

CITY AND COUNTY OF DENVER
Request for Proposal for
Material Inspection and Testing Specialist for
The Justice Center Project
CE_ OC64035

ADDENDUM 1

August 16, 2006

Attachment 5: Sample Contract

The sample contract contained in this addendum replaces the original Attachment 5 issued with the Material and Inspection Specialist Request for Proposal issued on August 16th, 2006.

ATTACHMENT 5

CITY AND COUNTY OF DENVER
DEPARTMENT OF PUBLIC WORKS

SAMPLE
PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made and entered into this ____ day of _____, 200__, by and between the **CITY AND COUNTY OF DENVER** (“City”), a municipal corporation of the State of Colorado, and _____ (“Consultant”), whose address _____ Colorado, _____.

WITNESSETH:

WHEREAS, the City desires to retain the Consultant to provide _____ services for the Design and Construction Management Division of the City’s Department of Public Works on the _____ Project, Project No. _____ (“Project”); and

WHEREAS, the Consultant represents that it has the requisite licensing, qualifications and experience required to perform the services contemplated by this Agreement, and that it is ready, willing and able to provide the services specified herein as an independent contractor; and

WHEREAS, the Consultant prepared and provided a proposal response to the City’s Request for Proposals; and

WHEREAS, the Consultant and the City have negotiated a Scope of Services and Fee Proposal for such professional services, a copy of which is attached hereto and incorporated herein as Exhibit A.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and obligations herein set forth, the parties hereto mutually agree as follows:

ARTICLE I. AUTHORITY: The City's Manager of Public Works ("Manager") is the City's representative who is responsible for authorizing and overseeing the work performed under this Agreement. The Manager hereby designates the City Engineer as the Manager's authorized representative for the purpose of directing, administering, coordinating and finally, reviewing and approving the work performed by the Consultant under this Agreement and for the purpose of designating a Project Manager. The “Project Manager,” who reports to and is designated by the City Engineer, shall be Jacobs Facilities, Inc. The Project Manager will e responsible for the day-to-day administration, coordination and oversight of work performed by the Consultant on the Project, except for approvals which are specifically identified in this Agreement as requiring the Manager's action. The Consultant recognizes that only the Manager of Public Works and the representatives designated herein have the authority to authorize or direct work under this Agreement.

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ARTICLE II. COMPENSATION: The Consultant shall provide professional _____ services, as directed by the Project Manager, in accordance with the terms and conditions of this Agreement, and the City shall compensate the Consultant for such services as set out below:

A. **Basic Services:** The City agrees to pay the Consultant, as compensation for any basic services rendered hereunder, an amount to be set forth for those professional testing and inspection services and other reimbursable expenses authorized by the Project Manager prior to commencement of such performance and satisfactorily performed by the Consultant. Compensation for the performance of such services and costs incurred for reimbursable expenses shall be based on the Consultant's fee schedule for services and expenses contained in Exhibit A.

B. **Additional Services:** Subject to prior approval of such costs by the Manager, the Consultant shall be paid its hourly rate for additional services not contemplated by Exhibit A, but which the City specifically requests in writing that the Consultant to provide under this Agreement.

C. **Invoices:** The Consultant shall invoice and be paid monthly for services performed and for fees and costs accrued only during the preceding month. In order to establish payment due the Consultant for services performed in accordance with the terms and conditions of this Agreement, the Consultant, at the end of each calendar month, shall present to the City a signed statement certifying the following: (i) the Basic Services actually performed during the month expressed with reference to the fee schedule contained in Exhibit A; (ii) a list of any Additional Service(s) actually performed during the month; and (iii) a list of any reimbursable expenses actually incurred and payable during the month. The Consultant shall also include with each statement all supporting documentation requested by the Project Manager or as is otherwise required to verify all invoiced amounts. In addition, the Consultant shall maintain hourly time records for all personnel performing hereunder and documentation of subconsultant billings and reimbursable expenses incurred sufficient to support any audits by the City. Payment of all invoiced amounts shall be made upon verification by the Project Manager of all services performed and reimbursable expensed incurred.

D. **Final Payment.** Final Payment to the Consultant shall not be made until after Final Completion, all guarantees, warranties, reports and other record documentation are delivered to the City, and this Agreement is otherwise fully performed by the Consultant.

E. **Maximum Contract Amount:** It is understood and agreed by the parties hereto that payment or reimbursement of any kind to the Consultant, for all work performed under this Agreement, shall not exceed a maximum of _____ **Thousand Dollars (\$_____.**00). In no event

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shall the maximum payment to the Consultant, for all work and services performed throughout the entire term of the contract exceed the contract maximum amount set forth above.

E. **Funding:** Notwithstanding any other term, provision, or condition herein, all payment obligations under this Agreement shall be limited to the funds duly and lawfully appropriated and encumbered or otherwise made available by the Denver City Council for the particular projects assigned to the Consultant under this Agreement for the particular year(s) in which this Agreement is in effect, and paid into the Treasury of the City. As of the date of this Agreement, the amount of _____ **Thousand Dollars (\$_____ .00)** has been lawfully appropriated for this Agreement.

