

PROFESSIONAL SERVICES AGREEMENT
(“On Call Professional Services”)

THIS PROFESSIONAL SERVICES AGREEMENT (“Agreement”) is made and entered into, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the “**City**”) and **ARCHITECTURAL ENERGY CORPORATION**, a Colorado corporation, whose address is 2540 Frontier Avenue, Suite 100, Boulder, Colorado 80301 (the “**Consultant**”), both of which may be individually referred to herein as a “Party” or jointly as the “Parties.”

In consideration of the mutual agreements contained in this Agreement, and subject to the terms and conditions stated in this Agreement, the Parties agree as follows:

1. WORK TO BE PERFORMED:

A. Services: The Consultant shall diligently and professionally perform, as assigned and on an “on-call” or “as needed” basis, the services and produce all the deliverables described in the **Scope of Services** attached hereto as **Exhibit A** and the **Rate Sheet** attached hereto as **Exhibit B**, both of which exhibits are incorporated herein by this reference (the “**Services**”). As prescribed in issued and executed Work Orders and Work Order Changes, the Consultant shall promptly initiate and complete the specifically assigned Services during the specified time periods (“**Assigned Services**”). The Consultant shall faithfully perform the Assigned Services required under this Agreement in accordance with the standards of care, skill, training, diligence and judgment provided by highly competent professionals who perform work of a similar nature to the Services described in this Agreement. Any professional services specified under this Agreement which requires the employment of licensed or registered personnel shall be performed by licensed or registered personnel.

B. Oversight: The Consultant shall conduct the Assigned Services under the general direction of and in coordination with the Manager of General Services or other designated supervisory personnel (the “**Manager**”) and the Department employee(s) assigned to manage this work (the “**Department**”) and make every reasonable effort to fully coordinate all Assigned Services with any City agency or any person or firm under contract with the City doing work which affects the Consultant’s Services. All records, data, specifications and documentation prepared by the Consultant under this Agreement, when delivered to and accepted by the Department, shall become the property of the City. The Consultant agrees to

allow the Department to review any of the procedures used by the Consultant in performing the Assigned Services and to make available for inspection all notes and other documents used in performing the Assigned Services.

C. Non-exclusivity: The Consultant acknowledges and agrees that this Agreement does not create an exclusive right to perform all Services for which the City may contract. The City may enter agreements with other consultants to perform the same or similar services and reserves the right to select, at the discretion of the Manager, the consultant which is the most cost effective, best suited, and/or most readily able to perform the Services.

D. Work Order: As the Manager determines the need and availability of funding for Assigned Services, the City will issue a Work Order to the Consultant detailing the nature and extent of Assigned Services to be provided, with a projected amount to be paid to the Consultant (the “**Assigned Services Amount**”) based on the Rate Sheet for the items contained in the Statement of Services in Exhibit A, Exhibit B attached to this Agreement and incorporated herein by reference contains the Rate Sheet, which the Consultant acknowledges and affirms that the City may rely upon in the preparation of Work Orders as provided herein. Exhibit C attached to this Agreement and incorporated herein by reference substantially reflects the form of the **Work Order** to be issued by the City. Following receipt of the issued Work Order, the Consultant shall, within three (3) business days and in good faith, confirm the scope of Assigned Services detailed therein and the associated Assigned Services Amount, all of which must be in accordance with the terms and conditions of this Agreement, and respond back to the Department as to the Consultant’s ability to initiate and complete the Assigned Services in the timeframe specified in the Work Order. The Consultant shall confirm the completeness and accuracy of the Work Order and the Assigned Services Amount. Confirmation includes, but is not restricted to, inquiries with the Department as to any directions or specifications in the Work Order which are not clear. If the Consultant fails to contact the Department within three (3) business days following receipt of the issued Work Order and state unequivocally that the Consultant is ready and willing to perform the Assigned Services in the manner and timeframe indicated on the Work Order, the City reserves the right to immediately withdraw the issued Work Order. Upon the Consultant executing the Work Order, the City shall finalize and execute the Work Order for the Assigned Services and return a copy of the executed Work Order to the Consultant. The City will not execute the Work Order unless any material changes proposed by

the Consultant to the terms of the issued Work Order and/or additions to the Assigned Services Amount are deemed acceptable by the Manager and incorporated into the Work Order and until funding adequate to cover the entire Assigned Services Amount is available.

