit to Plan Review – May 31, 2023»

.2 Submission of Design-Builder Proposal:

« May 31, 2023 »

.3 Phased completion dates:

« East Park Facility – Mid September, 2023
Central Park Facility – October 31, 2023 »

.4 Substantial Completion date:

« October 31, 2023 »

.5 Other milestone dates:

« To be determined »

§ 1.1.8 The Owner requires the Design-BUILDER to retain the following Architect, Consultants and Contractors at the Design-BUILDER's cost:

(List name, legal status, address and other information.)

.1 Architect

« GravityWorks Architecture »

« 101 S. Star »

« El Dorado, KS 67042 »

.2 Consultants

« To be retained by Architect. »

.3 Contractors

« Not applicable »

§ 1.1.9 Additional Owner's Criteria upon which the Agreement is based:

(Identify special characteristics or needs of the Project not identified elsewhere, such as historic preservation requirements.)

« None »

§ 1.1.10 The Design-BUILDER shall confirm that the information included in the Owner's Criteria complies with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.

§ 1.1.10.1 If the Owner's Criteria conflicts with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-BUILDER shall notify the Owner of the conflict.

§ 1.1.11 If there is a change in the Owner's Criteria, the Owner and the Design-BUILDER shall execute a Modification in accordance with Article 6.

§ 1.1.12 If the Owner and Design-BUILDER intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions. Unless otherwise agreed, the parties will use AIA Document E203™-2013 to establish the protocols for the development, use, transmission, and exchange of digital data and building information modeling.

§ 1.2 Project Team

§ 1.2.1 The Owner identifies the following representative in accordance with Section 7.1.1:

(List name, address and other information.)

« Kevin Wishart »

« City of Eldorado »

« 220 E. 1st Ave »

« Eldorado, KS 67042 »

§ 1.2.2 The persons or entities, in addition to the Owner's representative, who are required to review the Design-BUILDER's Submittals are as follows:

(List name, address and other information.)

« To be determined »

§ 1.2.3 The Owner will retain the following consultants and separate contractors:

(List discipline, scope of work, and, if known, identify by name and address.)

« To be determined »

§ 1.2.4 The Design-Builder identifies the following representative in accordance with Section 3.1.2:
(List name, address and other information.)

« Brad Dutcher »
« Conco, Inc. »
« 3051 N. Ohio »
« Wichita, KS 67219 »

§ 1.2.5 Neither the Owner's nor the Design-Builder's representative shall be changed without ten days' written notice to the other party.

§ 1.3 Binding Dispute Resolution

For any Claim subject to, but not resolved by, mediation pursuant to Section 14.3, the method of binding dispute resolution shall be the following:

(Check the appropriate box. If the Owner and Design-Builder do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

☐ Arbitration pursuant to Section 14.4

☒ Litigation in a court of competent jurisdiction

☐ Other: (Specify)

« »

§ 1.4 Definitions

§ 1.4.1 Design-Build Documents. The Design-Build Documents consist of this Agreement between Owner and Design-Builder and its attached Exhibits (hereinafter, the "Agreement"); other documents listed in this Agreement; and Modifications issued after execution of this Agreement. A Modification is (1) a written amendment to the Contract signed by both parties, including the Design-Build Amendment, (2) a Change Order, or (3) a Change Directive.

§ 1.4.2 The Contract. The Design-Build Documents form the Contract. The Contract represents the entire and integrated agreement between the parties and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Design-Build Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Owner and the Design-Builder.

§ 1.4.3 The Work. The term "Work" means the design, construction and related services required to fulfill the Design-Builder's obligations under the Design-Build Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by the Design-Builder. The Work may constitute the whole or a part of the Project.

§ 1.4.4 The Project. The Project is the total design and construction of which the Work performed under the Design-Build Documents may be the whole or a part, and may include design and construction by the Owner and by separate contractors.

§ 1.4.5 Instruments of Service. Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Design-Builder, Contractor(s), Architect, and Consultant(s) under their respective agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, digital models and other similar materials.

§ 1.4.6 Submittal. A Submittal is any submission to the Owner for review and approval demonstrating how the Design-Builder proposes to conform to the Design-Build Documents for those portions of the Work for which the

Design-Build Documents require Submittals. Submittals include, but are not limited to, shop drawings, product data, and samples. Submittals are not Design-Build Documents unless incorporated into a Modification.

§ 1.4.7 Owner. The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term “Owner” means the Owner or the Owner’s authorized representative.

§ 1.4.8 Design-Builder. The Design-Builder is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term “Design-Builder” means the Design-Builder or the Design-Builder’s authorized representative.

§ 1.4.9 Consultant. A Consultant is a person or entity providing professional services for the Design-Builder for all or a portion of the Work, and is referred to throughout the Design-Build Documents as if singular in number. To the extent required by the relevant jurisdiction, the Consultant shall be lawfully licensed to provide the required professional services.

§ 1.4.10 Architect. The Architect is a person or entity providing design services for the Design-Builder for all or a portion of the Work, and is lawfully licensed to practice architecture in the applicable jurisdiction. The Architect is referred to throughout the Design-Build Documents as if singular in number.

§ 1.4.11 Contractor. A Contractor is a person or entity performing all or a portion of the construction, required in connection with the Work, for the Design-Builder. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor is referred to throughout the Design-Build Documents as if singular in number and means a Contractor or an authorized representative of the Contractor.

§ 1.4.12 Confidential Information. Confidential Information is information containing confidential or business proprietary information that is clearly marked as “confidential.”

§ 1.4.13 Contract Time. Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, as set forth in the Design-Build Amendment for Substantial Completion of the Work.

§ 1.4.14 Day. The term “day” as used in the Design-Build Documents shall mean calendar day unless otherwise specifically defined.

§ 1.4.15 Contract Sum. The Contract Sum is the amount to be paid to the Design-Builder for performance of the Work after execution of the Design-Build Amendment, as identified in Article A.1 of the Design-Build Amendment.

ARTICLE 2 COMPENSATION AND PROGRESS PAYMENTS

§ 2.1 Compensation for Work Performed Prior To Execution of Design-Build Amendment

§ 2.1.1 Unless otherwise agreed, payments for Work performed prior to Execution of the Design-Build Amendment shall be made monthly. For the Design-Builder’s performance of Work prior to the execution of the Design-Build Amendment, the Owner shall compensate the Design-Builder as follows:

(Insert amount of, or basis for, compensation, including compensation for any Sustainability Services, or indicate the exhibit in which the information is provided. If there will be a limit on the total amount of compensation for Work performed prior to the execution of the Design-Build Amendment, state the amount of the limit.)

« Design Fees and applicable design-builder preconstruction services and mark-up not to exceed \$40,000 billed monthly. »

§ 2.1.2 The hourly billing rates for services of the Design-Builder and the Design-Builder’s Architect, Consultants and Contractors, if any, are set forth below.

(If applicable, attach an exhibit of hourly billing rates or insert them below.)

« To be determined »

Individual or Position

Rate

§ 2.1.3 Compensation for Reimbursable Expenses Prior To Execution of Design-Build Amendment

§ 2.1.3.1 Reimbursable Expenses are in addition to compensation set forth in Section 2.1.1 and 2.1.2 and include expenses, directly related to the Project, incurred by the Design-Builder and the Design-Builder's Architect, Consultants, and Contractors, as follows:

- .1 Transportation and authorized out-of-town travel and subsistence;
- .2 Dedicated data and communication services, teleconferences, Project web sites, and extranets;
- .3 Fees paid for securing approval of authorities having jurisdiction over the Project;
- .4 Printing, reproductions, plots, standard form documents;
- .5 Postage, handling and delivery;
- .6 Expense of overtime work requiring higher than regular rates, if authorized in advance by the Owner;
- .7 Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner;
- .8 All taxes levied on professional services and on reimbursable expenses; and
- .9 Other Project-related expenditures, if authorized in advance by the Owner.

§ 2.1.3.2 For Reimbursable Expenses, the compensation shall be the expenses the Design-Builder and the Design-Builder's Architect, Consultants and Contractors incurred, plus an administrative fee of « seven » percent (« 7 » %) of the expenses incurred.

§ 2.1.4 Payments to the Design-Builder Prior To Execution of Design-Build Amendment

§ 2.1.4.1 Payments are due and payable upon presentation of the Design-Builder's invoice. Amounts unpaid « thirty » (« 30 ») days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Design-Builder.
(Insert rate of monthly or annual interest agreed upon.)

« 18 » % « per annum »

§ 2.1.4.2 Records of Reimbursable Expenses and services performed on the basis of hourly rates shall be available to the Owner at mutually convenient times for a period of two years following execution of the Design-Build Amendment or termination of this Agreement, whichever occurs first.

§ 2.2 Contract Sum and Payment for Work Performed After Execution of Design-Build Amendment

For the Design-Builder's performance of the Work after execution of the Design-Build Amendment, the Owner shall pay to the Design-Builder the Contract Sum in current funds as agreed in the Design-Build Amendment.

ARTICLE 3 GENERAL REQUIREMENTS OF THE WORK OF THE DESIGN-BUILD CONTRACT

§ 3.1 General

§ 3.1.1 The Design-Builder shall comply with any applicable licensing requirements in the jurisdiction where the Project is located.

§ 3.1.2 The Design-Builder shall designate in writing a representative who is authorized to act on the Design-Builder's behalf with respect to the Project.