The Manager, upon reasonable written request, will advise the Consultant in writing of the total amount of appropriated and encumbered funds which are or remain available for payment for all work by the Consultant. The issuance of any form of order or directive by the City which would cause the aggregate amount payable to the Consultant for a specific project to exceed the amount appropriated for the Consultant's work on a specific project is expressly prohibited.

In no event shall the issuance of any work directive, change order or other form of order or directive by the City be considered valid or binding if it requires additional compensable work to be performed, which work will cause the aggregate amount payable for such work to exceed the amount appropriated and encumbered, unless and until such time as the Consultant has been advised in writing by the Manager that a lawful appropriation sufficient to cover the entire cost of such additional work, has been made.

It shall be the responsibility of the Consultant to verify that the amounts already appropriated for the Consultant's work on a specific project are sufficient to cover the entire costs of such work, and any work undertaken or performed in excess of the amount appropriated is undertaken or performed in violation of the terms of this contract, without the proper authorization for such work, and at the Consultant's own risk.

ARTICLE III. SCOPE OF WORK:

A. The Consultant shall perform _____ services for the Project (the "Basic Services"), in accordance with the terms of this Agreement and Exhibit A. Such services shall include, but shall not be limited to, _____ services required by the _____; and administrative support services.

B. The Consultant shall review and become thoroughly familiar with the Project Design Services Agreement for the Project, dated _____, 2003 and incorporated by reference as

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Exhibit B, and the Construction Contract for the Project, including the Contract Drawings and Technical Specification referenced therein, _____, 2003 and incorporated by reference as Exhibit C and shall perform in accordance with the terms and conditions of these agreements.

C. All of the work performed by the Consultant under this Agreement shall be performed in accordance with the standards of care, skill and diligence provided by competent professionals who perform work of a nature similar to the work described in this Agreement.

D. The Consultant agrees to strictly conform to and be bound by written standards, criteria, budgetary considerations and memoranda of policy furnished to it by the City.

E. The Consultant shall provide all professional services required by the City in defending all claims against the City, which relate in any way to alleged default hereunder, errors or omissions of the Consultant or its subconsultants, without additional compensation.

F. The responsibilities and obligations of the Consultant under this Agreement shall not be relieved or affected in any respect by the presence on the site of any agent, Consultant or subconsultant, or an employee of the City.

G. Coordination with the City and other involved agencies or third parties shall be a continuing work item. Such coordination may consist of progress and review meetings, work sessions and coordination with third parties. This work may also include office reviews of plans and documents as appropriate.

ARTICLE IV. PERSONNEL ASSIGNMENTS:

A. Those persons listed in Exhibit A are the principals and employees of the Consultant (the “Key People”) and the parties intend that such Key People be and remain assigned to the Project.

B. It is the intent of the parties hereto that all Key People be engaged to perform their specialty for all such services required by this Agreement, and that the Consultant's and the subconsultant's Key People be retained for the duration of this Agreement to the extent practicable and to the extent that such services maximize the quality of work performed hereunder.

C. If any of the key people become unavailable for reasons beyond the control of the Consultant, then the Consultant, subject to the Manager’s approval, shall promptly appoint a replacement. The City or the Project Manager shall be provided with complete information on each replacement, including a current resume, and shall have the opportunity to interview any such replacement.

D. If during the term of this Agreement, the Manager determines that the performance of approved Key People for the Consultant or a subconsultant is not acceptable, she shall notify the Consultant and give the Consultant a reasonable period of time to correct such performance. Thereafter,

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the Manager may require the Consultant to reassign or replace such Key People. If the Manager notifies the Consultant that certain of its Key People or those of a subconsultant should be replaced, the Consultant will use its best efforts to replace them within ten (10) working days from the date of the Manager's notice.

E. Neither the Consultant nor any subconsultant shall have interests which are in conflict with interests of the City, including connection with or to the sale or promotion of equipment or material which may be used on the Project, and the Consultant shall make written inquiry of all of its subconsultants concerning the existence of or potential for such conflict. In unusual circumstances, and at the City's sole discretion, the City may grant a written waiver for the particular consultant or subconsultant.

F. Actions taken by the City under this Article shall not, in any way, relieve the Consultant of its responsibility for design deficiencies, errors, or omissions.

ARTICLE V: CONFLICT WITH CONTRACTOR OR DESIGN CONSULTANT - NOTICE

The Consultant agrees to perform its services under this Agreement in such a manner and at such times that the City, the project design consultant, and any contractor who has work to perform can do so without unreasonable delay. In the event that a conflict as to scheduling or access arises between the Consultant and any contractor or any project design consultant during the term of this Agreement, which in the opinion of the Consultant prevents it from scheduling or coordinating with the contractor or project design consultant in a timely manner to meet the City's needs hereunder, the Consultant shall verbally inform the City of such dispute within two (2) hours, and confirm such dispute in writing within eight (8) hours from the point in time such conflict becomes apparent. Upon receipt of such notice, the City, through the Director or a representative, shall attempt to resolve such dispute and communicate a decision regarding such dispute, in writing, to any contractor, any project design consultant, and the Consultant.

