

BY AUTHORITY

ORDINANCE NO. _____
SERIES OF 2012

COUNCIL BILL NO. CB12-0054
COMMITTEE OF REFERENCE:

BUSINESS, WORKFORCE, & SUSTAINABILITY

A BILL

For an ordinance approving a proposed Design Services Agreement between the City and County of Denver and M. Arthur Gensler, Jr. and Associates, Inc. for architecture and engineering design services for the South Terminal Redevelopment Program at Denver International Airport.

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. The proposed Design Services Agreement between the City and County of Denver and M. Arthur Gensler, Jr. and Associates, Inc. in the words and figures contained and set forth in that form of Agreement available in the office and on the web page of City Council, and to be filed in the office of the Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver, under City Clerk's Filing No. 2012-0044, is hereby approved.

COMMITTEE APPROVAL DATE: January 20, 2012

MAYOR-COUNCIL DATE: January 24, 2012

PASSED BY THE COUNCIL: _____, 2012

_____ - PRESIDENT

APPROVED: _____ - MAYOR _____, 2012

ATTEST: _____ - CLERK AND RECORDER,
EX-OFFICIO CLERK OF THE
CITY AND COUNTY OF DENVER

NOTICE PUBLISHED IN THE DAILY JOURNAL: _____, 2012; _____, 2012

PREPARED BY: Deanne Durfee, Assistant City Attorney DATE: January 26, 2012

Pursuant to section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed ordinance. The proposed ordinance is submitted to the City Council for approval pursuant to § 3.2.6 of the Charter.

Douglas J. Friednash, City Attorney for the City and County of Denver

BY: _____, Assistant City Attorney DATE: January 26, 2012

DESIGN SERVICES AGREEMENT

THIS AGREEMENT is made and entered into between the **CITY AND COUNTY OF DENVER** (the "City"), a municipal corporation of the State of Colorado, and **M. ARTHUR GENSLER, JR. AND ASSOCIATES, INC.** (the "Design Consultant"), a California corporation authorized to transact business in the State of Colorado, whose address is 1625 Broadway, Suite 400, Denver, Colorado 80202.

RECITALS:

WHEREAS, the City issued a request for proposals to obtain professional architecture and engineering design services in support of the South Terminal Redevelopment Project (the "Project"); and

WHEREAS, Design Consultant submitted a proposal and was selected to provide certain design services for the Project; and

WHEREAS, Design Consultant entered into a Subconsultant Professional Services Agreement (Subconsultant Agreement) with Parsons Transportation Group Inc., to provide such services for the Project, a copy of which Subconsultant Agreement is attached as *Exhibit E*; and

WHEREAS, Parsons Transportation Group Inc. contemporaneously with this Agreement has assigned its rights, but not its obligations, under the Subconsultant Agreement to the City; and

WHEREAS, the Design Consultant represents that its team members include a duly licensed engineer/architect of the State of Colorado and that the Design Consultant has the present capacity and is experienced and qualified to perform professional architectural and engineering design services for the City in connection with the Project as specified in this Agreement; and

WHEREAS, Design Consultant is ready, willing and able to provide the services described herein.

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

SECTION 1 – ENGAGEMENT

1.01 Engagement. The City engages the Design Consultant with respect to the furnishing of professional design services for the Project as set forth in this Agreement. The Design Consultant accepts such engagement upon, subject to and in accordance with the terms, conditions and provisions of this Agreement.

1.02 Line of Authority for Contract Administration. The City's Manager of Aviation ("Manager") is the City's representative responsible for authorizing and approving the services performed under this Agreement. The Manager hereby designates the City's Director of the South Terminal Redevelopment Program (Director) as the Manager's authorized representatives

for the purpose of designating a Project Manager, for the purpose of issuing a written Notice to Proceed and for purposes of administering, coordinating and finally approving the services performed by the Design Consultant under this Agreement. The Project Manager shall be responsible for the day-to-day administration, coordination and approval of services performed by the Design Consultant, except for approvals which are specifically identified in this Agreement as requiring the Manager's approval. The Manager expressly reserves the right to designate another authorized representative to perform on the Manager's behalf by written notice to the Design Consultant.

1.03 Independent Contractor. The Design Consultant is an independent contractor retained to perform professional or technical services for limited periods of time. Neither the Design Consultant nor any of its employees are employees or officers of the City under Chapter 18 of the Denver Revised Municipal Code, or for any purpose whatsoever.

1.04 Scope of Design Consultant's Authority. The Design Consultant shall have no authority to act on behalf of the City other than as expressly provided in this Agreement. The Design Consultant is not authorized to act as a general agent for or to undertake, direct or modify any contracts on behalf of the City. The Design Consultant lacks any authority to bind the City on any contractual matters. Final approval of all contractual matters that purport to obligate the City must be executed by the City in accordance with the City's Charter and the Denver Revised Municipal Code.

SECTION 2 – DESIGN CONSULTANT'S SERVICES

2.01 General. The Design Consultant shall provide professional design services for the Project in accordance with the terms and conditions of this Agreement. The Design Consultant's basic services shall consist of all of those services described in this Agreement and in *Exhibit A*.

2.02 Professional Responsibility.

- (a) All of the services performed by the Design Consultant under this Agreement shall be performed in accordance with the standards of care, skill and diligence provided by competent professionals who perform services of a nature similar to the services described in this Agreement ("Standard of Care").
- (b) The Design 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 and further agrees to design each project in compliance with the Standard of Care, and all applicable laws, statutes, codes, ordinances, rules and regulations, and industry standards.
- (c) All professional services, plans and specifications and other work, or deliverables provided under this Agreement for the Project shall be adequate and sufficient for the proper construction of the Project and its intended purpose.
- (d) All drawings, specifications and other products shall be prepared so the Project, when constructed in accordance with such drawings and specifications, is in

compliance all applicable laws, statutes, codes, ordinances, and rules and regulations of the City, the State and the Federal government.