E. Work Order Change: If, after execution of a Work Order and commencement on the Assigned Services, additions, deletions or modifications to the Assigned Services described in the Work Order, along with any associated changes in the Assigned Services Amount, are required by the City or are requested by the Consultant and approved in advance by the Manager, a **Work Order Change**, in substantially the form as set forth in **Exhibit D** attached to this Agreement and incorporated herein by reference, may be issued in accordance to the same standards and procedures prescribed for Work Orders. The Consultant shall promptly and thoroughly review and respond to the proposed changes, in accordance to the same standards and procedures prescribed for Work Orders, and notify the Department that the Consultant is ready and willing to perform the Assigned Services in the manner and timeframe as modified by the Work Order Change. The City will not execute the Work Order Change unless any material changes proposed by the Consultant to the terms of the issued Work Order Change and/or additions to the Assigned Services Amount are deemed acceptable by the Manager and incorporated into the Work Order Change and until funding adequate to cover the entire Assigned Services Amount, if modified, is available.

F. Title & Rights: The Consultant warrants that the Consultant has full title to all deliverables and other materials and full legal rights to any software or other electronic support program utilized in creating the deliverables or in making the deliverables usable by the Department as contemplated in this Agreement, that the transfer of such title and legal rights to the City is rightful and free and clear from all security interests, liens, claims, encumbrances, or restrictions that would burden the Department's ability to access and use the deliverables as contemplated in this Agreement, and that the Consultant will defend such title and legal rights against all persons claiming the whole or part of any deliverable, at no cost to the City.

G. Completion; Deficiency: The Consultant shall promptly notify the Department as to the completion of the Assigned Service performed under any Work Order or Work Order Change so that inspection of the Assigned Services may be made by the Department. If a Completion Notice is specified in the Work Order or the Work Order Change, the Consultant shall not submit a request for payment for the Assigned Services performed until

a Completion Notice is issued by the Department or ten (10) calendar days after the Department is notified of completion of the Assigned Services, whichever is sooner. If the Assigned Services performed are determined by the Department to be defective, deficient or incomplete, whether or not a Completion Notice is required, the Consultant shall correct or complete the Assigned Services, at no additional cost to the City, within the timeframe specified in a Notice of Deficiency issued by the Department and promptly notify the Department upon correction or completion of the Assigned Services. In providing the Services, Consultant makes no guarantee that the City will experience energy savings.

H. Time is of the Essence: The Consultant acknowledges and affirms that it is imperative that the Consultant exercise due diligence and actively and expeditiously undertake all measures necessary: 1) in timely reviewing and assessing an issued Work Order or Work Order Change; 2) in evaluating the Consultant's ability to initiate and complete the Assigned Services in the manner and within the timeframe specified in the Work Order or the Work Order Change; 3) in confirming the Assigned Services Amount specified in the Work Order or any changes to the Assigned Services Amount under a Work Order Change; 4) in responding to the Department as required under this Agreement; 5) in timely executing and returning the Work Order or Work Order Change; 6) in initiating, making good progress, and completing the Assigned Services, all within the timeframe specified in the Work Order or the Work Order Change; and 7) in promptly and fully correcting or completing any Assigned Services noted in a Notice of Deficiency. Failure or refusal by the Consultant to confirm and execute a Work Order or Work Order Change or to initiate, make good progress, or complete the Assigned Services for an executed Work Order or Work Order Change within specified timeframe may result, at the discretion of the Manager and with very short notice, in the withdrawal of the Work Order or the Work Order Change. Flagrant or persistent problems with the Consultant performing obligations as specified herein may result in termination of this Agreement as provided in sub-section 4.C. below and/or, for failure to perform or substantially perform an executed Work Order or the Work Order Change within specified timeframe or in accordance with the Work Order or the Work Order Change, in the assessment of liquidated damages as provided in sub-section 4.E below. Except as approved by the Manager in advance and in writing, the Consultant shall not subcontract with another consultant to perform the Work or assign an issued Work Order or Work Order Change to another consultant.

2. **TERM:** The term of the Agreement runs from the Effective Date of this Agreement for a period of three years or until the Maximum Contract Amount specified in sub-section 3.A below is expended, whichever is sooner, unless this Agreement is terminated earlier as provided in this Agreement or unless this Agreement is extended as provided in a separate amendment to this Agreement (“**Term**”). If the term of any Work Order or Work Order Change extends beyond the Term specified above, this Agreement shall remain in full force and effect but only as to such Work Order or Work Order Change; however, the total amount paid to the Consultant shall not exceed the Maximum Contract Amount specified in sub-section 3.A below.