ARTICLE VI: INSURANCE:

A. **General Conditions:** Consultant agrees to secure, at or before the time of execution of this Agreement, the following insurance covering all operations, performance, goods or services provided pursuant to this Agreement. Consultant shall keep the required insurance coverage in force at all times during the term of the Agreement, or any extension thereof, during any warranty period, and for eight (8) years after termination of the Agreement. The required insurance shall be underwritten by an insurer licensed to do business in Colorado and rated by A.M. Best Company as "A"VIII or better. Each policy shall contain a valid provision or endorsement stating "Should any of the above-described policies be canceled or should any coverage be reduced before the expiration date thereof, the issuing company shall

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send written notice to the Denver Risk Administrator, 201 West Colfax Avenue, Dept. 1105, Denver, Colorado 80202 by certified mail, return receipt requested. Such written notice shall be sent thirty (30) days prior to such cancellation or reduction unless due to non-payment of premiums for which notice shall be sent ten (10) days prior.” If any policy is in excess of a deductible or self-insured retention, the City must be notified by the Consultant. Consultant shall be responsible for the payment of any deductible or self-insured retention. The City reserves the right to require the Consultant to provide a bond, at no cost to the City, in the amount of the deductible or self-insured retention to guarantee payment of claims. The insurance coverages specified in this Agreement are the minimum requirements, and these requirements do not lessen or limit the liability of the Consultant. The Consultant shall maintain, at its own expense, any additional kinds or amounts of insurance that it may deem necessary to cover its obligations and liabilities under this Agreement.

B. **Proof of Insurance:** Consultant shall provide a copy of this Agreement to its insurance agent or broker. Consultant further agrees to have its agent or broker provide proof of Consultant’s required insurance on www.Ins-Cert.com and link the information to the City. The City reserves the right to require the Consultant to provide a certificate of insurance, a policy, or other proof of insurance as required by the City’s Risk Administrator in his sole discretion.

C. **Additional Insureds:** For general liability, excess/umbrella liability, pollution legal liability, Consultant’s insurer shall name the City as an additional insured.

D. **Waiver of Subrogation:** For all coverages, Consultant’s insurer shall waive subrogation rights against the City.

E. **Subcontractors:** All subcontractors, subconsultants, independent contractors, suppliers or other entities providing performance, goods or services required under this Agreement shall be subject to all of the requirements herein and shall procure and maintain the same coverages required of the Consultant. Consultant shall include all such subcontractors, subconsultants, independent contractors, suppliers or other entities as insureds under its policies or shall ensure that all subcontractors maintain the required coverages. Consultant agrees to provide proof of insurance for all such subconsultants, subcontractors, independent contractors, suppliers or other entities upon request by the City.

F. **Workers’ Compensation/Employer’s Liability Insurance:** Consultant shall maintain the coverage as required by statute for each work location and shall maintain Employer’s Liability insurance with limits of \$100,000 for each bodily injury occurrence claim, \$100,000 for each bodily injury caused by disease claim, and \$500,000 aggregate for all bodily injuries caused by disease claims. Consultant expressly represents to the City, as a material representation upon which the City is relying in

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entering into this Agreement, that none of the Consultant's officers or employees who may be eligible under any statute or law to reject Workers' Compensation Insurance shall effect such rejection during any part of the term of this Agreement, and that any such rejections previously effected, have been revoked as of the date Consultant executes this Agreement.

G. **General Liability:** Consultant shall maintain limits of \$1,000,000 for each occurrence claim, \$1,000,000 for each personal and advertising injury claim, \$2,000,000 products and completed operations for each occurrence, and \$2,000,000 policy aggregate.

H. **Automobile Liability:** Consultant shall maintain limits of \$1,000,000 for bodily injury per person, \$1,000,000 for bodily injury for each accident, and \$1,000,000 for property damage applicable to all vehicles operating on City property and elsewhere.

I. **Professional Liability:** Consultant shall maintain limits of \$1,000,000 for each claim, and \$1,000,000 aggregate limit for all claims.

J. **Excess/Umbrella Liability:** Consultant shall maintain limits of \$5,000,000. Aggregate limits must be "per project" or "per locations."

K. **Pollution Liability:** Consultant shall maintain limits of \$1,000,000 per occurrence and in the aggregate.

L. **Additional Provisions:**

(1) For all general liability, excessive/umbrella liability, pollution liability, if required, the policy must provide the following:

- (a) If any aggregate limit is reduce by twenty-five percent (25%) or more by paid or reserved claims, the Consultant shall notify the City within ten (10) days and reinstate the aggregates required;
- (b) Unlimited defense costs in excess of policy limits;
- (c) Contractual liability covering the indemnification provisions of this Agreement;
- (d) A severability of interests provision;
- (e) Waiver of exclusion for lawsuits by one insured against another;
- (f) A provision that coverage is primary; and
- (g) A provision that coverage is non-contributory with other coverage or self-insurance provided by the City.