- (e) Any design changes required by changes in such applicable laws, statutes, codes, ordinances or rules and regulations of the City, the state or the federal government, which are enacted after the City's acceptance of Construction Documents, defined herein, will be outside the scope of the Design Consultant's basic services and basic fee, and will be compensated upon approval as an additional service, subject to the additional services budget for that project.
- (f) The Design Consultant shall prepare the plans, specifications and other requirements for the Project in a format that complies with all City requirements as well as all state and federal requirements for the Project. No funds will be paid to the Design Consultant for the preparation of contract documents in a form other than that considered usual and customary by the Department of Aviation. It shall be the responsibility of the Design Consultant to contact the reviewing agencies and determine the acceptable format for the final documents, including any state and federal requirements. No documents will be considered final until approved by the City, even though any responsible federal and state agencies have approved such documents.
- (g) The City has entered into CM/GC contracts for the construction of the Project. City reserves the right to proceed with the construction of the Project using any other construction contracting method available to it. The Design Consultant agrees to organize its Contract Documents for a CM/GC method of construction, or any other method of construction contracting selected by the City.
- (h) The reports, studies, drawings and specifications and other products prepared by the Design Consultant under this Agreement, when submitted by the Design Consultant to the Manager and the user agency for any identified phase of the Project, must represent a thorough study and competent solution for the project as per usual and customary professional standards and shall reflect all architectural and engineering disciplines applicable to that phase of the project.
- (i) The responsibilities and obligations of the Design Consultant under this Agreement shall not be relieved or affected in any respect by the presence on the site of any agent, other design consultant or subconsultant not contracted to Design Consultant, or an employee of the City. However, the Design Consultant shall not be responsible for the errors, acts or omissions of any agent, other design consultant or subconsultant not contracted to Design Consultant, or an employee of the City. Design Consultant shall have an affirmative obligation to notify the City of any errors, acts or omissions of other agents, design consultants or subconsultants not contracted to Design Consultant, or any employee of the City of which it becomes aware.

- (j) The Design Consultant shall provide all professional design services as 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 Design Consultant or its subconsultants, without additional compensation.
- (k) The Project is subject to the terms of the Termination Agreement between the City, Parsons Transportation Group, Santiago Calatrava LLC, and Festina Lente, LLP, a copy of which is attached as *Exhibit F*. Design Consultant acknowledges that it is familiar with the terms of the Termination Agreement, and will provide its services under this Agreement in a reasonable manner per the Standard of Care, to achieve compliance with the Termination Agreement.

2.03 Program and Budget.

- (a) The Design Consultant agrees to accomplish its services for the Project within the Program Budget set forth in *Exhibit B*. Should the Design Consultant determine that the Project cannot be accomplished within the Program Budget, the Design Consultant shall immediately notify the City, in writing, so that the project scope or project budget can be reviewed and modified if necessary.
- (b) The Design Consultant agrees to accomplish its services for the Project within the schedule set forth in *Exhibit H*, and comply with the design and review process, set forth in *Exhibit H*.

2.04 Coordination and Cooperation.

- (a) The Design Consultant agrees to perform under this Agreement in such a manner and at such times that the City or any contractor who has work to perform, or contracts to execute, can do so without unreasonable delay.
- (b) Coordination with the City and other involved agencies shall be a continuing work item through all phases of each assigned project. Such coordination shall consist of regular progress and review meetings with the City, work sessions with the City's Department of Aviation, and other agencies or as otherwise directed by the City. Such coordination may also include field and office reviews of plans and documents as required during the development of the design for any specific project. The Design Consultant shall document all such conferences and distribute notes to the City.

2.05 Personnel Assignments.

- (a) The key professional personnel identified in *Exhibit C* will be assigned by the Design Consultant or its subconsultants to perform the services required under this Agreement, as appropriate.
- (b) The Design Consultant's services shall be diligently performed by the regular professional and technical staff of the Design Consultant. In the event the

Design Consultant does not have as part of its regular staff certain professional Design Consultants, then such consulting services shall be performed, with City approval, by practicing professional subconsultants outside of the employ of the Design Consultant.

- (c) The Design Consultant agrees, at all times during the term of this Agreement, to maintain on its payroll or to have access to through outside subconsultants, professional design personnel and technicians in sufficient strength to meet the requirements of the City. Such personnel and technicians shall be of the classifications referenced in *Exhibit C*. The hourly rates specified therein include all costs except those specifically referenced as reimbursables in the appropriate hourly rate schedule.
- (d) Prior to designating an outside professional to perform subconsultants work, the Design Consultant shall submit the name of such subconsultant, together with a résumé of training and experience in work of like character and magnitude of the project being contemplated, to the City and receive prior approval in writing, unless such approval is otherwise excused by the City.
- (e) It is the intent of the Parties hereto that all key professional personnel be engaged to perform their specialty for all such services required by this Agreement and that the Design Consultant's and the subconsultant's key professional personnel be retained for the life of this Agreement to the extent practicable and to the extent that such services maximize the quality of work performed hereunder, provided, however, that the foregoing shall be subject to the discretionary cessation or termination of employment of any such key professional personnel.
- (f) If the Design Consultant or a subconsultant decides to replace any of its key professional personnel, the Design Consultant shall notify the Manager in writing of the desired change. No such changes shall be made until replacement personnel are recommended by the Design Consultant and approved in writing by the Manager, which approval shall not be unreasonably withheld.
- (g) If, during the term of this Agreement, the Manager determines that the performance of approved key personnel or a subconsultant is not acceptable, she shall notify the Design Consultant and give the Design Consultant the time which the Manager considers reasonable to correct such performance. Thereafter, she may require the Design Consultant to reassign or replace such key personnel. If the Manager notifies the Design Consultant that certain of its key personnel or a subconsultant should be replaced, Design Consultant will use its best efforts to replace such key personnel or a subconsultant within ten (10) business days from the date of the Manager's notice.
- (h) Neither the Design Consultant nor any subconsultant shall have other interests which conflict with the interests of the City, including being connected with the