§ 3.1.3 The Design-Builder shall perform the Work in accordance with the Design-Build Documents. The Design-Builder shall not be relieved of the obligation to perform the Work in accordance with the Design-Build Documents by the activities, tests, inspections or approvals of the Owner.

§ 3.1.3.1 The Design-Builder shall perform the Work in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Design-Builder performs Work contrary to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, the Design-Builder shall assume responsibility for such Work and shall bear the costs attributable to correction.

§ 3.1.3.2 Neither the Design-Builder nor any Contractor, Consultant, or Architect shall be obligated to perform any act which they believe will violate any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Design-Builder determines that implementation of any instruction received from the Owner, including those in the Owner's Criteria, would cause a violation of any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-Builder shall notify the

Owner in writing. Upon verification by the Owner that a change to the Owner's Criteria is required to remedy the violation, the Owner and the Design-BUILDER shall execute a Modification in accordance with Article 6.

§ 3.1.4 The Design-BUILDER shall be responsible to the Owner for acts and omissions of the Design-BUILDER's employees, Architect, Consultants, Contractors, and their agents and employees, and other persons or entities performing portions of the Work.

§ 3.1.5 **General Consultation.** The Design-BUILDER shall schedule and conduct periodic meetings with the Owner to review matters such as procedures, progress, coordination, and scheduling of the Work.

§ 3.1.6 When applicable law requires that services be performed by licensed professionals, the Design-BUILDER shall provide those services through qualified, licensed professionals. The Owner understands and agrees that the services of the Design-BUILDER's Architect and the Design-BUILDER's other Consultants are performed in the sole interest of, and for the exclusive benefit of, the Design-BUILDER.

§ 3.1.7 The Design-BUILDER, with the assistance of the Owner, shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.

§ 3.1.8 Progress Reports

§ 3.1.8.1 The Design-BUILDER shall keep the Owner informed of the progress and quality of the Work. On a monthly basis, or otherwise as agreed to by the Owner and Design-BUILDER, the Design-BUILDER shall submit written progress reports to the Owner, showing estimated percentages of completion and other information identified below:

- .1 Work completed for the period;
- .2 Project schedule status;
- .3 Submittal schedule and status report, including a summary of outstanding Submittals;
- .4 Responses to requests for information to be provided by the Owner;
- .5 Approved Change Orders and Change Directives;
- .6 Pending Change Order and Change Directive status reports;
- .7 Tests and inspection reports;
- .8 Status report of Work rejected by the Owner;
- .9 Status of Claims previously submitted in accordance with Article 14;
- .10 Cumulative total of the Cost of the Work to date including the Design-BUILDER's compensation and Reimbursable Expenses, if any;
- .11 Current Project cash-flow and forecast reports; and
- .12 Additional information as agreed to by the Owner and Design-BUILDER.

§ 3.1.8.2 In addition, where the Contract Sum is the Cost of the Work with or without a Guaranteed Maximum Price, the Design-BUILDER shall include the following additional information in its progress reports:

- .1 Design-BUILDER's work force report;
- .2 Equipment utilization report; and
- .3 Cost summary, comparing actual costs to updated cost estimates.

§ 3.1.9 Design-BUILDER's Schedules

§ 3.1.9.1 The Design-BUILDER, promptly after execution of this Agreement, shall prepare and submit for the Owner's information a schedule for the Work. The schedule, including the time required for design and construction, shall not exceed time limits current under the Design-Build Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Design-Build Documents, shall provide for expeditious and practicable execution of the Work, and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project.

§ 3.1.9.2 The Design-BUILDER shall perform the Work in general accordance with the most recent schedules submitted to the Owner.

§ 3.1.10 **Certifications.** Upon the Owner's written request, the Design-BUILDER shall obtain from the Architect, Consultants, and Contractors, and furnish to the Owner, certifications with respect to the documents and services provided by the Architect, Consultants, and Contractors (a) that, to the best of their knowledge, information and belief, the documents or services to which the certifications relate (i) are consistent with the Design-Build

Documents, except to the extent specifically identified in the certificate, and (ii) comply with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities governing the design of the Project; and (b) that the Owner and its consultants shall be entitled to rely upon the accuracy of the representations and statements contained in the certifications. The Design-Builder's Architect, Consultants, and Contractors shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of their services.

§ 3.1.11 Design-Builder's Submittals

§ 3.1.11.1 Prior to submission of any Submittals, the Design-Builder shall prepare a Submittal schedule, and shall submit the schedule for the Owner's approval. The Owner's approval shall not unreasonably be delayed or withheld. The Submittal schedule shall (1) be coordinated with the Design-Builder's schedule provided in Section 3.1.9.1, (2) allow the Owner reasonable time to review Submittals, and (3) be periodically updated to reflect the progress of the Work. If the Design-Builder fails to submit a Submittal schedule, the Design-Builder shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of Submittals.

§ 3.1.11.2 By providing Submittals the Design-Builder represents to the Owner that it has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Design-Build Documents.

§ 3.1.11.3 The Design-Builder shall perform no portion of the Work for which the Design-Build Documents require Submittals until the Owner has approved the respective Submittal.

§ 3.1.11.4 The Work shall be in accordance with approved Submittals except that the Design-Builder shall not be relieved of its responsibility to perform the Work consistent with the requirements of the Design-Build Documents. The Work may deviate from the Design-Build Documents only if the Design-Builder has notified the Owner in writing of a deviation from the Design-Build Documents at the time of the Submittal and a Modification is executed authorizing the identified deviation. The Design-Builder shall not be relieved of responsibility for errors or omissions in Submittals by the Owner's approval of the Submittals.

§ 3.1.11.5 All professional design services or certifications to be provided by the Design-Builder, including all drawings, calculations, specifications, certifications, shop drawings and other Submittals, shall contain the signature and seal of the licensed design professional preparing them. Submittals related to the Work designed or certified by the licensed design professionals, if prepared by others, shall bear the licensed design professional's written approval. The Owner and its consultants shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals.

§ 3.1.12 Warranty. The Design-Builder warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Design-Build Documents require or permit otherwise. The Design-Builder further warrants that the Work will conform to the requirements of the Design-Build Documents and will be free from defects, except for those inherent in the quality of the Work or otherwise expressly permitted by the Design-Build Documents. Work, materials, or equipment not conforming to these requirements may be considered defective. The Design-Builder's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Design-Builder, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Owner, the Design-Builder shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.1.13 Royalties, Patents and Copyrights

§ 3.1.13.1 The Design-Builder shall pay all royalties and license fees.

§ 3.1.13.2 The Design-Builder shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and its separate contractors and consultants harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Owner, or where the copyright violations are required in the Owner's Criteria. However, if the Design-Builder has reason to believe that the design, process or product required in the Owner's Criteria is an infringement of a copyright or a patent, the Design-Builder shall be responsible for such loss unless such information is promptly furnished to the Owner. If the Owner receives notice from a patent or copyright owner

of an alleged violation of a patent or copyright, attributable to the Design-Builder, the Owner shall give prompt written notice to the Design-Builder.

§ 3.1.14 Indemnification

§ 3.1.14.1 To the fullest extent permitted by law, the Design-Builder shall indemnify and hold harmless the Owner, including the Owner's agents and employees, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, but only to the extent caused by the negligent acts or omissions of the Design-Builder, Architect, a Consultant, a Contractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.1.14.

§ 3.1.14.2 The indemnification obligation under this Section 3.1.14 shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Design-Builder, Architect, a Consultant, a Contractor, or anyone directly or indirectly employed by them, under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 3.1.15 Contingent Assignment of Agreements

§ 3.1.15.1 Each agreement for a portion of the Work is assigned by the Design-Builder to the Owner, provided that

- .1 assignment is effective only after termination of the Contract by the Owner for cause, pursuant to Sections 13.1.4 or 13.2.2, and only for those agreements that the Owner accepts by written notification to the Design-Builder and the Architect, Consultants, and Contractors whose agreements are accepted for assignment; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of an agreement, the Owner assumes the Design-Builder's rights and obligations under the agreement.

§ 3.1.15.2 Upon such assignment, if the Work has been suspended for more than 30 days, the compensation under the assigned agreement shall be equitably adjusted for increases in cost resulting from the suspension.

§ 3.1.15.3 Upon such assignment to the Owner under this Section 3.1.15, the Owner may further assign the agreement to a successor design-builder or other entity. If the Owner assigns the agreement to a successor design-builder or other entity, the Owner shall nevertheless remain legally responsible for all of the successor design-builder's or other entity's obligations under the agreement.

§ 3.1.16 Design-Builder's Insurance and Bonds. The Design-Builder shall purchase and maintain insurance and provide bonds as set forth in Exhibit B.

ARTICLE 4 WORK PRIOR TO EXECUTION OF THE DESIGN-BUILD AMENDMENT

§ 4.1 General

§ 4.1.1 Any information submitted by the Design-Builder, and any interim decisions made by the Owner, shall be for the purpose of facilitating the design process and shall not modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.