(2) For all general liability, excessive/umbrella liability, pollution liability and professional liability, if required and if the policy is a claims-made policy, then the retroactive date must

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be on or before the contract date or the first date when any performance, goods or services were provided to the City, whichever is earlier.

M. Professional Liability –Project Specific:

(1) The City has elected to purchase a project specific professional liability policy, (the “Policy”) the Consultant and its team members shall be insured under this Policy as named insureds. Such insurance will be claims-made coverage and have a limit of not less than Ten Million Dollars (\$10,000,000.00) each claim and in the aggregate, including defense costs for the design firm’s negligent acts, errors, or omissions in performing professional services. The limits of liability will be maintained for the duration of the project (unless it is reduced by the payment of covered claims) and for a period of five (5) years commencing at the substantial completion of the Project, or on such other date as may be set forth in the project professional liability policy, whichever comes first. The insurance will include a self-insured retention no greater than \$100,000.00 for each claim for which the Consultant will be responsible. The project policy will contain standard industry terms, conditions, and exclusions. The policy will be retroactive to December 29, 2005. The City is responsible for the payment of project specific professional liability premiums, including potential audited future premiums.

(2) The Consultant and all of its subconsultants shall execute an agreement that shall apply to all parties covered by the Policy with respect to the terms and conditions of the payment of the deductible on a shared basis (“Deductible Payment Agreement”). The formal Deductible Payment Agreement is attached to this Agreement as Exhibit D and must be executed at the time of execution of this Agreement.

ARTICLE VII. INDEMNIFICATION: The Consultant shall defend, release, indemnify and save and hold harmless the City, its officers, agents and employees from and against: (1) any and all damages, including but not limited to loss of use, to property or injuries to or death of any person or persons (including but not limited to property and officers, agents and employees of the City) and (2) any and all claims, demands, suits, actions, liabilities, costs, expenses (including but not limited to reasonable attorney fees, expert witness fees and all associated defense fees), causes of action, or other legal, equitable or administrative proceedings of any kind or nature whatsoever, of or by anyone whomsoever, regardless of the legal theory(ies) upon which premised, including but not limited to contract, tort, express and/or implied warranty, strict liability, and workers' compensation, in any way resulting from, connected with, or arising out of, directly or indirectly, the tortious or negligent actions or omissions of the Consultant or those performing under it in connection with its operations or performance herewith or its use or occupancy of real or personal property hereunder, including tortious or negligent actions or

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omissions of subconsultants, and tortious or negligent acts or omissions of the officers, employees, agents, representatives, invitees, or licensees of the Consultant or its subconsultants; provided however, that the Consultant need not indemnify the City or its officers, agents and employees from damages proximately caused by and apportioned to the sole negligence of the City's officers, agents and employees.

This indemnity clause shall also cover the City's defense costs, in the event that the City, in its sole discretion elects to provide its own defense. The City retains the right to disapprove counsel, if any, selected by the Consultant to fulfill the forgoing defense indemnity obligation, which right of disapproval shall not be unreasonably exercised.

Insurance coverage requirements specified herein shall in no way lessen or limit the liability of the Consultant under the terms of this indemnification obligation. The Consultant shall obtain, at its own expense, any additional insurance that it deems necessary for the City's protection in the performance of this Agreement.

This defense and indemnification obligation shall survive the expiration or termination of this Agreement.

ARTICLE VIII. COMPLIANCE WITH LAWS

A. **Laws and Regulations.** The Consultant shall be responsible for the compliance of all activities undertaken by the Consultant pursuant to this Agreement and all drawings, documents, studies, reports and plans and specifications prepared and compiled as a part of this Agreement with all applicable laws, statutes, codes, ordinances, executive orders and rules and regulations of the City and County of Denver, the State of Colorado, the United States of America or any other governmental entity having jurisdiction over the subject matter of this Agreement, including all applicable environmental laws and regulations, all applicable safety laws and regulations, the Americans with Disabilities Act (the "ADA"), to the extent applicable, and the Denver Building Code (collectively the "Legal Requirements"). In the performance of its work and services, the Consultant shall make an independent evaluation with regard to such Legal Requirements and shall provide, as part of its Basic Services, all requisite retesting and inspection as may be necessary to obtain governmental approvals for the Project and comply with all Legal Requirements. The Consultant further agrees to perform its work or services in strict compliance with all Legal Requirements and all applicable industry standards and specifications in effect at the time of the execution of this Agreement or which may become effective before all work and services called for under this Agreement have been completed and accepted by the City.

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B. Governmental Authorities. The Consultant shall perform all of its duties, obligations and services, hereunder in a manner that complies with the City's directions to the Consultant and/or the City's obligations under any Legal Requirements to consult with, solicit advice from and involve in the City's decision-making process, all applicable governmental or quasi-governmental authorities having jurisdiction over the Project and the surrounding area, including, but not limited to, the State of Colorado and any agency or department thereof, and the City and County of Denver, and any agency or department thereof. The Consultant shall comply with all binding interpretations and directives issued by any such entity. The Consultant shall thoroughly document all communications with governing and regulatory authorities having jurisdiction over the subject matter of this Agreement and shall obtain written evidence of any binding interpretations, directives, waivers or appeals received from such authorities.