sale or promotion of equipment or material which may be used on a project to which they may be assigned, and the Design Consultant shall make written inquiry of all of its subconsultants concerning the existence of a potential for such conflict. In unusual circumstances, and with full disclosure to the City of such conflict of interest, the City, in its sole discretion, may grant a written waiver for the particular Design Consultant or subconsultant.

- (i) Actions taken by the City under this Article shall not relieve the Design Consultant of its responsibility for contractual or professional deficiencies, errors or omissions.
- (j) The Design Consultant shall submit to the Manager a list of any additional key professional personnel who will perform work under this Agreement within thirty (30) days after this Agreement has been executed, together with complete resumes and other information describing their ability to perform the tasks which may be assigned. Such additional personnel must be recommended by the Design Consultant and approved by the Manager before they are assigned to a specific project.
- (k) The Manager shall respond to the Design Consultant's written notice regarding replacement of key professional personnel within fifteen (15) days after the Manager receives the list of changes. If the Manager or her designated representative does not respond within that time, the changes shall be deemed to be approved.

2.06 Basic Services – General.

- (a) These services shall be diligently performed by the regular professional and technical staff of the Design Consultant. In the event the Design Consultant does not have as part of its regular staff certain professional Design Consultants, then such consulting services shall be performed, with City approval, by practicing professional Design Consultants outside of the employ of the Design Consultant.
- (b) Prior to designating an outside professional to perform work or services under this Agreement, the Design Consultant shall submit the name of such professional, together with a resume of training and experience in services of like character and magnitude as the project being contemplated, to the City and receive prior approval in writing.
- (c) All professional subconsultants must be retained for the life of the Project to the extent practicable, except that acceptable replacements may be substituted with prior written approval from the City as set out in Section 2.05.
- (d) The Design Consultant's basic services for the Project shall consist of the phases described below and shall include, but not be limited to, architectural, structural, mechanical, civil and electrical engineering services appropriate to each Project for each phase.

- (e) The Design Consultant shall obtain written authorization from the City before proceeding with each phase.
- (f) Nothing in this Agreement shall be construed as placing any obligation on the City to proceed with any phase beyond the latest phase authorized in writing by City.
- (g) The responsibilities and obligations of the Design Consultant under this Agreement shall not be relieved or affected in any respect by the presence on the site of any agent, Design Consultant, subconsultant, or employee of the City.

2.07 Basic Services - Phase Specific. In the interest of tracking progress towards completion of all work items necessary to complete the Project specified herein, the required Basic Services tasks which must be performed on each Project have been separated into phases. As applicable for the Project, the Design Consultant shall satisfactorily complete all services necessary to complete each phase as specifically set out in *Exhibit A*.

2.08 Additional Services.

- (a) If the Design Consultant performs services in addition to its Basic Services, as a result of material changes in the Project or due to other circumstances beyond the Design Consultant's control, and if such services (1) are pre-approved in writing; (2) will not cause the total compensation payable to the Design Consultant to exceed the Maximum Contract Amount; and (3) are not occasioned by any neglect, breach or default of the Design Consultant, then the Design Consultant will be reimbursed its pre-approved cost for performance of such service(s).
- (b) Before providing any such services, the Design Consultant first shall file with the City, and secure the City's written approval of, a complete description of the proposed services including an estimate of the maximum cost of any and all such services, on the basis set out in *Exhibit C*, of rates per hour, per day, or other basis of cost. Such description shall also include a statement from the Design Consultant that the maximum cost of such services will not cause the total amount payable to the Design Consultant under this Agreement to exceed the Maximum Contract Amount. In no event shall any form of authorization or pre-approval of additional services be deemed valid or binding upon either the City or the Design Consultant if the maximum cost of such services would cause the aggregate amount payable under this Agreement to exceed the Maximum Contract Amount. Payment for additional services shall not, in any event, exceed the cost estimated by the Design Consultant and approved in writing by the City.
- (c) The cost of such additional service shall be deemed to be the lesser of the estimated maximum cost or:

1. The actual time card cost of all design personnel including principal designer's time at the rates as set out in *Exhibit C*;
 2. The actual cost to the Design Consultant for other necessary outside services, such as structural, mechanical or electrical engineering performed by independent Design Consultants; and
 3. The Design Consultant's actual reproduction cost for drawings.
- (d) The Design Consultant shall maintain an accurate and acceptable cost accounting as to all such additional expenses and shall make available to the City all records, canceled checks and other disbursement media to substantiate any and all requests for payment for additional services.
- (e) Payment to the Design Consultant for such additional services shall not, in any event, exceed the maximum additional services amount set forth in Section 3.