3. **COMPENSATION AND PAYMENT:**

A. **Maximum Contract Amount:** The Maximum Contract Amount to be paid by the City to the Consultant shall in no event exceed the sum of One Million Five Hundred Thousand Dollars (\$1,500,000.00), unless this Agreement is modified to increase said amount by a duly authorized and written amendment to this Agreement executed by the Parties in the same manner as this Agreement. The Maximum Contract Amount stated herein is not intended, and shall not be construed, as a promise or guarantee to the Consultant that Work Orders with Assigned Services Amounts totaling or approximating the Maximum Contract Amount will be issued to or executed with the Consultant. Issued Work Orders or Work Order Changes shall not, individually or cumulatively, authorize the performance of Assigned Services for which the Assigned Services Amount(s) exceed the Maximum Contract Amount. It shall be the responsibility of the Consultant to verify that the total Assigned Services Amount(s) do not exceed the Maximum Contract Amount of this Agreement.

B. **Payments:** A fully executed Work Order or Work Order Change, and any required Completion Notice, shall be a condition precedent to any obligation for the City to make payment for Assigned Services performed by the Consultant. Payment shall be made upon satisfactory completion of Assigned Services in accordance with the executed Work Order or any executed Work Order Change and this Agreement. The request for payment submitted by the Consultant must fully document and itemize the Assigned Services rendered in accordance with **Exhibit A** and **Exhibit B**. The request for payment shall affirmatively represent that: i) all of the Assigned Services specified in the Work Order and any Work Order Change has been fully performed and completed and any Deficiency Notice has been satisfied; ii) no claims, liens, encumbrances or restrictions that would prevent the full benefit of the Assigned Services to the

City are outstanding or in effect; iii) all rights, title and interests to the deliverables or other provided materials have transferred to the City; and iv) no interest or encumbrance of any kind associated with the Work will be asserted, has been acquired, or will be made by the Consultant or any other person or entity. If the request for payment does not contain these representations, the request for payment is hereby deemed to contain them. The request for payment must be approved by the Manager in writing in order to be eligible for compensation under this Agreement. Any payment may be reduced by any liquidated damages assessed by the Manager under sub-section 4.E.2) below.

C. Subject to Appropriation; No Multiple Year Obligation: It is understood and agreed that any payment obligation of the City hereunder, whether direct or contingent, shall extend only to funds appropriated by the Denver City Council for the purpose of this Agreement, encumbered for the purpose of the Agreement and paid into the Treasury of the City. The Consultant acknowledges that (i) the City does not by this Agreement, irrevocably pledge present cash reserves for payments in future fiscal years, and (ii) this Agreement is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of the City.

D. Amendment: The Consultant acknowledges that the City is not obligated to execute an amendment to this Agreement for any further phase of work by the Consultant other than the Services described in **Exhibit A**, and that any further phase of work performed by Consultant beyond that specifically described or without an amendment to this Agreement is performed at Consultant's risk and without authorization under this Agreement.

E. Prompt Payment: All invoicing and payments are subject to the City's Prompt Payment Ordinance, §§ 20-107 through 20-118, D.R.M.C.

F. Reimbursable Expenses: Unless pre-authorized in writing by the City, there are no reimbursable expenses allowed under the Agreement and all of the Consultant's expenses are contained in the rates in **Exhibit B**.

4. TERMINATION:

A. Termination for Convenience of the City: The Manager, upon giving twenty (20) calendar days written notice (unless a longer period is given), may terminate this Agreement, in whole or part, when it is in the best interest of the City as determined by the Manager. To the extent that the Consultant has initiated or completed Assigned Services on an executed Work Order or Work Order Change for which the Consultant has not yet been

compensated in accordance with this Agreement, the Assigned Services required under the Work Order or Work Order Change shall be completed and such compensation for all such authorized Assigned Services shall be paid to the Consultant in accordance with this Agreement. The Consultant shall have no claim of any kind whatsoever against the City for any termination for convenience of the City, except for compensation as described herein.