§ 4.1.2 The Design-Builder shall advise the Owner on proposed site use and improvements, selection of materials, and building systems and equipment. The Design-Builder shall also provide the Owner with recommendations, consistent with the Owner's Criteria, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 4.2 Evaluation of the Owner's Criteria

§ 4.2.1 The Design-Builder shall schedule and conduct meetings with the Owner and any other necessary individuals or entities to discuss and review the Owner's Criteria as set forth in Section 1.1. The Design-Builder shall thereafter again meet with the Owner to discuss a preliminary evaluation of the Owner's Criteria. The preliminary evaluation shall address possible alternative approaches to design and construction of the Project and include the Design-Builder's recommendations, if any, with regard to accelerated or fast-track scheduling, procurement, or

phased construction. The preliminary evaluation shall consider cost information, constructability, and procurement and construction scheduling issues.

§ 4.2.2 After the Design-Builder meets with the Owner and presents the preliminary evaluation, the Design-Builder shall provide a written report to the Owner, summarizing the Design-Builder's evaluation of the Owner's Criteria. The report shall also include

- .1 allocations of program functions, detailing each function and their square foot areas;
- .2 a preliminary estimate of the Cost of the Work, and, if necessary, recommendations to adjust the Owner's Criteria to conform to the Owner's budget;
- .3 a preliminary schedule, which shall include proposed design milestones; dates for receiving additional information from, or for work to be completed by, the Owner; anticipated date for the Design-Builder's Proposal; and dates of periodic design review sessions with the Owner; and
- .4 the following:
(List additional information, if any, to be included in the Design-Builder's written report.)

« None »

§ 4.2.3 The Owner shall review the Design-Builder's written report and, if acceptable, provide the Design-Builder with written consent to proceed to the development of the Preliminary Design as described in Section 4.3. The consent to proceed shall not be understood to modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.

§ 4.3 Preliminary Design

§ 4.3.1 Upon the Owner's issuance of a written consent to proceed under Section 4.2.3, the Design-Builder shall prepare and submit a Preliminary Design to the Owner. The Preliminary Design shall include a report identifying any deviations from the Owner's Criteria, and shall include the following:

- .1 Confirmation of the allocations of program functions;
- .2 Site plan;
- .3 Building plans, sections and elevations;
- .4 Structural system;
- .5 Selections of major building systems, including but not limited to mechanical, electrical and plumbing systems; and
- .6 Outline specifications or sufficient drawing notes describing construction materials.

The Preliminary Design may include some combination of physical study models, perspective sketches, or digital modeling.

§ 4.3.2 The Owner shall review the Preliminary Design and, if acceptable, provide the Design-Builder with written consent to proceed to development of the Design-Builder's Proposal. The Preliminary Design shall not modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.

§ 4.4 Design-Builder's Proposal

§ 4.4.1 Upon the Owner's issuance of a written consent to proceed under Section 4.3.2, the Design-Builder shall prepare and submit the Design-Builder's Proposal to the Owner. The Design-Builder's Proposal shall include the following:

- .1 A list of the Preliminary Design documents and other information, including the Design-Builder's clarifications, assumptions and deviations from the Owner's Criteria, upon which the Design-Builder's Proposal is based;
- .2 The proposed Contract Sum, including the compensation method and, if based upon the Cost of the Work plus a fee, a written statement of estimated cost organized by trade categories, allowances, contingencies, Design-Builder's Fee, and other items that comprise the Contract Sum;
- .3 The proposed date the Design-Builder shall achieve Substantial Completion;
- .4 An enumeration of any qualifications and exclusions, if applicable;
- .5 A list of the Design-Builder's key personnel, Contractors and suppliers; and
- .6 The date on which the Design-Builder's Proposal expires.

§ 4.4.2 Submission of the Design-Builder's Proposal shall constitute a representation by the Design-Builder that it has visited the site and become familiar with local conditions under which the Work is to be completed.

§ 4.4.3 If the Owner and Design-Builder agree on a proposal, the Owner and Design-Builder shall execute the Design-Build Amendment setting forth the terms of their agreement.

ARTICLE 5 WORK FOLLOWING EXECUTION OF THE DESIGN-BUILD AMENDMENT

§ 5.1 Construction Documents

§ 5.1.1 Upon the execution of the Design-Build Amendment, the Design-Builder shall prepare Construction Documents. The Construction Documents shall establish the quality levels of materials and systems required. The Construction Documents shall be consistent with the Design-Build Documents.

§ 5.1.2 The Design-Builder shall provide the Construction Documents to the Owner for the Owner's information. If the Owner discovers any deviations between the Construction Documents and the Design-Build Documents, the Owner shall promptly notify the Design-Builder of such deviations in writing. The Construction Documents shall not modify the Design-Build Documents unless the Owner and Design-Builder execute a Modification. The failure of the Owner to discover any such deviations shall not relieve the Design-Builder of the obligation to perform the Work in accordance with the Design-Build Documents.

§ 5.2 Construction

§ 5.2.1 **Commencement.** Except as permitted in Section 5.2.2, construction shall not commence prior to execution of the Design-Build Amendment.

§ 5.2.2 If the Owner and Design-Builder agree in writing, construction may proceed prior to the execution of the Design-Build Amendment. However, such authorization shall not waive the Owner's right to reject the Design-Builder's Proposal.

§ 5.2.3 The Design-Builder shall supervise and direct the Work, using the Design-Builder's best skill and attention. The Design-Builder shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, unless the Design-Build Documents give other specific instructions concerning these matters.

§ 5.2.4 The Design-Builder shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 5.3 Labor and Materials

§ 5.3.1 Unless otherwise provided in the Design-Build Documents, the Design-Builder shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services, necessary for proper execution and completion of the Work, whether temporary or permanent, and whether or not incorporated or to be incorporated in the Work.

§ 5.3.2 When a material or system is specified in the Design-Build Documents, the Design-Builder may make substitutions only in accordance with Article 6.

§ 5.3.3 The Design-Builder shall enforce strict discipline and good order among the Design-Builder's employees and other persons carrying out the Work. The Design-Builder shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

§ 5.4 Taxes

The Design-Builder shall pay sales, consumer, use and similar taxes, for the Work provided by the Design-Builder, that are legally enacted when the Design-Build Amendment is executed, whether or not yet effective or merely scheduled to go into effect.

§ 5.5 Permits, Fees, Notices and Compliance with Laws

§ 5.5.1 Unless otherwise provided in the Design-Build Documents, the Design-Builder shall secure and pay for the building permit as well as any other permits, fees, licenses, and inspections by government agencies, necessary for proper execution of the Work and Substantial Completion of the Project.

§ 5.5.2 The Design-Builder shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, applicable to performance of the Work.

§ 5.5.3 Concealed or Unknown Conditions. If the Design-Builder encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Design-Build Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Design-Build Documents, the Design-Builder shall promptly provide notice to the Owner before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Owner shall promptly investigate such conditions and, if the Owner determines that they differ materially and cause an increase or decrease in the Design-Builder's cost of, or time required for, performance of any part of the Work, shall recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Owner determines that the conditions at the site are not materially different from those indicated in the Design-Build Documents and that no change in the terms of the Contract is justified, the Owner shall promptly notify the Design-Builder in writing, stating the reasons. If the Design-Builder disputes the Owner's determination or recommendation, the Design-Builder may proceed as provided in Article 14.

§ 5.5.4 If, in the course of the Work, the Design-Builder encounters human remains, or recognizes the existence of burial markers, archaeological sites, or wetlands, not indicated in the Design-Build Documents, the Design-Builder shall immediately suspend any operations that would affect them and shall notify the Owner. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Design-Builder shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 14.

§ 5.6 Allowances

§ 5.6.1 The Design-Builder shall include in the Contract Sum all allowances stated in the Design-Build Documents. Items covered by allowances shall be supplied for such amounts, and by such persons or entities as the Owner may direct, but the Design-Builder shall not be required to employ persons or entities to whom the Design-Builder has reasonable objection.

§ 5.6.2 Unless otherwise provided in the Design-Build Documents,

- .1 allowances shall cover the cost to the Design-Builder of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 the Design-Builder's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts, shall be included in the Contract Sum but not in the allowances; and
- .3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 5.6.2.1 and (2) changes in Design-Builder's costs under Section 5.6.2.2.

§ 5.6.3 The Owner shall make selections of materials and equipment with reasonable promptness for allowances requiring Owner selection.

§ 5.7 Key Personnel, Contractors and Suppliers

§ 5.7.1 The Design-Builder shall not employ personnel, or contract with Contractors or suppliers to whom the Owner has made reasonable and timely objection. The Design-Builder shall not be required to contract with anyone to whom the Design-Builder has made reasonable and timely objection.

§ 5.7.2 If the Design-Builder changes any of the personnel, Contractors or suppliers identified in the Design-Build Amendment, the Design-Builder shall notify the Owner and provide the name and qualifications of the new personnel, Contractor or supplier. The Owner may reply within 14 days to the Design-Builder in writing, stating (1) whether the Owner has reasonable objection to the proposed personnel, Contractor or supplier or (2) that the Owner requires additional time to review. Failure of the Owner to reply within the 14-day period shall constitute notice of no reasonable objection.

§ 5.7.3 Except for those persons or entities already identified or required in the Design-Build Amendment, the Design-Builder, as soon as practicable after execution of the Design-Build Amendment, shall furnish in writing to

the Owner the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Owner may reply within 14 days to the Design-Builder in writing stating (1) whether the Owner has reasonable objection to any such proposed person or entity or (2) that the Owner requires additional time for review. Failure of the Owner to reply within the 14-day period shall constitute notice of no reasonable objection.