2.09 Surveying and Testing.

- (a) The Design Consultant and its appropriate subconsultant shall review all survey and test results reports and shall follow the recommendation of the soils engineer or other subconsultant unless, in the exercise of appropriate professional judgment, the Design Consultant or appropriate subconsultant discovers, or should in the exercise of professional judgment discover, factors indicating the report or results are not reliable.
- (b) If any such inadequacy or any inconsistency, based upon such exercise of professional judgment, is noted the Design Consultant and/or its appropriate subconsultant shall report such inconsistency or inadequacy promptly of the City and require such inadequacy or inconsistency to be addressed by the soils engineer, testing laboratory or land surveyor before any further use is put to the data.
- (c) The Design Consultant shall require all surveying, engineering and testing entities it selects to carry and maintain Comprehensive Auto Liability and Property Damage Insurance, General Commercial Liability and Property Damage Insurance and Professional Errors and Omissions coverage as required by the City's Office of Risk Management which will adequately protect the interests of the City and third parties from the acts and omissions of the testing entity.
- (d) The amount of surveying or testing, the cost, and the types of reports required must be approved by the Manager prior to the Design Consultant actually ordering any such work to be accomplished. Such approvals by the City shall be for purposes of compensation only and shall not relieve the Design Consultant of any responsibility for determining the scope and amount of surveying and testing necessary for the design of the project.

- (e) It is understood and agreed that this Agreement does not include the investigation, sampling, testing, planning, abatement design, and remediation management of asbestos or other hazardous waste material. Should the presence of asbestos or other hazardous waste material be known to exist on a specific project or if the Design Consultant shall observe the presence of asbestos or hazardous waste material on any project site during its performance of services under this Agreement, the Design Consultant shall notify the City in writing immediately.
- (f) Payment to the Design Consultant for such surveying, testing, and abatement shall not exceed the surveying and testing budget set forth in the project specific proposal for each project.

2.10 Compliance with M/WBE Requirements.

- (a) This Agreement is subject to Article III, Divisions 1 and 3 of Chapter 28, Denver Revised Municipal Code (D.R.M.C.), designated as Sections 28-31 to 28-36 and 28-52 to 28-90 D.R.M.C. (the "M/WBE Ordinance") and any Rules or Regulations promulgated pursuant thereto. The Design Consultant has identified MBE and/or WBE firms with which it intends to subcontract under this Agreement, with a total participation level by such firms of 25% in the attached *Exhibit G*. The project goal for M/WBE participation established for this Agreement by the Division of Small Business Opportunity (DSBO) is 25%.
- (b) Under § 28-72 D.R.M.C., the Design Consultant has an ongoing, affirmative obligation to maintain for the duration of this Agreement, at a minimum, compliance with its originally achieved level of MBE and WBE participation upon which this Agreement was awarded, unless the City initiates a material alteration to the scope of work affecting MBEs or WBEs performing on this Agreement through change order, contract amendment, force account, or as otherwise described in § 28-73 D.R.M.C. The Design Consultant acknowledges that:
 - (1) It must establish and maintain records and submit regular reports, as required, which will allow the City to assess progress in achieving the M/WBE participation goal.
 - (2) If change orders or any other contract modifications are issued under the Agreement, the Design Consultant shall have a continuing obligation to immediately inform DSBO in writing of any agreed upon increase or decrease in the scope of work of such contract, upon any of the bases discussed in § 28-73, D.R.M.C., regardless of whether such increase or decrease in scope of work has been reduced to writing at the time of notification.
 - (3) If change orders or other contract modifications are issued under the contract, that include an increase in scope of work of this

Agreement, whether by amendment, change order, force account or otherwise which increases the dollar value of the contract, whether or not such change is within the scope of work designated for performance by an M/WBE at the time of contract award, such change orders or contract modification shall be immediately submitted to DSBO for notification purposes. Those amendments, change orders, force accounts or other contract modifications that involve a changed scope of work that cannot be performed by existing project subconsultants or by the Design Consultant shall be subject to a goal for M/WBEs equal to the original goal on the contract which was included in the proposal. The Design Consultant shall satisfy such goal with respect to such changed scope of work by soliciting new M/WBEs in accordance with § 28-73, D.R.M.C., as applicable, or the Design Consultant must show each element of modified good faith set out in § 28-75(c) D.R.M.C. The Design Consultant shall supply to the director the documentation described in § 28-75 (c) D.R.M.C. with respect to the increased dollar value of the contract.

- (4) Failure to comply with these provisions may subject the Design Consultant to sanctions set forth in the M/WBE Ordinance. Should any questions arise regarding specific circumstances, the Design Consultant must consult the M/WBE Ordinance or contact the Project's designated DSBO representative at (720) 913-1999.

SECTION 3 – COMPENSATION, PAYMENT, AND FUNDING

The City shall compensate the Design Consultant for its service performed and expenses incurred under this Agreement as follows.

3.01 Fee for basic services. The City agrees to pay the Design Consultant, as full compensation for its basic services rendered hereunder, a lump sum fee in the amount of THIRTY-ONE MILLION TWO HUNDRED THOUSAND AND NO/100 DOLLARS (\$31,200,000.00), in accordance with the billing rates and project budget stated in *Exhibits B and C*. The amounts budgeted for phases may be increased or decreased, and the amounts allocated for services and expenses adjusted, upon written approval of the Manager or her designee, and subject to the Maximum Contract Amount stated in this Section 3.