B. Termination by Consultant: Provided that the Consultant is not in Breach as provided in sub-section 5.C. below and subject to the survival provision in section 33 below, the Consultant, upon giving ninety (90) calendar days written notice (unless a longer period is stated), may terminate this Agreement. Grounds for termination may include failure to pay Consultant pursuant to the terms of this Agreement. To the extent there is an executed Work Order(s) or an executed Work Order Change(s) which will extend beyond the termination date, the Consultant shall fully and faithfully complete all authorized Assigned Services, unless the Manager determines (in the Manager's discretion) to withdraw the Work Order(s) or Work Order Change(s). The Consultant shall be paid for all authorized and completed Assigned Services in accordance with this Agreement. The Consultant shall have no claim of any kind whatsoever against the City for any termination for convenience of the Consultant, except for compensation as described herein.

C. Termination, With Cause, by the City: The occurrence of any one or more of the following shall constitute a breach of this Agreement ("**Breach**"), for which the Manager may, at the Manager's option, either terminate this Agreement or withdraw a Work Order or Work Order Change, with cause, upon written notice to the Consultant:

1) The Consultant fails or refuses, within three (3) business days of being notified, to expeditiously and actively undertake or substantially or timely perform its responsibilities and obligations or fails or refuses to make adequate progress in performing its responsibilities and obligations under this Agreement or under any Work Order or Work Order Change executed under this Agreement, including the due diligence obligations set forth in section 1 of this Agreement, provided that the failure or refusal to undertake, make good progress, or complete the Assigned Services is not due to matters beyond the Consultant's control such as lack of response to a reasonable request for clarification, information, or access by Consultant to the City, weather disaster or persistent bad weather, floods, or other acts of

God, civil unrest, acts of the public enemy, national calamity, a strike at a manufacturer or supplier for the Assigned Services, or widespread unavailability of necessary materials;

2) There is substantial evidence that it has been or will be impossible for the Consultant to perform the Assigned Services required due to matters within the Consultant's control such as voluntary bankruptcy, strikes, boycotts, and labor disputes involving Consultant's employees or closure or suspension of operations by regulatory order of a governmental entity or an order of a court due to violations or infractions by the Consultant or Consultant's employees;

3) The Consultant has persistently or flagrantly failed to perform the Assigned Services or failed to timely perform the Assigned Services or to comply with the specifications and requirements as set forth in the Scope of Services in **Exhibit A** to this Agreement and the City has provided Notices to the Consultant accordingly;

4) The Consultant has submitted requests for payment under section 3 of this Agreement that are fraudulent or persistently or flagrantly erroneous or misleading;

5) The Consultant has made an assignment or transfer of, or subcontracts, its responsibilities and obligations under this Agreement without obtaining the Manager's written consent or not in conformance with this Agreement;

6) The Consultant fails to obtain, renew, replace, or maintain the insurance coverage required by this Agreement or causes or is at fault for damage to property or injury to persons that is not covered or not adequately covered by insurance and the Consultant fails to remedy the situation to the satisfaction of the Manager;

7) The Consultant refuses or fails to comply with the warranty of title and rights set forth in sub-section 1.F. of this Agreement;

8) Any lien or adverse claim is filed or asserted against any deliverables or other material provided by Consultant to the City because of any act or omission of the Consultant and is not timely resolved;

9) The Consultant has failed to obtain or maintain any required permit or license or has utilized personnel or workers not licensed or registered as required by law;

10) The Consultant or any of its officers or employees are convicted, plead nolo contendere, enter into a formal agreement in which they admit guilt, enter a plea of guilty, or otherwise admit culpability to criminal offenses of bribery, kickbacks, collusive bidding,

bid-rigging, antitrust, fraud, undue influence, theft, racketeering, extortion or any offense of a similar nature, in connection with the Consultant's business.

D. Compensation: Upon termination of this Agreement or withdrawal of a Work Order or a Work Order Change by the Department, with cause, under sub-section 4.C above, the Consultant shall be compensated for the Work that the Manager determines to have been satisfactorily completed, except that the City shall be entitled to keep any unpaid amount owing to the Consultant to the extent that said amount or some portion of said amount is needed to compensate the City for: 1) liquidated damages, if specified under sub-section 4.E below; 2) the costs of releasing any liens or resolving any adverse claims against the deliverables and other materials provided by the Consultant to the City under this Agreement; and/or 3) the costs to repair or replace any damaged or lost property or rights caused by the Breach of this Agreement. The Consultant shall have no claim of any kind whatsoever against the City for any termination with cause, except for compensation for the Assigned Services satisfactorily performed as described herein.