§ 5.7.3.1 If the Owner has reasonable objection to a person or entity proposed by the Design-Builder, the Design-Builder shall propose another to whom the Owner has no reasonable objection. If the rejected person or entity was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute person or entity's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Design-Builder has acted promptly and responsively in submitting names as required.

§ 5.8 Documents and Submittals at the Site

The Design-Builder shall maintain at the site for the Owner one copy of the Design-Build Documents and a current set of the Construction Documents, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Submittals. The Design-Builder shall deliver these items to the Owner in accordance with Section 9.10.2 as a record of the Work as constructed.

§ 5.9 Use of Site

The Design-Builder shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Design-Build Documents, and shall not unreasonably encumber the site with materials or equipment.

§ 5.10 Cutting and Patching

The Design-Builder shall not cut, patch or otherwise alter fully or partially completed construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Design-Builder shall not unreasonably withhold from the Owner or a separate contractor the Design-Builder's consent to cutting or otherwise altering the Work.

§ 5.11 Cleaning Up

§ 5.11.1 The Design-Builder shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Design-Builder shall remove waste materials, rubbish, the Design-Builder's tools, construction equipment, machinery and surplus materials from and about the Project.

§ 5.11.2 If the Design-Builder fails to clean up as provided in the Design-Build Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Design-Builder.

§ 5.12 Access to Work

The Design-Builder shall provide the Owner and its separate contractors and consultants access to the Work in preparation and progress wherever located. The Design-Builder shall notify the Owner regarding Project safety criteria and programs, which the Owner, and its contractors and consultants, shall comply with while at the site.

§ 5.13 Construction by Owner or by Separate Contractors

§ 5.13.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 5.13.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces; and to award separate contracts in connection with other portions of the Project, or other construction or operations on the site, under terms and conditions identical or substantially similar to this Contract, including those terms and conditions related to insurance and waiver of subrogation. The Owner shall notify the Design-Builder promptly after execution of any separate contract. If the Design-Builder claims that delay or additional cost is involved because of such action by the Owner, the Design-Builder shall make a Claim as provided in Article 14.

§ 5.13.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Design-Builder" in the Design-Build Documents in each case shall mean the individual or entity that executes each separate agreement with the Owner.

§ 5.13.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces, and of each separate contractor, with the Work of the Design-Builder, who shall cooperate with them. The Design-Builder shall participate with other separate contractors and the Owner in reviewing their construction schedules. The Design-Builder shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Design-Builder, separate contractors and the Owner until subsequently revised.

§ 5.13.1.4 Unless otherwise provided in the Design-Build Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces or separate contractors, the Owner shall be deemed to be subject to the same obligations, and to have the same rights, that apply to the Design-Builder under the Contract.

§ 5.14 Mutual Responsibility

§ 5.14.1 The Design-Builder shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Design-Builder's construction and operations with theirs as required by the Design-Build Documents.

§ 5.14.2 If part of the Design-Builder's Work depends upon construction or operations by the Owner or a separate contractor, the Design-Builder shall, prior to proceeding with that portion of the Work, prepare a written report to the Owner, identifying apparent discrepancies or defects in the construction or operations by the Owner or separate contractor that would render it unsuitable for proper execution and results of the Design-Builder's Work. Failure of the Design-Builder to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Design-Builder's Work, except as to defects not then reasonably discoverable.

§ 5.14.3 The Design-Builder shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Design-Builder's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Design-Builder for costs the Design-Builder incurs because of a separate contractor's delays, improperly timed activities, damage to the Work or defective construction.

§ 5.14.4 The Design-Builder shall promptly remedy damage the Design-Builder wrongfully causes to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

§ 5.14.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching the Work as the Design-Builder has with respect to the construction of the Owner or separate contractors in Section 5.10.

§ 5.15 Owner's Right to Clean Up

If a dispute arises among the Design-Builder, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and will allocate the cost among those responsible.

ARTICLE 6 CHANGES IN THE WORK

§ 6.1 General

§ 6.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order or Change Directive, subject to the limitations stated in this Article 6 and elsewhere in the Design-Build Documents.

§ 6.1.2 A Change Order shall be based upon agreement between the Owner and Design-Builder. The Owner may issue a Change Directive without agreement by the Design-Builder.

§ 6.1.3 Changes in the Work shall be performed under applicable provisions of the Design-Build Documents, and the Design-Builder shall proceed promptly, unless otherwise provided in the Change Order or Change Directive.

§ 6.2 Change Orders

A Change Order is a written instrument signed by the Owner and Design-Builder stating their agreement upon all of the following:

- .1 The change in the Work;

- .2 The amount of the adjustment, if any, in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation; and
- .3 The extent of the adjustment, if any, in the Contract Time.

§ 6.3 Change Directives

§ 6.3.1 A Change Directive is a written order signed by the Owner directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, or Contract Time. The Owner may by Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, and Contract Time being adjusted accordingly.

§ 6.3.2 A Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 6.3.3 If the Change Directive provides for an adjustment to the Contract Sum or, if prior to execution of the Design-Build Amendment, an adjustment in the Design-Builder's compensation, the adjustment shall be based on one of the following methods:

- .1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 Unit prices stated in the Design-Build Documents or subsequently agreed upon;
- .3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 As provided in Section 6.3.7.

§ 6.3.4 If unit prices are stated in the Design-Build Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Design-Builder, the applicable unit prices shall be equitably adjusted.

§ 6.3.5 Upon receipt of a Change Directive, the Design-Builder shall promptly proceed with the change in the Work involved and advise the Owner of the Design-Builder's agreement or disagreement with the method, if any, provided in the Change Directive for determining the proposed adjustment in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, or Contract Time.

§ 6.3.6 A Change Directive signed by the Design-Builder indicates the Design-Builder's agreement therewith, including adjustment in Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 6.3.7 If the Design-Builder does not respond promptly or disagrees with the method for adjustment in the Contract Sum or, if prior to execution of the Design-Build Amendment, the method for adjustment in the Design-Builder's compensation, the Owner shall determine the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 6.3.3.3, the Design-Builder shall keep and present, in such form as the Owner may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Design-Build Documents, costs for the purposes of this Section 6.3.7 shall be limited to the following:

- .1 Additional costs of professional services;
- .2 Costs of labor, including social security, unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .3 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .4 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Design-Builder or others;
- .5 Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .6 Additional costs of supervision and field office personnel directly attributable to the change.

§ 6.3.8 The amount of credit to be allowed by the Design-Builder to the Owner for a deletion or change that results in a net decrease in the Contract Sum or, if prior to execution of the Design-Build Amendment, in the Design-Builder's compensation, shall be actual net cost. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 6.3.9 Pending final determination of the total cost of a Change Directive to the Owner, the Design-Builder may request payment for Work completed under the Change Directive in Applications for Payment. The Owner will make an interim determination for purposes of certification for payment for those costs deemed to be reasonably justified. The Owner's interim determination of cost shall adjust the Contract Sum or, if prior to execution of the Design-Build Amendment, the Design-Builder's compensation, on the same basis as a Change Order, subject to the right of Design-Builder to disagree and assert a Claim in accordance with Article 14.

§ 6.3.10 When the Owner and Design-Builder agree with a determination concerning the adjustments in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Owner and Design-Builder shall execute a Change Order. Change Orders may be issued for all or any part of a Change Directive.

ARTICLE 7 OWNER'S RESPONSIBILITIES

§ 7.1 General

§ 7.1.1 The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all Project matters requiring the Owner's approval or authorization.

§ 7.1.2 The Owner shall render decisions in a timely manner and in accordance with the Design-Builder's schedule agreed to by the Owner. The Owner shall furnish to the Design-Builder, within 15 days after receipt of a written request, information necessary and relevant for the Design-Builder to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

§ 7.2 Information and Services Required of the Owner

§ 7.2.1 The Owner shall furnish information or services required of the Owner by the Design-Build Documents with reasonable promptness.

§ 7.2.2 The Owner shall provide, to the extent under the Owner's control and if not required by the Design-Build Documents to be provided by the Design-Builder, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems; chemical, air and water pollution; hazardous materials; or environmental and subsurface conditions and information regarding the presence of pollutants at the Project site. Upon receipt of a written request from the Design-Builder, the Owner shall also provide surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site under the Owner's control.

§ 7.2.3 The Owner shall promptly obtain easements, zoning variances, and legal authorizations or entitlements regarding site utilization where essential to the execution of the Project.

§ 7.2.4 The Owner shall cooperate with the Design-Builder in securing building and other permits, licenses and inspections.

§ 7.2.5 The services, information, surveys and reports required to be provided by the Owner under this Agreement, shall be furnished at the Owner's expense, and except as otherwise specifically provided in this Agreement or elsewhere in the Design-Build Documents or to the extent the Owner advises the Design-Builder to the contrary in writing, the Design-Builder shall be entitled to rely upon the accuracy and completeness thereof. In no event shall the Design-Builder be relieved of its responsibility to exercise proper precautions relating to the safe performance of the Work.

§ 7.2.6 If the Owner observes or otherwise becomes aware of a fault or defect in the Work or non-conformity with the Design-Build Documents, the Owner shall give prompt written notice thereof to the Design-Builder.