3.02 Reimbursable Expenses. Except for those reimbursable expenses specifically identified in *Exhibit I* or approved in writing by the City as reasonably related to or necessary for the Design Consultant's services, all other expenses shall be included in the Design Consultant's fee and will not be reimbursed hereunder. The maximum amount to be paid for all reimbursable expenses under this Agreement is TWO MILLION AND NO/100 DOLLARS (\$2,000,000.00) unless an additional amount is approved by the Manager or her designee in writing, subject to the Maximum Contract Amount stated herein. Unless this Agreement is

amended in writing according to its terms to increase the Maximum Contract Amount, any increase in the maximum amount of reimbursable expenses will reduce the Design Consultant's maximum fee amount accordingly.

3.03. Additional Services. If pre-approved additional services are performed by the Design Consultant, the City agrees to pay the Design Consultant for such additional services in accordance with Section 2.08. The maximum amount to be paid by the City for all additional services under this contract is ONE MILLION EIGHT HUNDRED THOUSAND AND NO/100 DOLLARS (\$1,800,000.00).

3.04 Invoicing and Payment. The City will make monthly progress payments for all services performed under this Agreement based upon the Design Consultant's monthly invoices. Such invoices shall be in a form acceptable to the City and shall include detail of the time worked by the Design Consultant's own personnel, billings from subcontractors, and all other information necessary to assess the Design Consultant's progress, and shall comply with the Program Controls, attached as *Exhibit I*. Invoices shall be accompanied by documentation of expenses for which reimbursement is sought, and all other supporting documentation required by the City. The City's Prompt Payment Ordinance, §§ 20-107 to 20-118, D.R.M.C., applies to invoicing and payment under this Agreement. Final Payment to the Design Consultant shall not be made until after the Project is accepted, and all certificates of completion, record drawings and reproducible copies are delivered to the City, and the Agreement is otherwise fully performed by the Design Consultant. The City shall deduct and retain a total of five percent (5%) from approved monthly billings and the entirety of the final payment until all such requirements are performed to the satisfaction of the Manager. However, no deductions shall be made from the Design Consultant's compensation on account of penalty, liquidated damages or other sums withheld from payments to contractor(s).

3.05 Maximum Contract Amount.

- (a) Notwithstanding any other provision of the Agreement, the City's maximum payment obligation will not exceed **THIRTY-FIVE MILLION AND NO/100 DOLLARS (\$35,000,000.00)** (the "Maximum Contract Amount"). The City is not obligated to execute an Agreement or any amendments for any further services, including any services performed by Design Consultant beyond that specifically described in *Exhibit A*. Any services performed beyond those set forth therein are performed at Design Consultant's risk and without authorization under the Agreement.
- (b) The City's payment obligation, whether direct or contingent, extends only to funds appropriated annually by the Denver City Council, paid into the Treasury of the City, and encumbered for the purpose of the Agreement. The City does not by the Agreement irrevocably pledge present cash reserves for payment or performance in future fiscal years, and the Agreement does not and is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of the City.

- (c) All payments under this Agreement shall be paid from the City's Airport System Capital Improvement and Replacement Fund, Airport Operations and Maintenance Fund, or Airport Bond Revenue Funds. The City has no obligation to make payments from other sources or issue additional revenue bonds to satisfy such costs. The City is not under any obligation to make any future encumbrances or appropriations for this Agreement, nor is the City under any obligation to amend this Agreement to increase the Maximum Contract Liability set forth above.
- (d) The City has disclosed to Design Consultant and Design Consultant acknowledges an amount less than the total Maximum Contract Liability has been appropriated and encumbered for purposes of this Agreement. The City will, upon request at any time during the term of this Agreement, disclose to Design Consultant the amount which has been appropriated and encumbered for purposes of this Agreement, the total amount of Design Consultant's approved billings to that date, and the amount of appropriated funds which are at that date available for expenditure by the City under this Agreement. Design Consultant is not eligible for payment for services performed or expenses incurred at any time when there are insufficient funds available for payment by the City for such services or expenses. Design Consultant is not obligated to provide services under this Agreement when there are insufficient funds available to pay for such services. In such event, Design Consultant shall immediately notify the Manager, in writing, of the amount of funds available for expenditure, the amount needed to pay for pending services, and the date when Design Consultant will cease to perform services due to the unavailability of funds hereunder. However, nothing in this paragraph shall be construed to allow Design Consultant to stop work when the amount of funds available for expenditure hereunder is equal to or greater than Design Consultant's project billings for services to be performed and expenditures to be incurred in the next 15 days. If Design Consultant has ceased work under this paragraph, the Manager will notify Design Consultant in writing when sufficient funds to pay for future services have been appropriated, encumbered and made available for expenditure under this Agreement and Design Consultant will resume providing such services within five (5) business days thereafter.

SECTION 4 – TERM AND TERMINATION

4.01 **Term.** The term of this Agreement shall commence on execution of this Agreement and expire, unless sooner terminated, upon final completion of the Project. Design Consultant shall complete all services under this Agreement no later than January 14, 2018.

4.02 **Termination.**

- (a) Nothing herein shall be construed as giving the Design 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 Design Consultant's services become unsatisfactory, in the sole discretion of the Manager, but only after prior written notice explaining the basis or reason for the City's dissatisfaction and failure of the Design Consultant to remedy the situation to the City's reasonable satisfaction within fifteen (15) days thereafter.
- (c) In the event of a termination for cause, or in the event the Design 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 Design Consultant shall be liable to City for all reasonable cost in excess of what the City would have paid the Design 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) days' prior written notice to the Design Consultant, which notice shall state the date of cancellation and termination.
- (e) If the Design Consultant's services are terminated, postponed or revised, or if the Design Consultant shall be discharged before all the work and services contemplated have been completed, or if the project is, for any reason, stopped or discontinued, the Design Consultant shall be paid only for the portion of work or services which has been satisfactorily completed and reimbursable expenses incurred prior to the time of such dismissal, termination, cancellation, 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 Design Consultant to the City in the event of any dismissal, termination, cancellation, postponement, revision or stoppage.
- (g) In the event of any dismissal, termination, cancellation, postponement, revision or stoppage, the Design 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 Design Consultant, if applicable.