E. Remedies:

1) *Termination:* For any termination of this Agreement, with cause, the City shall have the right to any or all of the following remedies through the courts or other means of legal recourse available to the City: a) cancellation of the Agreement; b) actual damages or costs caused by the Breach of the Consultant; and c) recovery of costs incurred by the City as a result of the Breach of the Consultant, to the extent not covered in sub-section 4.D. above. In any legal action brought by the Consultant, the Consultant shall not be entitled to recover any more than the full amount, not previously paid, of any Work Orders or Work Order Changes executed with and performed in whole or part by the Consultant. The City and the Consultant understand and agree that the rights of specific performance and to incidental, consequential, or punitive damages have been hereby expressly waived and released by both Parties.

2) *Liquidated Damages:* If the Manager determines, for a Breach of this Agreement under sub-section 4.C.1) above, to withdraw an executed a Work Order or a Work Order Change, the Consultant shall be liable to the City for liquidated damages in the amount of two hundred dollars (\$200.00) per day, calculated from the day that the Manager issues notice to the Consultant of a Breach under sub-section 4.C.1) through the day that a new

Work Order or Agreement is executed with another consultant to perform the Assigned Services which was the subject of the withdrawn Work Order or Work Order Change or upon termination of the Work Order or Work Order Change, as so determined by the Manager. In no event shall Consultant's liability for liquidated damages exceed \$2,000. The Consultant and City hereby acknowledges and agrees that it would be impractical and extremely difficult to estimate the damages which the City might incur for said Breach, and that, in the interest of assuring that Work Orders and Work Order Changes are timely and properly performed, the liquidated damages provided herein is the most fair and reasonable way to compensate the City for any delay or inadequate performance without termination of the Agreement or litigation.

F. Product Delivery: If this Agreement is terminated for any reason, the City shall take possession of all materials, equipment, tools and facilities owned by the City which the Consultant is using by whatever method the City deems expedient. The Consultant shall deliver to the City all deliverables or other materials the Consultant has completed or partially completed under this Agreement, together with all other items, materials and documents which have been paid for by the City. These documents and materials shall be the property of the City. Copies of work product incomplete at the time of termination shall be marked "DRAFT-INCOMPLETE".

5. RIGHTS AND REMEDIES NOT WAIVED: In no event shall any action or inaction, including any payments to the Consultant, by the Consultant constitute or be construed to be a waiver by the City of any breach of covenant or default which may then exist on the part of the Consultant, and the City's action or inaction when any such breach or default shall exist shall not impair or prejudice any right or remedy available to the City with respect to such breach or default. No assent, expressed or implied, to any breach or default shall be deemed or taken to be a waiver of any other breach or default.

6. INDEPENDENT CONTRACTOR: It is understood and agreed that the status of the Consultant shall be that of an independent contractor and an entity or person 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. It is not intended, nor shall it be construed, that the Consultant or the Consultant's employees, agents, or subcontractors are employees or officers of the City under Chapter 18 of the Denver Revised Municipal Code or for any purpose whatsoever. The Consultant is responsible for the operational management, errors and omissions of the Consultant's employees, agents, and subcontractors. Without limiting the

foregoing, the Consultant understands and acknowledges that the Consultant and the Consultant's employees, agents and subcontractors: a) are not entitled to workers' compensation benefits through the City; b) are not entitled to unemployment insurance benefits unless unemployment compensation coverage is provided by the Consultant or some other entity besides the City; and c) are obligated to pay federal and state taxes on any monies earned pursuant to this Agreement. Furthermore, it is understood and agreed that nothing in this Agreement is intended, or shall be construed, to constitute a joint venture between the Parties.