§ 7.2.7 Prior to the execution of the Design-Build Amendment, the Design-Builder may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Design-Build Documents and the Design-Builder's Proposal. Thereafter, the Design-Builder may only request such evidence if (1) the Owner fails to make payments to the Design-Builder as the Design-Build Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Design-Builder identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Design-Builder.

§ 7.2.8 Except as otherwise provided in the Design-Build Documents or when direct communications have been specially authorized, the Owner shall communicate through the Design-Builder with persons or entities employed or retained by the Design-Builder.

§ 7.2.9 Unless required by the Design-Build Documents to be provided by the Design-Builder, the Owner shall, upon request from the Design-Builder, furnish the services of geotechnical engineers or other consultants for investigation of subsurface, air and water conditions when such services are reasonably necessary to properly carry out the design services furnished by the Design-Builder. In such event, the Design-Builder shall specify the services required. Such services may include, but are not limited to, test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, and necessary operations for anticipating subsoil conditions. The services of geotechnical engineer(s) or other consultants shall include preparation and submission of all appropriate reports and professional recommendations.

§ 7.2.10 The Owner shall purchase and maintain insurance as set forth in Exhibit B.

§ 7.3 Submittals

§ 7.3.1 The Owner shall review and approve or take other appropriate action on Submittals. Review of Submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities; or for substantiating instructions for installation or performance of equipment or systems; or for determining that the Submittals are in conformance with the Design-Build Documents, all of which remain the responsibility of the Design-Builder as required by the Design-Build Documents. The Owner's action will be taken in accordance with the submittal schedule approved by the Owner or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Owner's judgment to permit adequate review. The Owner's review of Submittals shall not relieve the Design-Builder of the obligations under Sections 3.1.11, 3.1.12, and 5.2.3. The Owner's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Owner, of any construction means, methods, techniques, sequences or procedures. The Owner's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 7.3.2 Upon review of the Submittals required by the Design-Build Documents, the Owner shall notify the Design-Builder of any non-conformance with the Design-Build Documents the Owner discovers.

§ 7.4 Visits to the site by the Owner shall not be construed to create an obligation on the part of the Owner to make on-site inspections to check the quality or quantity of the Work. The Owner shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, because these are solely the Design-Builder's rights and responsibilities under the Design-Build Documents.

§ 7.5 The Owner shall not be responsible for the Design-Builder's failure to perform the Work in accordance with the requirements of the Design-Build Documents. The Owner shall not have control over or charge of, and will not be responsible for acts or omissions of the Design-Builder, Architect, Consultants, Contractors, or their agents or employees, or any other persons or entities performing portions of the Work for the Design-Builder.

§ 7.6 The Owner has the authority to reject Work that does not conform to the Design-Build Documents. The Owner shall have authority to require inspection or testing of the Work in accordance with Section 15.5.2, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Owner nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Owner

to the Design-Builder, the Architect, Consultants, Contractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 7.7 The Owner shall determine the date or dates of Substantial Completion in accordance with Section 9.8 and the date of final completion in accordance with Section 9.10.

§ 7.8 Owner's Right to Stop Work

If the Design-Builder fails to correct Work which is not in accordance with the requirements of the Design-Build Documents as required by Section 11.2 or persistently fails to carry out Work in accordance with the Design-Build Documents, the Owner may issue a written order to the Design-Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Design-Builder or any other person or entity, except to the extent required by Section 5.13.1.3.

§ 7.9 Owner's Right to Carry Out the Work

If the Design-Builder defaults or neglects to carry out the Work in accordance with the Design-Build Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due the Design-Builder the reasonable cost of correcting such deficiencies. If payments then or thereafter due the Design-Builder are not sufficient to cover such amounts, the Design-Builder shall pay the difference to the Owner.

ARTICLE 8 TIME

§ 8.1 Progress and Completion

§ 8.1.1 Time limits stated in the Design-Build Documents are of the essence of the Contract. By executing the Design-Build Amendment the Design-Builder confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.1.2 The Design-Builder shall not, except by agreement of the Owner in writing, commence the Work prior to the effective date of insurance, other than property insurance, required by this Contract. The Contract Time shall not be adjusted as a result of the Design-Builder's failure to obtain insurance required under this Contract.

§ 8.1.3 The Design-Builder shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.2 Delays and Extensions of Time

§ 8.2.1 If the Design-Builder is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or of a consultant or separate contractor employed by the Owner; or by changes ordered in the Work by the Owner; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Design-Builder's control; or by delay authorized by the Owner pending mediation and binding dispute resolution or by other causes that the Owner determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Owner may determine.

§ 8.2.2 Claims relating to time shall be made in accordance with applicable provisions of Article 14.

§ 8.2.3 This Section 8.2 does not preclude recovery of damages for delay by either party under other provisions of the Design-Build Documents.

ARTICLE 9 PAYMENT APPLICATIONS AND PROJECT COMPLETION

§ 9.1 Contract Sum

The Contract Sum is stated in the Design-Build Amendment.

§ 9.2 Schedule of Values

Where the Contract Sum is based on a stipulated sum or Guaranteed Maximum Price, the Design-Builder, prior to the first Application for Payment after execution of the Design-Build Amendment shall submit to the Owner a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form

and supported by such data to substantiate its accuracy as the Owner may require. This schedule, unless objected to by the Owner, shall be used as a basis for reviewing the Design-Builder's Applications for Payment.

§ 9.3 Applications for Payment

§ 9.3.1 At least ten days before the date established for each progress payment, the Design-Builder shall submit to the Owner an itemized Application for Payment for completed portions of the Work. The application shall be notarized, if required, and supported by data substantiating the Design-Builder's right to payment as the Owner may require, such as copies of requisitions from the Architect, Consultants, Contractors, and material suppliers, and shall reflect retainage if provided for in the Design-Build Documents.

§ 9.3.1.1 As provided in Section 6.3.9, Applications for Payment may include requests for payment on account of changes in the Work that have been properly authorized by Change Directives, or by interim determinations of the Owner, but not yet included in Change Orders.

§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Design-Builder does not intend to pay the Architect, Consultant, Contractor, material supplier, or other persons or entities providing services or work for the Design-Builder, unless such Work has been performed by others whom the Design-Builder intends to pay.

§ 9.3.2 Unless otherwise provided in the Design-Build Documents, payments shall be made for services provided as well as materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Design-Builder with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

§ 9.3.3 The Design-Builder warrants that title to all Work, other than Instruments of Service, covered by an Application for Payment will pass to the Owner no later than the time of payment. The Design-Builder further warrants that, upon submittal of an Application for Payment, all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Design-Builder's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Design-Builder, Architect, Consultants, Contractors, material suppliers, or other persons or entities entitled to make a claim by reason of having provided labor, materials and equipment relating to the Work.

§ 9.4 Certificates for Payment

The Owner shall, within seven days after receipt of the Design-Builder's Application for Payment, issue to the Design-Builder a Certificate for Payment indicating the amount the Owner determines is properly due, and notify the Design-Builder in writing of the Owner's reasons for withholding certification in whole or in part as provided in Section 9.5.1.

§ 9.5 Decisions to Withhold Certification

§ 9.5.1 The Owner may withhold a Certificate for Payment in whole or in part to the extent reasonably necessary to protect the Owner due to the Owner's determination that the Work has not progressed to the point indicated in the Design-Builder's Application for Payment, or the quality of the Work is not in accordance with the Design-Build Documents. If the Owner is unable to certify payment in the amount of the Application, the Owner will notify the Design-Builder as provided in Section 9.4. If the Design-Builder and Owner cannot agree on a revised amount, the Owner will promptly issue a Certificate for Payment for the amount that the Owner deems to be due and owing. The Owner may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued to such extent as may be necessary to protect the Owner from loss for which the Design-Builder is responsible because of

- .1 defective Work, including design and construction, not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Design-Builder;
- .3 failure of the Design-Builder to make payments properly to the Architect, Consultants, Contractors or others, for services, labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a separate contractor;

- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 repeated failure to carry out the Work in accordance with the Design-Build Documents.

§ 9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.3 If the Owner withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Design-Builder and to the Architect or any Consultants, Contractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder to whom the Design-Builder failed to make payment for Work properly performed or material or equipment suitably delivered.

§ 9.6 Progress Payments

§ 9.6.1 After the Owner has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Design-Build Documents.

§ 9.6.2 The Design-Builder shall pay each Architect, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder no later than the time period required by applicable law, but in no event more than seven days after receipt of payment from the Owner the amount to which the Architect, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder is entitled, reflecting percentages actually retained from payments to the Design-Builder on account of the portion of the Work performed by the Architect, Consultant, Contractor, or other person or entity. The Design-Builder shall, by appropriate agreement with each Architect, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder, require each Architect, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder to make payments to subconsultants and subcontractors in a similar manner.

§ 9.6.3 The Owner will, on request and if practicable, furnish to the Architect, a Consultant, Contractor, or other person or entity providing services or work for the Design-Builder, information regarding percentages of completion or amounts applied for by the Design-Builder and action taken thereon by the Owner on account of portions of the Work done by such Architect, Consultant, Contractor or other person or entity providing services or work for the Design-Builder.