SECTION 5 – GENERAL PROVISIONS

5.01 City's Responsibilities.

- (a) The City shall provide available information regarding its requirements for each project, including related budgetary information, and shall cooperate fully with the Design Consultant at all times. However, the City does not guarantee the accuracy of any such information and assumes no liability therefore. The Design Consultant shall notify City in writing of any information or requirements provided by the City which the Design Consultant believes to be inaccurate or inappropriate to the design or construction of the project.

- (b) If the City observes or otherwise becomes aware of any fault or defect in the project or non-conformance with Contract Documents, it shall give prompt notice thereof to Design Consultant.

5.02 Ownership of Documents.

- (a) The City shall have title and all intellectual and other property rights, in and to all phased and final Design documents, and all data used in the development of the same, including the results of any tests, surveys or inspections at the Project site, and all photographs, drawings, drafts, studies, estimates, reports, models, notes and any other materials or work products, whether in electronic or hard copy format, created by the Design 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 Design Consultant shall identify and disclose, as requested, all such Documents to the City.
- (b) 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 Design 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.
- (c) The Design 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.
- (d) The Design 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.
- (e) The Design 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 delivered to the City promptly upon completion thereof, or if authorized by the City's Project Manager, upon termination or expiration of this Agreement.

5.03 Taxes and Licenses. The Design Consultant shall promptly pay, when they are due, all taxes, excises, license fees and permit fees of whatever nature applicable to the work and services which it performs under this Agreement, and shall take out and keep current all required municipal, county, state or federal licenses required to perform its services under this Agreement. The Design 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 Design Consultant shall promptly pay all owed bills, debts and obligations it incurs performing services under this Agreement and shall not allow any lien, verified claim, mortgage, judgment or execution to be filed against land, facilities or improvements owned or beneficially owned by the City as a result of such bills, debts or obligations.

5.04 Examination of Records.

- (a) Records of the Design Consultant's direct personnel, Design Consultant and reimbursable expenses pertaining to this Project and records of accounts between the City and the Design Consultant shall be kept on a generally recognized accounting basis. The Design Consultant agrees that the Manager and the Auditor of the city or any of their duly authorized representatives, until the expiration of three (3) years after the final payment under this Agreement, shall have access to and the right to examine any books, documents, papers and records of the Design Consultant, involving transactions related to this Agreement, without regard to whether the work was paid for in whole or in part with federal funds or was otherwise related to a federal grant program. The Design Consultant, upon request by either shall make all such books and records available for examination and copying in Denver, Colorado.
- (b) In connection with any services performed hereunder on items of work toward which federal funds may be received under the Airport and Airway Development Act of 1970, as amended, the City, the Federal Aviation Administration, the Comptroller General of the United States, and any of their duly authorized representatives, shall have access to any books, documents, papers and records of the Consultant which are directly pertinent to a specific grant program for the purpose of making audit, examination, excerpts and transcriptions. The Consultants further agree that such records will contain information concerning the personnel, hours and specific tasks performed, along with the applicable federal project number.

5.05 Assignment and Subcontracting. The City is not obligated or liable under this Agreement to any party other than the Design Consultant named herein. The Design 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 Design 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 Design 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 subcontractor, and the Design Consultant named herein shall in any and all events be and remain responsible to the City according to the terms of this Agreement.

5.06 No Discrimination in Employment. In connection with the performance of services under this Agreement, the Design 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. The Design Consultant agrees to insert the foregoing provision in all subcontracts hereunder.

5.07 Federal Provisions. This Agreement is subject and subordinate to the terms, reservations, restrictions and conditions of any existing or future agreements between the City and the United States, the execution of which has been or may be required as a condition precedent to the transfer of federal rights or property to the City for airport purposes and the expenditure of federal funds for the extension, expansion or development of the Denver Municipal Airport System, including DIA. The provisions of the attached Appendix No. 1 are incorporated herein by reference.

5.08 Insurance.

- (a) The Design Consultant shall obtain and keep in force during the entire term of this Agreement, all of the insurance policies described in the City's form of insurance certificate which is attached to this Agreement as *Exhibit D* and incorporated herein. Such insurance coverage includes workers' compensation and employer liability, commercial general liability, business automobile liability, and professional liability. Upon execution of this Agreement, the Design Consultant shall submit to the City a fully completed and executed original of the attached insurance certificate form, which specifies the issuing company or companies, policy numbers and policy periods for each required coverage. In addition to the completed and executed certificate, the Design Consultant shall submit a copy of a letter from each company issuing a policy identified on the certificate, confirming the authority of the broker or agent to bind the issuing company, and a valid receipt of payment of premium.
- (b) The City's acceptance of any submitted insurance certificate is subject to the approval of the City's Risk Management Administrator. All coverage requirements specified in the certificate shall be enforced unless waived or otherwise modified in writing by the City's Risk Management Administrator.
- (c) The Design Consultant shall comply with all conditions and requirements set forth in the insurance certificate for each required coverage during all periods in which coverage is in effect.