7. INSURANCE:

A. General Conditions: The Consultant agrees to secure, at or before the time of execution of this Agreement, the following insurance covering all operations, goods or services provided pursuant to this Agreement. The 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 such time period specified in Section 33 of the Agreement. The required insurance shall be underwritten by an insurer licensed or authorized 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 requiring notification to the City in the event any of the required policies are canceled or non-renewed before the expiration date thereof. Such written notice shall be sent to the parties identified in the notices section of the Agreement. Such notice shall reference the City contract number listed on the signature page of this Agreement. Said notice shall be sent thirty (30) days prior to such cancellation or non-renewal unless due to non-payment of premiums for which notice shall be sent ten (10) days prior. If such written notice is unavailable from the insurer, the Consultant shall provide written notice of cancellation, non-renewal and any reduction in coverage to the parties identified in the notices section by certified mail, return receipt requested within three (3) business days of such notice by its insurer(s) and referencing the City's contract number. The Consultant shall be responsible for the payment of any deductible or self-insured retention. 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: The Consultant shall provide a copy of this Agreement to its insurance agent or broker. The Consultant may not commence services or work relating to the Agreement prior to placement of coverage required under this Agreement. The Consultant certifies that the certificate of insurance attached as **Exhibit E**, preferably an ACORD certificate, complies with all insurance requirements of this Agreement. The City requests that the City's contract number be referenced on the Certificate. The City's acceptance of a certificate of insurance or other proof of insurance that does not comply with all insurance requirements set forth in this Agreement shall not act as a waiver of Consultant's breach of this Agreement or of any of the City's rights or remedies under this Agreement. The City's Risk Management Office may require additional proof of insurance, including but not limited to policies and endorsements. For the avoidance of doubt, Consultant shall not be required to provide copies of its full insurance policies to the City unless so required by law or in connection with a lawsuit or claim.

C. Additional Insureds: For Commercial General Liability and Business Auto Liability, the Consultant and subcontractor's insurer(s) shall name the City and County of Denver, its elected and appointed officials, employees and volunteers as additional insured.

D. Waiver of Subrogation: For all coverages required under this Agreement, the Consultant's insurer shall waive subrogation rights against the City.

E. Subcontractors and Subconsultants: All subcontractors and subconsultants (including independent contractors, suppliers or other entities providing goods or services required by this Agreement) shall be subject to all of the requirements herein and shall procure and maintain the same coverages required of the Consultant. The Consultant shall include all such subcontractors and subconsultants as additional insured under its policies (with the exception of Workers' Compensation) or shall ensure that all such subcontractors and subconsultants maintain the required coverages. The Consultant agrees to provide proof of insurance for all such subcontractors and subconsultants upon request by the City.

F. Workers' Compensation/Employer's Liability Insurance: The 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 per occurrence for each bodily injury claim, \$100,000 per occurrence for each bodily injury caused by disease claim, and \$500,000 aggregate for all bodily injuries caused by disease claims. The Consultant expressly represents

to the City, as a material representation upon which the City is relying in 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 the Consultant executes this Agreement.

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

H. Business Automobile Liability: The Consultant shall maintain Business Automobile Liability with limits of \$1,000,000 combined single limit applicable to all owned, hired and non-owned vehicles used in performing services under this Agreement.

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

J. Additional Provisions:

(1) For Commercial General Liability and Business Automobile Liability, the policy must provide the following:

- (i) That this Agreement is an Insured Contract under the policy;
- (ii) Defense costs are outside the limits of liability;
- (iii) A severability of interests, separation of insureds or cross liability provision; and
- (iv) A provision that coverage is primary and non-contributory with other coverage or self-insurance maintained by the City.

(2) For claims-made coverage, the retroactive date must be on or before the contract date or the first date when any goods or services were provided to the City, whichever is earlier.

(3) The Consultant shall advise the City in the event any general aggregate or other aggregate limits are reduced below the required per occurrence limits. At the Consultant's own expense, where such general aggregate or other aggregate limits have been reduced below the required per occurrence limit, the Consultant shall procure such per occurrence limits and furnish a new certificate of insurance showing such coverage is in force.

8. DEFENSE & INDEMNIFICATION:

A. The Consultant hereby agrees to defend, indemnify, and hold harmless the City, its appointed and elected officials, agents and employees against all liabilities, claims, judgments, suits or demands for damages to persons or property arising out of, resulting from, or relating to the work performed under this Agreement (“Claims”), unless and until such Claims have been specifically determined by the trier of fact to be due to the sole negligence or willful misconduct of the City. This indemnity shall be interpreted in the broadest possible manner to indemnify City for any acts or omissions of the Consultant or its sub-consultants or subcontractors either passive or active, irrespective of fault, including the City’s concurrent negligence whether active or passive, except for the sole negligence or willful misconduct of the City.