§ 9.6.4 The Owner has the right to request written evidence from the Design-Builder that the Design-Builder has properly paid the Architect, Consultants, Contractors, or other person or entity providing services or work for the Design-Builder, amounts paid by the Owner to the Design-Builder for the Work. If the Design-Builder fails to furnish such evidence within seven days, the Owner shall have the right to contact the Architect, Consultants, and Contractors to ascertain whether they have been properly paid. The Owner shall have no obligation to pay or to see to the payment of money to a Consultant or Contractor, except as may otherwise be required by law.

§ 9.6.5 Design-Builder payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Design-Build Documents.

§ 9.6.7 Unless the Design-Builder provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Design-Builder for Work properly performed by the Architect, Consultants, Contractors and other person or entity providing services or work for the Design-Builder, shall be held by the Design-Builder for the Architect and those Consultants, Contractors, or other person or entity providing services or work for the Design-Builder, for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Design-Builder, shall create any fiduciary liability or tort liability on the part of the Design-Builder for breach of trust or shall entitle any person or entity to an award of punitive damages against the Design-Builder for breach of the requirements of this provision.

§ 9.7 Failure of Payment

If the Owner does not issue a Certificate for Payment, through no fault of the Design-Builder, within the time required by the Design-Build Documents, then the Design-Builder may, upon seven additional days' written notice

to the Owner, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Design-Builder's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Design-Build Documents.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Design-Build Documents so that the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion is the date certified by the Owner in accordance with this Section 9.8.

§ 9.8.2 When the Design-Builder considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Design-Builder shall prepare and submit to the Owner a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Design-Builder to complete all Work in accordance with the Design-Build Documents.

§ 9.8.3 Upon receipt of the Design-Builder's list, the Owner shall make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Owner's inspection discloses any item, whether or not included on the Design-Builder's list, which is not sufficiently complete in accordance with the Design-Build Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Design-Builder shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Owner. In such case, the Design-Builder shall then submit a request for another inspection by the Owner to determine Substantial Completion.

§ 9.8.4 Prior to issuance of the Certificate of Substantial Completion under Section 9.8.5, the Owner and Design-Builder shall discuss and then determine the parties' obligations to obtain and maintain property insurance following issuance of the Certificate of Substantial Completion.

§ 9.8.5 When the Work or designated portion thereof is substantially complete, the Design-Builder will prepare for the Owner's signature a Certificate of Substantial Completion that shall, upon the Owner's signature, establish the date of Substantial Completion; establish responsibilities of the Owner and Design-Builder for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Design-Builder shall finish all items on the list accompanying the Certificate. Warranties required by the Design-Build Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.6 The Certificate of Substantial Completion shall be submitted by the Design-Builder to the Owner for written acceptance of responsibilities assigned to it in the Certificate. Upon the Owner's acceptance, and consent of surety, if any, the Owner shall make payment of retainage applying to the Work or designated portion thereof. Payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Design-Build Documents.

§ 9.9 Partial Occupancy or Use

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Design-Builder, provided such occupancy or use is consented to, by endorsement or otherwise, by the insurer providing property insurance and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Design-Builder have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Design-Build Documents. When the Design-Builder considers a portion substantially complete, the Design-Builder shall prepare and submit a list to the Owner as provided under Section 9.8.2. Consent of the Design-Builder to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Design-Builder.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner and Design-Builder shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Design-Build Documents.

§ 9.10 Final Completion and Final Payment

§ 9.10.1 Upon receipt of the Design-Builder's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Owner will promptly make such inspection. When the Owner finds the Work acceptable under the Design-Build Documents and the Contract fully performed, the Owner will, subject to Section 9.10.2, promptly issue a final Certificate for Payment.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Design-Builder submits to the Owner (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work, for which the Owner or the Owner's property might be responsible or encumbered, (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Design-Build Documents to remain in force after final payment is currently in effect, (3) a written statement that the Design-Builder knows of no substantial reason that the insurance will not be renewable to cover the period required by the Design-Build Documents, (4) consent of surety, if any, to final payment, (5) as-constructed record copy of the Construction Documents marked to indicate field changes and selections made during construction, (6) manufacturer's warranties, product data, and maintenance and operations manuals, and (7) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, or releases and waivers of liens, claims, security interests, or encumbrances, arising out of the Contract, to the extent and in such form as may be designated by the Owner. If an Architect, a Consultant, or a Contractor, or other person or entity providing services or work for the Design-Builder, refuses to furnish a release or waiver required by the Owner, the Design-Builder may furnish a bond satisfactory to the Owner to indemnify the Owner against such liens, claims, security interests, or encumbrances. If such liens, claims, security interests, or encumbrances remains unsatisfied after payments are made, the Design-Builder shall refund to the Owner all money that the Owner may be compelled to pay in discharging such liens, claims, security interests, or encumbrances, including all costs and reasonable attorneys' fees.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Design-Builder or by issuance of Change Orders affecting final completion, the Owner shall, upon application by the Design-Builder, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Design-Build Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Design-Builder to the Owner prior to issuance of payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

- .1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Design-Build Documents; or
- .3 terms of special warranties required by the Design-Build Documents.

§ 9.10.5 Acceptance of final payment by the Design-Builder shall constitute a waiver of claims by the Design-Builder except those previously made in writing and identified by the Design-Builder as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 Safety Precautions and Programs

The Design-Builder shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

§ 10.2 Safety of Persons and Property

§ 10.2.1 The Design-Builder shall be responsible for precautions for the safety of, and reasonable protection to prevent damage, injury or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Design-Builder or the Architect, Consultants, or Contractors, or other person or entity providing services or work for the Design-Builder; and

- 3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, or structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Design-Builder shall comply with, and give notices required by, applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, bearing on safety of persons or property, or their protection from damage, injury or loss.

§ 10.2.3 The Design-Builder shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notify owners and users of adjacent sites and utilities of the safeguards and protections.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment, or unusual methods, are necessary for execution of the Work, the Design-Builder shall exercise utmost care, and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Design-Builder shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Design-Build Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3, caused in whole or in part by the Design-Builder, the Architect, a Consultant, a Contractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Design-Builder is responsible under Sections 10.2.1.2 and 10.2.1.3; except damage or loss attributable to acts or omissions of the Owner, or anyone directly or indirectly employed by the Owner, or by anyone for whose acts the Owner may be liable, and not attributable to the fault or negligence of the Design-Builder. The foregoing obligations of the Design-Builder are in addition to the Design-Builder's obligations under Section 3.1.14.

§ 10.2.6 The Design-Builder shall designate a responsible member of the Design-Builder's organization, at the site, whose duty shall be the prevention of accidents. This person shall be the Design-Builder's superintendent unless otherwise designated by the Design-Builder in writing to the Owner.

§ 10.2.7 The Design-Builder shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

§ 10.2.8 **Injury or Damage to Person or Property.** If the Owner or Design-Builder suffers injury or damage to person or property because of an act or omission of the other, or of others for whose acts such party is legally responsible, written notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§ 10.3 Hazardous Materials

§ 10.3.1 The Design-Builder is responsible for compliance with any requirements included in the Design-Build Documents regarding hazardous materials. If the Design-Builder encounters a hazardous material or substance not addressed in the Design-Build Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Design-Builder, the Design-Builder shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner in writing.

§ 10.3.2 Upon receipt of the Design-Builder's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Design-Builder and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Design-Build Documents, the Owner shall furnish in writing to the Design-Builder the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Design-Builder will promptly reply to the Owner in writing stating whether or not the Design-Builder has reasonable objection to the persons or entities proposed by the Owner. If the Design-Builder has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Design-Builder has no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon

written agreement of the Owner and Design-Builder. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Design-Builder's reasonable additional costs of shut-down, delay and start-up.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Design-Builder, the Architect, Consultants, and Contractors, and employees of any of them, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area, if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to, or destruction of, tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for materials or substances the Design-Builder brings to the site unless such materials or substances are required by the Owner's Criteria. The Owner shall be responsible for materials or substances required by the Owner's Criteria, except to the extent of the Design-Builder's fault or negligence in the use and handling of such materials or substances.

§ 10.3.5 The Design-Builder shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Design-Builder brings to the site and negligently handles, or (2) where the Design-Builder fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.6 If, without negligence on the part of the Design-Builder, the Design-Builder is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Design-Build Documents, the Owner shall indemnify the Design-Builder for all cost and expense thereby incurred.

§ 10.4 Emergencies

In an emergency affecting safety of persons or property, the Design-Builder shall act, at the Design-Builder's discretion, to prevent threatened damage, injury or loss.

ARTICLE 11 UNCOVERING AND CORRECTION OF WORK

§ 11.1 Uncovering of Work

The Owner may request to examine a portion of the Work that the Design-Builder has covered to determine if the Work has been performed in accordance with the Design-Build Documents. If such Work is in accordance with the Design-Build Documents, the Owner and Design-Builder shall execute a Change Order to adjust the Contract Time and Contract Sum, as appropriate. If such Work is not in accordance with the Design-Build Documents, the costs of uncovering and correcting the Work shall be at the Design-Builder's expense and the Design-Builder shall not be entitled to a change in the Contract Time unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs and the Contract Time will be adjusted as appropriate.

§ 11.2 Correction of Work

§ 11.2.1 Before or After Substantial Completion. The Design-Builder shall promptly correct Work rejected by the Owner or failing to conform to the requirements of the Design-Build Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for any design consultant employed by the Owner whose expenses and compensation were made necessary thereby, shall be at the Design-Builder's expense.