- (d) Unless specifically excepted in writing by the City's Risk Management Administrator, the Design Consultant shall include all subconsultants performing services hereunder as insureds under each required policy or shall furnish a separate certificate (on the form certificate provided), with authorization letter(s) for each subconsultant. All coverages for subconsultants shall be subject to all of the requirements set forth in the form certificate and the Design Consultant shall insure that each subconsultant complies with all of the coverage requirements.
- (e) The insurance coverages specified in this Agreement are the minimum requirements, and these requirements do not lessen or limit the liability of the Design Consultant. The Design Consultant shall maintain, at its own expense, any additional kinds and amounts of insurance that it may deem necessary to cover its obligations and liabilities under this Agreement.
- (f) The parties hereto understand and agree that the City and County of Denver, its officers, officials and employees, are relying on, and do not waive or intend to waive by any provisions of this agreement, the monetary limitations or any other rights, immunities and protections provided by the Colorado Governmental Immunity Act, §§ 24-10-101 to 120, C.R.S., or otherwise available to the City and County of Denver, its officers, officials and employees.
- (g) If the City elects to purchase an owner's professional protective insurance policy, the insurance will include a self-insured retention for which the Design Consultant will be responsible. The City will endeavor to obtain a policy that has a self-insured retention for what is reasonably available in the market place.

5.09 Indemnification.

- (a) To the fullest extent permitted by law, the Design Consultant hereby agrees to indemnify, reimburse and hold harmless City, its appointed and elected officials, agents and employees for, from and against all liabilities, claims, judgments, suits or demands for damages to persons or property arising out of, resulting from, or related to the work performed under this Agreement that are due to the negligence or fault of the Design Consultant or the Design Consultant's agents, representatives, subcontractors, or suppliers ("Claims"). This indemnity shall be interpreted in the broadest possible manner consistent with the applicable law to indemnify the City.
- (b) Design Consultant will indemnify and reimburse City any expenses incurred by reason of any Claims which may be brought or threatened against City, including, but not limited to, court costs and attorney fees incurred in defending and investigating such Claims or seeking to enforce this indemnity obligation. Such

payments on behalf of City shall be in addition to any other legal remedies available to City and shall not be considered City's exclusive remedy.

- (c) Insurance coverage requirements specified in this Agreement shall in no way lessen or limit the liability of the Design Consultant under the terms of this indemnification obligation. The Design Consultant shall obtain, at its own expense, any additional insurance that it deems necessary for the City's protection.
- (d) This defense and indemnification obligation shall survive the expiration or termination of this Agreement.

5.10 Colorado Governmental Immunity Act. The parties hereto understand and agree that the City is relying upon, and has not waived, the monetary limitations (presently \$150,000 per person, \$600,000 per occurrence) and all other rights, immunities and protection provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*

5.11 Contract Documents; Order of Precedence. This Agreement consists of Sections 1 through 5, which precede the signature page, and the following attachment, which is incorporated herein and made a part hereof by reference:

Appendix No. 1	Standard Federal Assurances
Exhibit A	Scope of Work
Exhibit B	Program Construction Budget and Design Fees
Exhibit C	Key Personnel and Hourly Rates of Pay
Exhibit D	Insurance Requirements
Exhibit E	Parsons/Gensler Subconsultant Agreement
Exhibit F	Calatrava Termination Agreement (License Agreement)
Exhibit G	MBE/WBE Approved Letters of Intent
Exhibit H	Program Schedule and Packaging
Exhibit I	Program Controls

In the event of an irreconcilable conflict between a provision of Sections 1 through 5 and the listed attachments, or between provisions of any attachments, such that it is impossible to give effect to both, the order of precedence to determine which provision shall control to resolve such conflict, is as follows, in descending order:

- Appendix No. 1
- Sections 1 through 5
- Exhibit F
- Exhibit A
- Exhibit B
- Exhibit C
- Exhibit H
- Exhibit I
- Exhibit E
- Exhibit D

Exhibit G

5.12 When 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 Design 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.

5.13 Governing Law; Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of Colorado, the Charter and Revised Municipal Code of the City and County of Denver, and the ordinances, regulations and Executive Orders enacted or promulgated pursuant to the Charter and Code, including any amendments. 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. Venue for any action arising hereunder shall be in the City and County of Denver, Colorado.

5.14 Conflict of Interest.

- (a) The parties agree that no employee of the City shall have any personal or beneficial interest in the services or property described herein, and the Design Consultant further agrees not to hire or contract for services with any employee or officer of the City which would be in violation of the Revised Municipal Code Chapter 2, Article IV, Code of Ethics or Denver City Charter provisions 1.2.9 and 1.2.12.
- (b) The Design Consultant agrees that it will not engage in any transaction, activity or conduct that would result in a conflict of interest under this Agreement. The Design Consultant represents that it has disclosed any and all current or potential conflicts of interest. A conflict of interest shall include transactions, activities or conduct that would affect the judgment, actions or work of the Design Consultant by placing the Design Consultant's own interests, or the interests of any party with whom the Design Consultant has a contractual arrangement, in conflict with those of the City. The City, in its sole discretion, shall determine the existence of a conflict of interest and may terminate this Agreement in the event such a conflict exists after it has given the Design Consultant written notice which describes the conflict. The Design Consultant shall have thirty (30) days after the notice is received to eliminate or cure the conflict of interest in a manner that is acceptable to the City.

5.15 No Third Party Beneficiaries. 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 Design 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 parties that any person other than the City or the Design Consultant receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

5.16 Time is of the Essence. The parties agree that in the performance of the terms, conditions and requirements of this Agreement by the Design Consultant, time is of the essence.