C. Licensing Requirements. The Consultant shall comply, at its own expense, with all laws and regulations, including, but not limited to, licensing and registration requirements pertaining to its professional status and that of its employees, partners, associates, consultants under subcontract and others employed or utilized to render the work and services called for by this Agreement.

D. Certification Under §8-17.5-102, C.R.S.:

1. This Agreement is subject to Article 17.5 of Title 8, Colorado Revised Statutes, as now existing or hereafter amended, (the "Certification Statute"). Compliance by the Consultant and its subconsultants with the Certification Statute is expressly made a contractual condition of this Agreement.

2. The Consultant shall not knowingly employ or contract with an illegal alien to perform work under this Agreement. The Consultant shall not enter into a contract with a subconsultant that knowingly employs or contracts with an illegal alien or that fails to certify to the Consultant that it does not knowingly employ or contract with an illegal alien to perform work under this Agreement.

3. The Consultant represents, warrants, and agrees that:

(a) It has verified or attempted to verify that it does not employ any illegal aliens, through participation in the Basic Pilot Employment Verification Program administered by the U.S. Social Security Administration and U.S. Department of Homeland Security ("Basic Pilot Program" or "BPP"), as defined in § 8-17.5-101(1), C.R.S., or that if it is not accepted into the BPP prior to entering into this Agreement, it shall apply to participate in the BPP every three months until either it is accepted into the BPP or its has completed its obligations under this Agreement, whichever occurs first.

(b) It will not use the BPP to undertake pre-employment screening of job applicants while performing its obligations under this Agreement.

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(c) If it obtains actual knowledge that a subconsultant performing work under this Agreement knowingly employs with or contracts with an illegal alien, it will notify such subconsultant and the City within three days, and terminate such subconsultant if within three days after such notice the subconsultant does not stop employing or contracting with the illegal alien, unless during such three day period the subconsultant provides information to establish that the subconsultant has not knowingly employed or contracted with an illegal alien.

(d) It shall comply with all reasonable requests made in the course of an investigation by the Colorado Department of Labor and Employment under authority of § 8-17.5-102(5), C.R.S.

4. The form which must be used for such certification, entitled "Certification Under §8-17.5-102, C.R.S.", is attached hereto and incorporated herein by this reference as Exhibit E. The Consultant shall submit this completed form prior to the execution of this Agreement.

5. If the Consultant fails to comply with any provision of this provision, the City may terminate this Agreement for breach and the Consultant shall be liable for actual and consequential damages to the City.

ARTICLE IX. ACCOUNTING RECORDS: Records of the Consultant's direct personnel, Consultant and reimbursable expenses pertaining to the project and records of accounts between the City and the Consultant shall be kept on a generally recognized accounting basis and shall be available for audit by the City, including the Auditor of the City or authorized representative within the City, at mutually convenient times for three (3) years after the final payment under this Agreement.

ARTICLE X. NONDISCRIMINATION:

In connection with the performance of work under this Agreement, the Consultant agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and further agrees to insert the foregoing provision in all subcontracts hereunder.

ARTICLE XI. CONFLICT OF INTEREST: The parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein and the Court further agrees not to hire or contract for services any official, officer, or employee of the City or any other person which would be in violation of the Denver Revised Municipal Code Chapter 2, Article IV, Code of Ethics, or Denver City Charter provisions 1.2.9 and 1.2.12.

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ARTICLE XII. TAXES AND LICENSES: The Consultant shall promptly pay, when they are due, all taxes, excises, license fees and permit fees, of whatever nature, applicable to the work which it performs under this Agreement, and shall take out and keep current all required municipal, county, state or federal licenses required to perform this work. The Consultant shall furnish the Manager, upon request, duplicate receipts or other satisfactory evidence showing or certifying to the proper payment of all required licenses and/or registrations and taxes. The Consultant shall promptly pay, all owed bills, debts and obligations it incurs performing work under this Agreement and shall not allow any lien, mortgage, judgment or execution to be filed against land, facilities or improvements owned or beneficially owned by the City.

ARTICLE XIII. TERM AND TERMINATION:

A. Nothing herein shall be construed as giving the Consultant the right to perform the services contemplated under this Agreement beyond the time when its services become unsatisfactory to the Manager.

B. The Manager may terminate this Agreement for cause at any time if the Consultant's services become unsatisfactory to the Manager. The City shall have the sole discretion to permit the Consultant to remedy the cause of a contemplated termination for cause without waiving the City's right to terminate the Agreement.

C. In the event of a termination for cause, or in the event the Consultant becomes unable to serve under this Agreement, the City may take over work to be done under this Agreement and prosecute the work to the completion by contract or otherwise, and the Consultant shall be liable to City for all reasonable cost in excess of what the City would have paid the Consultant had there been no termination for cause.