B. The Consultant’s duty to defend and indemnify the City shall arise at the time written notice of the Claim is first provided to the City regardless of whether an action has been filed in court on the Claim. The Consultant’s duty to defend and indemnify the City shall arise even if the City is the only party sued and/or it is alleged that the City’s negligence or willful misconduct was the sole cause of the alleged damages.

C. The Consultant shall defend any and all Claims which may be brought or threatened against the City and shall pay on behalf of the City any expenses incurred by reason of such Claims 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 the City shall be in addition to any other legal remedies available to City and shall not be considered the City’s exclusive remedy.

D. Insurance coverage requirements specified in this Agreement 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.

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

9. COLORADO GOVERNMENTAL IMMUNITY ACT: The Parties hereto understand and agree that the City is relying upon, and has not waived, the monetary limitations

and all other rights, immunities and protection provided by the Colorado Governmental Act, § 24-10-101, *et seq.*, C.R.S.

10. PERMITS, LICENSES, TAXES, CHARGES AND PENALTIES: The Consultant agrees to pay promptly all taxes, excises, license fees, and permit fees of whatever nature applicable to its operations or activities under this Agreement, and to take out and keep current all required licenses or permits (federal, state, or local) required for the conduct of its business hereunder, and further agrees not to permit any of said taxes, excises or license or permit fees to become delinquent. The Consultant further agrees to pay promptly when due all bills, debts and obligations incurred by it in connection with its operations and the performance of this Agreement and not to permit the same to be come delinquent. The City shall not be liable for the payment of taxes, late charges or penalties of any nature, except for any additional amounts which the City may be required to pay under § 20-107 to § 20-115, D.R.M.C. The City is a tax exempt entity.

11. EXAMINATION OF RECORDS: The Consultant agrees that any duly authorized representative of the City, including the City Auditor, shall, until the expiration of three (3) years after the final payment under this Agreement, have access to and the right to examine any books, documents, papers and records of the Consultant, involving transactions related to this Agreement.

12. ASSIGNMENT & SUBCONTRACT: Unless otherwise expressly provided in this Agreement, the Consultant covenants and agrees that the Consultant will not assign, transfer or subcontract the Consultant's rights and obligations hereunder without first obtaining the written consent of the Manager. Any assignment or subcontract approved by the Manager may require new or extended insurance being provided by the Consultant or the Consultant's assignee or subcontractor, as specified in the Manager's written consent. Any attempt by the Consultant to assign, transfer or subcontract the Consultant's rights and obligations hereunder without such prior written consent of the Manager may, at the option of said Manager, terminate this Agreement and all rights of the Consultant hereunder. Such consent may be granted or denied at the sole and absolute discretion of said Manager.

13. NO THIRD PARTY BENEFICIARY: The Parties understand and expressly agree 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 Parties. Nothing contained in this

Agreement shall give or allow any such claim or right of action by any third person. It is the express intention of the Parties 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.

14. NO AUTHORITY TO BIND CITY TO CONTRACTS: The Consultant has no authority to bind the City on any contractual matters. Final approval of all contractual matters which obligate the City must be executed by the City, as required by Charter and ordinance.

15. INTEGRATION & AMENDMENTS: This Agreement, including the exhibits and attachments hereto (each of which is specifically incorporated herein), is intended as the complete integration of all understandings between the Parties. No prior or contemporaneous addition, deletion, or other modification hereto shall have any force or effect, unless embodied in this Agreement in writing. No subsequent novation, renewal, addition, deletion, or other modification shall have any force of effect unless embodied in a written amendment to this Agreement properly executed by the Parties. Any oral representation by any officer or employee of the City at variance with terms and conditions of this Agreement or any written amendment to this Agreement shall not have any force or effect nor bind the City.

16. SEVERABILITY: The Parties agree that if any provision of this Agreement or any portion thereof is held by a court of competent jurisdiction to be invalid, illegal, unenforceable, or in conflict with any law, except for the provisions of the Agreement requiring prior appropriation of funds and limiting the total amount payable by the City, the validity of the remaining portions or provisions shall not be affected, if the intent of the Parties can be fulfilled.

17. CONFLICT OF INTEREST:

A. No employee of the City shall have any personal or beneficial interest in the services or property described in the Agreement; and the Consultant shall not hire, or contract for services with, any employee or officer of the City in violation of the City's Code of Ethics, D.R.M.C. §2-51, et seq. or the Charter §§ 1.2.8, 1.2.9, and 1.2.12.