5.17 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 except as provided in the City's Prompt Payment Ordinance.

5.18 Proprietary or Confidential Information.

- (a) City Information: The Design Consultant acknowledges and accepts that, in performance of its services under the terms of this Agreement, the Design 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 Design Consultant agrees that all information provided or otherwise disclosed by the City to the Design Consultant be held in confidence and used only in the performance of its obligations under this Agreement. The Design Consultant shall exercise the same standard of care to protect such information as a reasonably prudent Design Consultant would to protect its own proprietary or confidential data. "Proprietary Data" shall mean geographic materials or Geographic Information Systems ("GIS") data owned by 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 Design Consultant by the City. Such Proprietary Data may be in hardcopy, printed, digital or electronic format.
- (b) Design 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 Design Consultant of such request in order to give the Design 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 Design 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 Design 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 Design Consultant's intervention to protect and assert its claim of privilege against disclosure under this Article including, but not limited to, prompt 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.

5.19 Use, Possession or Sale of Alcohol or Drugs. The Design Consultant, its officers, agents, and employees shall cooperate and comply with the provisions of Executive Order 94

and Attachment A thereto concerning the use, possession or sale of alcohol or drugs. Violation of these provisions or refusal to cooperate with implementation of the policy can result in the City's barring the Design Consultant from City facilities or participating in City operations.

5.20 No Employment of Illegal Aliens to Perform Work Under the Agreement.

- (a) This Agreement is subject to Division 5 of Article IV of Chapter 20 of the Denver Revised Municipal Code, and any amendments (the "Certification Ordinance").
- (b) The Design Consultant certifies that:
 - (1) At the time of its execution of this Agreement, it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement.
 - (2) It will participate in the E-Verify Program, as defined in § 8-17.5-101(3.7), C.R.S., to confirm the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement.
- (c) The Design Consultant also agrees and represents that:
 - (1) It shall not knowingly employ or contract with an illegal alien to perform work under the Agreement.
 - (2) It shall not enter into a contract with a subconsultant or subcontractor that fails to certify to the Design Consultant that it shall not knowingly employ or contract with an illegal alien to perform work under the Agreement.
 - (3) It has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement, through participation in the E-Verify Program.
 - (4) It is prohibited from using the E-Verify Program procedures to undertake pre-employment screening of job applicants while performing its obligations under the Agreement, and that otherwise requires the Design Consultant to comply with any and all federal requirements related to use of the E-Verify Program including, by way of example, all program requirements related to employee notification and preservation of employee rights.
 - (5) If it obtains actual knowledge that a subconsultant or subcontractor performing work under the Agreement knowingly employs or contracts with an illegal alien, it will notify such subconsultant or subcontractor and the City within three (3) days. The Design Consultant will also then terminate such subconsultant or subcontractor if within three (3) days after such notice the subconsultant or subcontractor does not stop employing or contracting with the illegal alien, unless during such

three-day period the subconsultant or subcontractor provides information to establish that the subconsultant or subcontractor has not knowingly employed or contracted with an illegal alien.

- (6) It will comply with any reasonable request 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., or the City Auditor, under authority of D.R.M.C. 20-90.3.
- (d) The Design Consultant is liable for any violations as provided in the Certification Ordinance. If Design Consultant violates any provision of this section or the Certification Ordinance, the City may terminate this Agreement for a breach of the Agreement. If the Agreement is so terminated, the Design Consultant shall be liable for actual and consequential damages to the City. Any such termination of a contract due to a violation of this section or the Certification Ordinance may also, at the discretion of the City, constitute grounds for disqualifying Design Consultant from submitting bids or proposals for future contracts with the City.

5.21 Disputes. All disputes between the City and Design Consultant regarding this Agreement shall be resolved by administrative hearing pursuant to the procedure established by D.R.M.C. § 5-17 *et seq.* For the purposes of that procedure, the City official rendering a final determination shall be the Manager.

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

5.23 Survival of Certain Contract Provisions. The parties understand and agree that all terms and conditions of this Agreement, together with the exhibits and attachments hereto, which, by reasonable implication, contemplate continued performance or compliance beyond the termination of this Agreement, (by expiration of the term or otherwise), shall survive such termination and shall continue to be enforceable as provided herein. Without limiting the generality of the foregoing, the Design Consultant's obligations for the provision of insurance and to indemnify the City shall survive for a period equal to any and all relevant statutes of limitation, plus the time necessary to fully resolve any claims, matters, or actions begun within that period."

5.24 Advertising and Public Disclosure. The Design Consultant shall not include any reference to this Agreement or to services performed pursuant to this Agreement in any of its advertising or public relations materials without first obtaining the written approval of the Manager, which will not be unreasonably withheld. Any oral presentation or written materials related to services performed under this Agreement shall include only services that have been accepted by the City. The Manager shall be notified in advance of the date and time of any such presentation. Nothing in this provision shall preclude the transmittal of any information to

5.29 Counterparts of this Agreement. 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.

5.30 Electronic Signatures and Electronic Records. Design Consultant consents to the use of electronic signatures by the City. The Agreement, and any other documents requiring a signature hereunder, may be signed electronically by the City in the manner specified by the City. The Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

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IN WITNESS WHEREOF, the parties hereunto set their hands and affixed their seals at Denver, Colorado as of the day on the City's signature page.

Contract Control Number: 201103967

Vender Name: M. ARTHUR GENSLER, JR. AND ASSOCIATES, INC.

By: 

Name: ANDREW P. COHEN
(please print)

Title: EXECUTIVE DIRECTOR
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)