§ 11.2.2 After Substantial Completion

§ 11.2.2.1 In addition to the Design-Builder's obligations under Section 3.1.12, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Design-Build Documents, any of the Work is found not to be in accordance with the requirements of the Design-Build Documents, the Design-Builder shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Design-Builder a written acceptance of such condition. The Owner shall

give such notice promptly after discovery of the condition. During the one-year period for correction of the Work, if the Owner fails to notify the Design-Builder and give the Design-Builder an opportunity to make the correction, the Owner waives the rights to require correction by the Design-Builder and to make a claim for breach of warranty. If the Design-Builder fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner, the Owner may correct it in accordance with Section 7.9.

§ 11.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 11.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Design-Builder pursuant to this Section 11.2.

§ 11.2.3 The Design-Builder shall remove from the site portions of the Work that are not in accordance with the requirements of the Design-Build Documents and are neither corrected by the Design-Builder nor accepted by the Owner.

§ 11.2.4 The Design-Builder shall bear the cost of correcting destroyed or damaged construction of the Owner or separate contractors, whether completed or partially completed, caused by the Design-Builder's correction or removal of Work that is not in accordance with the requirements of the Design-Build Documents.

§ 11.2.5 Nothing contained in this Section 11.2 shall be construed to establish a period of limitation with respect to other obligations the Design-Builder has under the Design-Build Documents. Establishment of the one-year period for correction of Work as described in Section 11.2.2 relates only to the specific obligation of the Design-Builder to correct the Work, and has no relationship to the time within which the obligation to comply with the Design-Build Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Design-Builder's liability with respect to the Design-Builder's obligations other than specifically to correct the Work.

§ 11.3 Acceptance of Nonconforming Work

If the Owner prefers to accept Work that is not in accordance with the requirements of the Design-Build Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

ARTICLE 12 COPYRIGHTS AND LICENSES

§ 12.1 Drawings, specifications, and other documents furnished by the Design-Builder, including those in electronic form, are Instruments of Service. The Design-Builder, and the Architect, Consultants, Contractors, and any other person or entity providing services or work for any of them, shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements, or for similar purposes in connection with the Project, is not to be construed as publication in derogation of the reserved rights of the Design-Builder and the Architect, Consultants, and Contractors, and any other person or entity providing services or work for any of them.

§ 12.2 The Design-Builder and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

§ 12.3 Upon execution of the Agreement, the Design-Builder grants to the Owner a limited, irrevocable and non-exclusive license to use the Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under the Design-Build Documents. The license granted under this section permits the Owner to authorize its consultants and separate contractors to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Design-Builder rightfully terminates this Agreement for cause as provided in Section 13.1.4 or 13.2.1 the license granted in this Section 12.3 shall terminate.

§ 12.3.1 The Design-Builder shall obtain non-exclusive licenses from the Architect, Consultants, and Contractors, that will allow the Design-Builder to satisfy its obligations to the Owner under this Article 12. The Design-Builder's licenses from the Architect and its Consultants and Contractors shall also allow the Owner, in the event this Agreement is terminated for any reason other than the default of the Owner or in the event the Design-Builder's Architect, Consultants, or Contractors terminate their agreements with the Design-Builder for cause, to obtain a limited, irrevocable and non-exclusive license solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner (1) agrees to pay to the Architect, Consultant or Contractor all amounts due, and (2) provide the Architect, Consultant or Contractor with the Owner's written agreement to indemnify and hold harmless the Architect, Consultant or Contractor from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's alteration or use of the Instruments of Service.

§ 12.3.2 In the event the Owner alters the Instruments of Service without the author's written authorization or uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the Design-Builder, Architect, Consultants, Contractors and any other person or entity providing services or work for any of them, from all claims and causes of action arising from or related to such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Design-Builder, Architect, Consultants, Contractors and any other person or entity providing services or work for any of them, from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's alteration or use of the Instruments of Service under this Section 12.3.2. The terms of this Section 12.3.2 shall not apply if the Owner rightfully terminates this Agreement for cause under Sections 13.1.4 or 13.2.2.

ARTICLE 13 TERMINATION OR SUSPENSION

§ 13.1 Termination or Suspension Prior to Execution of the Design-Build Amendment

§ 13.1.1 If the Owner fails to make payments to the Design-Builder for Work prior to execution of the Design-Build Amendment in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Design-Builder's option, cause for suspension of performance of services under this Agreement. If the Design-Builder elects to suspend the Work, the Design-Builder shall give seven days' written notice to the Owner before suspending the Work. In the event of a suspension of the Work, the Design-Builder shall have no liability to the Owner for delay or damage caused by the suspension of the Work. Before resuming the Work, the Design-Builder shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Design-Builder's Work. The Design-Builder's compensation for, and time to complete, the remaining Work shall be equitably adjusted.

§ 13.1.2 If the Owner suspends the Project, the Design-Builder shall be compensated for the Work performed prior to notice of such suspension. When the Project is resumed, the Design-Builder shall be compensated for expenses incurred in the interruption and resumption of the Design-Builder's Work. The Design-Builder's compensation for, and time to complete, the remaining Work shall be equitably adjusted.

§ 13.1.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Design-Builder, the Design-Builder may terminate this Agreement by giving not less than seven days' written notice.

§ 13.1.4 Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

§ 13.1.5 The Owner may terminate this Agreement upon not less than seven days' written notice to the Design-Builder for the Owner's convenience and without cause.

§ 13.1.6 In the event of termination not the fault of the Design-Builder, the Design-Builder shall be compensated for Work performed prior to termination, together with Reimbursable Expenses then due and any other expenses directly attributable to termination for which the Design-Builder is not otherwise compensated. In no event shall the Design-Builder's compensation under this Section 13.1.6 be greater than the compensation set forth in Section 2.1.

§ 13.2 Termination or Suspension Following Execution of the Design-Build Amendment

§ 13.2.1 Termination by the Design-Builder

§ 13.2.1.1 The Design-Builder may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Design-Builder, the Architect, a Consultant, or a Contractor, or their agents or employees, or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, for any of the following reasons:

- .1** Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2** An act of government, such as a declaration of national emergency that requires all Work to be stopped;
- .3** Because the Owner has not issued a Certificate for Payment and has not notified the Design-Builder of the reason for withholding certification as provided in Section 9.5.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Design-Build Documents; or
- .4** The Owner has failed to furnish to the Design-Builder promptly, upon the Design-Builder's request, reasonable evidence as required by Section 7.2.7.

§ 13.2.1.2 The Design-Builder may terminate the Contract if, through no act or fault of the Design-Builder, the Architect, a Consultant, a Contractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 13.2.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 13.2.1.3 If one of the reasons described in Section 13.2.1.1 or 13.2.1.2 exists, the Design-Builder may, upon seven days' written notice to the Owner, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

§ 13.2.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Design-Builder or any other persons or entities performing portions of the Work under contract with the Design-Builder because the Owner has repeatedly failed to fulfill the Owner's obligations under the Design-Build Documents with respect to matters important to the progress of the Work, the Design-Builder may, upon seven additional days' written notice to the Owner, terminate the Contract and recover from the Owner as provided in Section 13.2.1.3.

§ 13.2.2 Termination by the Owner For Cause

§ 13.2.2.1 The Owner may terminate the Contract if the Design-Builder

- .1** fails to submit the Proposal by the date required by this Agreement, or if no date is indicated, within a reasonable time consistent with the date of Substantial Completion;
- .2** repeatedly refuses or fails to supply an Architect, or enough properly skilled Consultants, Contractors, or workers or proper materials;
- .3** fails to make payment to the Architect, Consultants, or Contractors for services, materials or labor in accordance with their respective agreements with the Design-Builder;
- .4** repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .5** is otherwise guilty of substantial breach of a provision of the Design-Build Documents.

§ 13.2.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Design-Builder and the Design-Builder's surety, if any, seven days' written notice, terminate employment of the Design-Builder and may, subject to any prior rights of the surety:

- .1** Exclude the Design-Builder from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Design-Builder;
- .2** Accept assignment of the Architect, Consultant and Contractor agreements pursuant to Section 3.1.15; and
- .3** Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Design-Builder, the Owner shall furnish to the Design-Builder a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 13.2.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 13.2.2.1, the Design-Builder shall not be entitled to receive further payment until the Work is finished.

§ 13.2.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Design-Builder. If such costs and damages exceed the unpaid balance, the Design-Builder shall pay the difference to the Owner. The obligation for such payments shall survive termination of the Contract.

§ 13.2.3 Suspension by the Owner for Convenience

§ 13.2.3.1 The Owner may, without cause, order the Design-Builder in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§ 13.2.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 13.2.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Design-Builder is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

§ 13.2.4 Termination by the Owner for Convenience

§ 13.2.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 13.2.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Design-Builder shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and,
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing Project agreements, including agreements with the Architect, Consultants, Contractors, and purchase orders, and enter into no further Project agreements and purchase orders.

§ 13.2.4.3 In case of such termination for the Owner's convenience, the Design-Builder shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

ARTICLE 14 CLAIMS AND DISPUTE RESOLUTION

§ 14.1 Claims

§ 14.1.1 **Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Design-Builder arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

§ 14.1.2 **Time Limits on Claims.** The Owner and Design-Builder shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other, arising out of or related to the Contract in accordance with the requirements of the binding dispute resolution method selected in Section 1.3, within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Design-Builder waive all claims and causes of action not commenced in accordance with this Section 14.1.2.