D. The City may, for convenience, cancel and terminate this Agreement by giving not less than thirty (30) working days' prior written notice to the Consultant, which notice shall state the date of cancellation and termination.

E. If the Consultant's services are terminated, postponed or revised, or if the Consultant shall be discharged before all the work contemplated has been completed, or if work for any reason shall be stopped or discontinued, the Consultant shall be paid only for the portion of work which has been satisfactorily completed at the time of such dismissal, termination, postponement, revision or stoppage.

F. All drawings, specifications, and other documents relating to the design or administration of work completed or partially completed shall be delivered by the Consultant to the City in the event of any termination.

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G. In the event of any termination, the Consultant shall cooperate in all respects with the City. Such cooperation shall include, but not be limited to, delivery of drawings, specifications, and other documents referred to herein, and assisting the City during a transition to another Consultant, if applicable.

ARTICLE XIV. OWNERSHIP OF DOCUMENTS

A. The City shall have title and all intellectual and other property rights, in and to all phased and final testing and inspection results, analyses, reports, studies, recommendations, designs, plans, and specifications, and all data used in the development of the same, including all photographs, drawings, draft specifications, contract documents, estimates, models, notes, work papers and any other materials or work products, whether in electronic or hard copy format, created by the Consultant pursuant to this Agreement, in preliminary and final forms and on any media whatsoever (collectively the "Documents"), whether the Project for which the Documents were created is executed or not. The Consultant shall identify and disclose, as requested, all such Documents to the City.

To the extent permitted by the U.S. Copyright Act, 17 USC § 101 et seq., as the same may be amended from time to time, the Documents are a "work made for hire," and all ownership of copyright in the Documents shall vest in the City at the time the Documents are created. To the extent that the Documents are not a "work made for hire," the Consultant hereby assigns and transfers all right, title and interest in and to the Documents to the City, as of the time of the creation of the Documents, including the right to secure copyright, patent, trademark, and other intellectual property rights throughout the world and to have and to hold such copyright, patent, trademark, and other intellectual property rights in perpetuity.

B. The Consultant shall provide (and cause its employees and subcontractors to provide) all assistance reasonably requested in securing for the City's benefit any patent, copyright, trademark, service mark, license, right or other evidence of ownership of such Documents, and shall provide full information regarding the Documents and execute all appropriate documentation in applying for or otherwise registering, in the City's name, all rights to such Documents.

C. The Consultant agrees to allow the City to review any of the procedures used in performing the work and services hereunder, and to make available for inspection the field notes and other documents used in the preparation for and performance of any of the services performed hereunder.

D. The Consultant shall be permitted to retain reproducible copies of all of the Documents for the information and reference, and the originals of all of the Documents, including all CAD disks, shall be

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delivered to the City promptly upon completion thereof, or if authorized by the City's Project Manager, upon termination or expiration of this Agreement.

ARTICLE XV. PROTECTION OF PROPRIETARY OR CONFIDENTIAL INFORMATION

A. **City Information:** The Consultant acknowledges and accepts that, in performance of its work under the terms of this Agreement, the Consultant may have access to Proprietary Data or confidential information which may be owned or controlled by the City and that the disclosure of such data or information may be damaging to the City or third parties. As such, the Consultant agrees that all information provided or otherwise disclosed by the City to the Consultant be held in confidence and used only in the performance of its obligations under this Agreement. The Consultant shall exercise the same standard of care to protect such information as a reasonably prudent Consultant would to protect its own proprietary or confidential data. "Proprietary Data" shall mean geographic materials or Geographic Information Systems ("GIS") data relating to the City and County of Denver including but not limited to maps, computer programs, aerial photography, methodologies, software, diagnostics and documents; or any other materials or information which may be designated or marked "Proprietary" or "Confidential" and provided to or made available to the Consultant by the City. Such Proprietary Data may be in hardcopy, printed, digital or electronic format.

1. **Use of Proprietary Data or Confidential Information:** The Consultant agrees that the Consultant shall not use Proprietary Data or confidential information for any purpose other than performing its obligations under its Agreement and, that by providing this Proprietary Data or confidential information, the City is not granting to the Consultant any right or license to use such data except as provided for herein. The Consultant further agrees not to disclose or distribute to any other party, in whole or in part, the Proprietary Data or confidential information without written authorization from the GIS Administrator or the Manager. The Consultant agrees that any ideas, concepts, know-how, computer programs, or data processing techniques developed by the Consultant or provided by the City in connection with this Agreement or the Proprietary Data or confidential information shall be deemed to be the sole property of the City and all rights, including copyright, shall be reserved to the City. The Consultant agrees, with respect to the Proprietary Data and confidential information, that: (1) the Consultant shall not copy, recreate, reverse engineer or decompile such data, in whole or in part; unless authorized in writing by the City's GIS Data Administrator or the Manager; (2) the Consultant shall retain no copies, recreations, compilations, or decompilations, in whole or in part, of such data; (3) the Consultant shall, upon the expiration or earlier termination of the Agreement, destroy (and, in writing,

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certify destruction) or return all such data or work products incorporating such data or information to the City.