§ 14.1.3 Notice of Claims

§ 14.1.3.1 **Prior To Final Payment.** Prior to Final Payment, Claims by either the Owner or Design-Builder must be initiated by written notice to the other party within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 14.1.3.2 **Claims Arising After Final Payment.** After Final Payment, Claims by either the Owner or Design-Builder that have not otherwise been waived pursuant to Sections 9.10.4 or 9.10.5, must be initiated by prompt written notice to the other party. The notice requirement in Section 14.1.3.1 and the Initial Decision requirement as a condition precedent to mediation in Section 14.2.1 shall not apply.

§ 14.1.4 Continuing Contract Performance. Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 13, the Design-Builder shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Design-Build Documents.

§ 14.1.5 Claims for Additional Cost. If the Design-Builder intends to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the portion of the Work that relates to the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 14.1.6 Claims for Additional Time

§ 14.1.6.1 If the Design-Builder intends to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Design-Builder's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 14.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

§ 14.1.7 Claims for Consequential Damages

The Design-Builder and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Design-Builder for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 13. Nothing contained in this Section 14.1.7 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Design-Build Documents.

§ 14.2 Initial Decision

§ 14.2.1 An initial decision shall be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder initiated prior to the date final payment is due, excluding those arising under Sections 10.3 and 10.4 of the Agreement and Sections B.3.2.9 and B.3.2.10 of Exhibit B to this Agreement, unless 30 days have passed after the Claim has been initiated with no decision having been rendered. Unless otherwise mutually agreed in writing, the Owner shall render the initial decision on Claims.

§ 14.2.2 Procedure

§ 14.2.2.1 Claims Initiated by the Owner. If the Owner initiates a Claim, the Design-Builder shall provide a written response to Owner within ten days after receipt of the notice required under Section 14.1.3.1. Thereafter, the Owner shall render an initial decision within ten days of receiving the Design-Builder's response: (1) withdrawing the Claim in whole or in part, (2) approving the Claim in whole or in part, or (3) suggesting a compromise.

§ 14.2.2.2 Claims Initiated by the Design-Builder. If the Design-Builder initiates a Claim, the Owner will take one or more of the following actions within ten days after receipt of the notice required under Section 14.1.3.1: (1) request additional supporting data, (2) render an initial decision rejecting the Claim in whole or in part, (3) render an initial decision approving the Claim, (4) suggest a compromise or (5) indicate that it is unable to render an initial decision because the Owner lacks sufficient information to evaluate the merits of the Claim.

§ 14.2.3 In evaluating Claims, the Owner may, but shall not be obligated to, consult with or seek information from persons with special knowledge or expertise who may assist the Owner in rendering a decision. The retention of such persons shall be at the Owner's expense.

§ 14.2.4 If the Owner requests the Design-Builder to provide a response to a Claim or to furnish additional supporting data, the Design-Builder shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Owner when the response or supporting data will

be furnished or (3) advise the Owner that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Owner will either reject or approve the Claim in whole or in part.

§ 14.2.5 The Owner's initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) identify any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 14.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 14.2.6.1.

§ 14.2.6.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 14.2.7 In the event of a Claim against the Design-Builder, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Design-Builder's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 14.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 14.3 Mediation

§ 14.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 14.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 14.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this Section 14.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 14.3.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction.

§ 14.4 Arbitration

§ 14.4.1 If the parties have selected arbitration as the method for binding dispute resolution in Section 1.3, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 14.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations or statute of repose. For statute of limitations or statute of repose purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 14.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

§ 14.4.3 The foregoing agreement to arbitrate, and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 14.4.4 Consolidation or Joinder

§ 14.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 14.4.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 14.4.4.3 The Owner and Design-Builder grant to any person or entity made a party to an arbitration conducted under this Section 14.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Design-Builder under this Agreement.

ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Governing Law

The Contract shall be governed by the law of the place where the Project is located except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 14.4.

§ 15.2 Successors and Assigns

§ 15.2.1 The Owner and Design-Builder, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Design-Build Documents. Except as provided in Section 15.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 15.2.2 The Owner may, without consent of the Design-Builder, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Design-Build Documents. The Design-Builder shall execute all consents reasonably required to facilitate such assignment.

§ 15.2.3 If the Owner requests the Design-Builder, Architect, Consultants, or Contractors to execute certificates, other than those required by Section 3.1.10, the Owner shall submit the proposed language of such certificates for review at least 14 days prior to the requested dates of execution. If the Owner requests the Design-Builder, Architect, Consultants, or Contractors to execute consents reasonably required to facilitate assignment to a lender, the Design-Builder, Architect, Consultants, or Contractors shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to them for review at least 14 days prior to execution. The Design-Builder, Architect, Consultants, and Contractors shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of their services.

§ 15.3 Written Notice

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.

§ 15.4 Rights and Remedies

§ 15.4.1 Duties and obligations imposed by the Design-Build Documents, and rights and remedies available thereunder, shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

§ 15.4.2 No action or failure to act by the Owner or Design-Builder shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

§ 15.5 Tests and Inspections

§ 15.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Design-Build Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Design-Builder shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Design-Builder shall give the Owner timely notice of when and where tests and inspections are to be made so that the Owner may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Design-Builder.

§ 15.5.2 If the Owner determines that portions of the Work require additional testing, inspection or approval not included under Section 15.5.1, the Owner will instruct the Design-Builder to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Design-Builder shall give timely notice to the Owner of when and where tests and inspections are to be made so that the Owner may be present for such procedures. Such costs, except as provided in Section 15.5.3, shall be at the Owner's expense.

§ 15.5.3 If such procedures for testing, inspection or approval under Sections 15.5.1 and 15.5.2 reveal failure of the portions of the Work to comply with requirements established by the Design-Build Documents, all costs made necessary by such failure shall be at the Design-Builder's expense.

§ 15.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Design-Build Documents, be secured by the Design-Builder and promptly delivered to the Owner.

§ 15.5.5 If the Owner is to observe tests, inspections or approvals required by the Design-Build Documents, the Owner will do so promptly and, where practicable, at the normal place of testing.

§ 15.5.6 Tests or inspections conducted pursuant to the Design-Build Documents shall be made promptly to avoid unreasonable delay in the Work.

§ 15.6 Confidential Information

If the Owner or Design-Builder transmits Confidential Information, the transmission of such Confidential Information constitutes a warranty to the party receiving such Confidential Information that the transmitting party is authorized to transmit the Confidential Information. If a party receives Confidential Information, the receiving party shall keep the Confidential Information strictly confidential and shall not disclose it to any other person or entity except as set forth in Section 15.6.1.

§ 15.6.1 A party receiving Confidential Information may disclose the Confidential Information as required by law or court order, including a subpoena or other form of compulsory legal process issued by a court or governmental entity. A party receiving Confidential Information may also disclose the Confidential Information to its employees, consultants or contractors in order to perform services or work solely and exclusively for the Project, provided those employees, consultants and contractors are subject to the restrictions on the disclosure and use of Confidential Information as set forth in this Contract.

§ 15.7 Capitalization

Terms capitalized in the Contract include those that are (1) specifically defined, (2) the titles of numbered articles or (3) the titles of other documents published by the American Institute of Architects.

§ 15.8 Interpretation

§ 15.8.1 In the interest of brevity the Design-Build Documents frequently omit modifying words such as “all” and “any” and articles such as “the” and “an,” but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§ 15.8.2 Unless otherwise stated in the Design-Build Documents, words which have well-known technical or construction industry meanings are used in the Design-Build Documents in accordance with such recognized meanings.

ARTICLE 16 SCOPE OF THE AGREEMENT

§ 16.1 This Agreement is comprised of the following documents listed below:

- .1 AIA Document A141™–2014, Standard Form of Agreement Between Owner and Design-Builder
- .2 AIA Document A141™–2014, Exhibit A, Design-Build Amendment, if executed
- .3 AIA Document A141™–2014, Exhibit B, Insurance and Bonds

« »

- .4 Other:

«Exhibit C – GravityWorks Schematic Design Dated June 25, 2021 »

This Agreement entered into as of the day and year first written above.

OWNER *(Signature)*

« »« »

(Printed name and title)

DESIGN-BUILDER *(Signature)*

« D. Craig Nelson »« President & CEO »

(Printed name and title)

TO: City Commission
FROM: David Dillner, City Manager
SUBJ: Butler Rural Electric Cooperative Request
DATE: May 1, 2023

Background:

Kevin Brownlee, CEO of Butler Rural Electric Cooperative (BREC), inquired as to whether the City would consider leasing the southeast corner of the Civic Center property. This section of property is currently undeveloped and would be used by BREC as a laydown yard for the storage of materials for an upcoming project.

Attachments:

1. BREC Civic Center Request

Policy Issue:

Should the City lease a portion of its property to a private entity for the outside storage of materials?

Fiscal Impact:

Unknown. If approved, the City Manager will negotiate a lease agreement with BREC that will include a lease payment for the use of the property.

Trade-offs:

NA

Staff Recommendation:

NA

Commission Action:

No formal action is required at this time. The City Manager wants direction from the governing body on its willingness to consider a lease of City-owned property before proceeding with negotiations.



E CENTRAL AVE

S VINE ST

S GRIFFITH ST

24,500 SF