2. Employees and Subconsultants: The Consultant will inform its employees and officers of the obligations under this Agreement and all requirements and obligations of the Consultant under this Agreement shall survive the expiration or earlier termination of this Agreement. The Consultant shall not disclose Proprietary Data or confidential information to subconsultants unless such subconsultants are bound by non-disclosure and confidentiality provisions at least as strict as those contained in this Agreement.

3. Disclaimer: Notwithstanding any other provision of this Agreement, **THE CITY IS FURNISHING PROPRIETARY DATA AND CONFIDENTIAL INFORMATION ON AN "AS IS" BASIS, WITHOUT ANY SUPPORT WHATSOEVER, AND WITHOUT REPRESENTATION, WARRANTY OR GUARANTEE, INCLUDING BUT NOT IN ANY MANNER LIMITED TO, FITNESS, MERCHANTABILITY OR THE ACCURACY AND COMPLETENESS OF THE GIS DATA OR CONFIDENTIAL INFORMATION. THE CONSULTANT IS HEREBY ADVISED TO VERIFY ITS WORK. THE CITY ASSUMES NO LIABILITY FOR ANY ERRORS OR OMISSIONS HEREIN. SPECIFICALLY, THE CITY IS NOT RESPONSIBLE FOR ANY COSTS INCLUDING, BUT NOT LIMITED TO, THOSE INCURRED AS RESULT OF LOST REVENUES, LOSS OF USE OF DATA, THE COSTS OF RECOVERING SUCH PROGRAMS OR DATA, THE COST OF ANY SUBSTITUTE PROGRAM, CLAIMS BY THIRD PARTIES, OR FOR SIMILAR COSTS. IF DISCREPANCIES ARE FOUND, THE CONSULTANT AGREES TO CONTACT THE CITY IMMEDIATELY.**

B. Consultant's Information: The parties understand that all the material provided or produced under this Agreement may be subject to the Colorado Open Records Act, C.R.S. 24-72-201, et seq., and that in the event of a request to the City for disclosure of such information, the City shall advise the Consultant of such request in order to give the Consultant the opportunity to object to the disclosure of any of its proprietary or confidential material. In the event of the filing of a lawsuit to compel such disclosure, the City will tender all such material to the court for judicial determination of the issue of disclosure and the Consultant agrees to intervene in such lawsuit to protect and assert its claims of privilege and against disclosure of such material or waive the same. The Consultant further agrees to defend, indemnify and save and hold harmless the City, its officers, agents and employees, from any claim, damages, expense, loss or costs arising out of the Consultant's intervention to protect and assert its claim of privilege against disclosure under this Article including, but not limited to, prompt

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reimbursement to the City of all reasonable attorney fees, costs and damages that the City may incur directly or may be ordered to pay by such court.

ARTICLE XVI. TIME IS OF THE ESSENCE: The parties agree that in the performance of the terms, conditions, and requirements of this Agreement by the Consultant, time is of the essence.

ARTICLE XVII. MISCELLANEOUS PROVISIONS:

A. **Cooperation.** The Consultant agrees to perform its services under this Agreement in such a manner and at such times that the City and any Contractor who has work to perform, or contracts to execute, can do so without unreasonable delay.

B. **Professional Responsibility.** All of the work performed by the Consultant under this Agreement shall be performed in accordance with the standards of care, skill and diligence provided by competent professionals who perform work or services of a similar nature to the work or services described in this Agreement.

C. **Compliance With SBE Requirement.** This Agreement is subject to all applicable provisions of Divisions 1 and 2 of Article VII of Chapter 28 of the City's Revised Municipal Code. Without limiting the general applicability of the foregoing, the Consultant acknowledges its continuing duty, pursuant to section 28-218, Revised Municipal Code, to maintain throughout the duration of this Agreement, compliance with the level of small business enterprise participation, upon which the City approved the award of this Agreement to the Consultant. Nothing contained in this Article or in the referenced City ordinance, shall negate the City's right to prior approval of subconsultants, or substitutes therefor, under this Agreement.

D. **Term.** The term of this Agreement shall commence upon written Notice to Proceed from the City to Consultant and end upon final completion of the services to be provided by the Consultant. The Insurance and Indemnification provisions of this Agreement shall survive the term.

E. **Disputes.** All disputes of any nature whatsoever regarding this Agreement, including but not limited to disputes concerning payment or breach or default of this Agreement, shall be ultimately resolved by administrative hearing pursuant to D.R.M.C. Section 56-106 or, with respect to appropriate issues involving SBE requirements, by D.R.M.C. 28-33.

F. **Status of Consultant:** It is understood and agreed that the status of the Consultant shall be that of an independent Consultant retained on a contractual basis to perform professional or technical services for limited periods of time as described in Section 9.1.1.E(x) of the Charter of the City and it is not intended, nor shall it be construed, that the Consultant, or any member of its staff or any Consultant, is

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an employee, officer or agent of the City under Chapter 18 of the Denver Revised Municipal Code or for any purpose whatsoever.

G. **Exhibits:** The following documents are incorporated herein and made a part of this Agreement:

1. Exhibit A, Consultant's Scope of Services and Fee Proposal
2. Exhibit B, Design Service Agreement, (incorporated by reference only)
3. Exhibit C, Construction Contract (incorporated by reference only)
4. Exhibit D, Deductible Payment Agreement
5. Exhibit E, Certification Under § 8-17.5-102, C.R.S.

The terms and conditions of this Agreement shall control over any contradictory or inconsistent terms and conditions that may be found or contained in the above referenced Exhibits.

H. **Rights and Remedies Not Waived:** In no event shall any payment by the City constitute a waiver of any breach of covenant or default which may then exist on the part of the Consultant. No assent, expressed or implied, to any breach of the Agreement shall be held to be a waiver of any later or other breach.

I. **Waiver of C.R.S. 13-20-802 et. seq.:** The Consultant specifically waives all the provisions of Chapter 8 of Article 20 of Title 13, Colorado Revised Statutes (also designated C.R.S. 13.2-802 *et seq.*) relating to design defects in the Project under this Agreement.

J. **Subject to Local Laws; Venue:** This Agreement shall be construed and enforced in accordance with the laws of the State of Colorado, without regard to the choice of law thereof, and the Charter and Revised Municipal Code of the City and County of Denver, and the ordinances, regulations, and Executive Orders enacted or promulgated pursuant thereto. The Charter and Revised Municipal Code of the City and County of Denver, as the same may be amended from time to time, are hereby expressly incorporated into this Agreement as if fully set out herein by this reference. Venue for any legal action relating to this Agreement shall lie in the District Court in and for the City and County of Denver, Colorado.

K. **No Third Party Beneficiaries:** It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the Consultant, and nothing contained in this Agreement shall give or allow any claim or right of action by any other or third person under this Agreement. It is the express intention of the City and the Consultant that any person other than the City or the Consultant receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

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L. **Assignment and Subcontracting:** The City is not obligated or liable under this Agreement to any party other than the Consultant named herein. The Consultant understands and agrees that it shall not assign or subcontract with respect to any of its rights, benefits, obligations or duties under this Agreement except upon prior written consent and approval of the City to such assignment or subcontracting. Any attempt by the Consultant to assign or subcontract its rights hereunder without such prior written consent of the City shall, at the option of the City, automatically terminate this Agreement and all rights of the Consultant hereunder. Such consent may be granted or denied at the sole and absolute discretion of the City. In the event any such subcontracting shall occur, with the City's approval, such action shall not be construed to create any contractual relationship between the City and such subconsultant, and the Consultant named herein shall in any and all events be and remain responsible to the City according to the terms of this Agreement.

M. **Taxes, Charges and Penalties:** The City and County of Denver shall not be liable for the payment of taxes, late charges, or penalties of any nature.

N. **Paragraph Headings:** The captions and headings set forth herein are for convenience of reference only, and shall not be construed so as to define or limit the terms and provisions hereof.

O. **Severability:** It is understood and agreed by the parties hereto that if any part, term, or provision of this Agreement, except for the provisions of this Agreement requiring prior appropriation and limiting the total amount to be paid by the City, is by the courts held to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular part, term, or provision held to be invalid.

P. **Agreement as Complete Integration; Amendments:** This Agreement is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion or other amendment shall have any force or effect, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written amendatory or other agreement executed by the parties and signed by the signators of the original Agreement. This Agreement and any amendments shall be binding upon the parties, their successors and assigns.

Q. **Counterparts:** This Agreement will be executed in two (2) counterparts, each of which shall be deemed to be an original, and all of which, taken together, shall constitute one and the same instrument.

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IN WITNESS WHEREOF, the City and the Consultant have executed, through their respective lawfully empowered representatives, this Agreement as of the day and year first above written.

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ATTEST:

WAYNE E. VADEN, Clerk
and Recorder, Ex-Officio Clerk of the
City and County of Denver

By: _____
MAYOR

RECOMMENDED AND APPROVED:

By: _____
Manager of Public Works

APPROVED AS TO FORM
COLE FINEGAN, Attorney
For the City and County of Denver

RECOMMENDED AND APPROVED:

By: _____
Assistant City Attorney

By: _____
Auditor
Contract Control No. _____

"CITY"

IRS # _____

By: _____

Title: _____

"CONSULTANT"

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**Exhibit D
Deductible Payment Agreement**

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Exhibit E

CERTIFICATION UNDER § 8-17.5-102, C.R.S.

The Consultant, in compliance with §8-17.5-102, C.R.S., certifies that at the time of the execution of this Certification:

1. The Consultant does not knowingly employ or contract with an illegal alien.
2. The Consultant has participated or attempted to participate in the Basic Pilot Employment Verification Program in order to verify that it does not employ any illegal aliens.

[Printed] NAME OF CONSULTANT

By: _____
Signature

[Printed] Name of Person Signing

[Printed] Title

DATE: _____