B. The Consultant shall not engage in any transaction, activity or conduct which would result in a conflict of interest under this Agreement. The Consultant represents that the Consultant 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 Consultant by placing the Consultant's own interests, or the interests of any party

with whom the 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 the City has given the Consultant written notice which describes the conflict.

18. NOTICES & WORK ORDERS: Notices concerning the termination of this Agreement, notices of alleged or actual violations of the terms or conditions of this Agreement, and other notices of similar importance, including changes to the persons to be notified or their addresses, shall be made:

By Consultant to: Manager of General Services
 201 West Colfax Avenue, Dept. 1110
 Denver, Colorado 80202

All notices shall be in writing and provided by either personal delivery, certified mail, return receipt requested, or overnight courier. All notices are effective upon personal delivery or upon placing in the United States mail or with the courier service. Work Orders and Work Order Changes and notices related to the same may be delivered by means of facsimile transmission or email as specified in the Work Orders and Work Order Changes.

19. DISPUTES: All disputes of whatsoever nature between the City and the Consultant regarding this Agreement shall be resolved by administrative hearings pursuant to the procedure established by Denver Revised Municipal Code (“D.R.M.C.”), § 56-106(b), *et seq.* For the purposes of that procedure, the City official rendering a final determination shall be the Manager of the Department of Parks and Recreation.

20. GOVERNING LAW; COMPLIANCE WITH LAW; VENUE:

A. Governing Law: This Agreement shall be construed and enforced in accordance with applicable federal law, the laws of the State of Colorado, and the Charter and Revised Municipal Code of the City and County of Denver, and the ordinances, regulations and Executive Orders enacted and/or promulgated pursuant thereto, 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 as if fully set out herein by this reference.

B. Compliance with Law: The Consultant shall perform or cause to be performed all services and work under this Agreement in full compliance with all applicable

laws, ordinances, codes, rules, regulations and executive orders of the United States of America, the State of Colorado, and the City and County of Denver.

C. Venue: Venue for any legal action relating to this Agreement shall lie in the District Court in and for the City and County of Denver.

21. NO DISCRIMINATION IN EMPLOYMENT: 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 the Consultant further agrees to insert the foregoing provision in all subcontracts hereunder.

22. PREVAILING WAGES: Employees of the Consultant or the Consultant's subcontractors may be subject to the payment of prevailing wages pursuant to § 20-76, D.R.M.C., depending upon the nature of their work. By executing this Agreement, the Consultant covenants and affirms that the Consultant is familiar with the prevailing wages provisions and is prepared to pay or cause to be paid prevailing wages, if any, required by the scope of work of the Consultant or the Consultant's subcontractors.

23. PAYMENT OF LIVING WAGES:

A. Employees of the Consultant or the Consultant's sub-consultants or subcontractors may be subject to the payment of living wages pursuant to § 20-80 *et seq.*, D.R.M.C., depending upon the nature of their work. Pursuant to § 20-80, D.R.M.C., the Consultant shall pay every Covered Worker, as defined in § 20-80(a) D.R.M.C., employed by the Consultant directly upon the site of the work under this Agreement, the full amounts accrued at the time of payment, computed at wage rates not less than that specified in § 20-80(c), D.R.M.C., regardless of any contractual relationship which may be alleged to exist between the Consultant or any subcontractor and such workers. The Consultant shall post in a prominent place which is easily accessible to the Covered Workers that scale of wages to be paid to such workers.

B. The Consultant shall furnish to the City Auditor or his authorized representative, upon the Auditor's request, a true and correct copy of the payroll records of all Covered Workers working under this Agreement, either for the Consultant or any subcontractor. All such payroll records shall include information showing the number of hours worked by each Covered Workers, the hourly pay of such worker, any deductions made from pay, and the net

amount of pay received by such Covered Worker. The payroll record shall be accompanied by a sworn statement of the Consultant that the copy is a true and correct copy of the payroll records of all Covered Workers working under this Agreement, either for the Consultant or a subcontractor, that payments were made to the Covered Workers as set forth in such records, that no deductions were made other than those set forth in such records, and that all Covered Workers employed on work under this Agreement, whether by the Consultant or any subcontractor, were paid the living wages as set forth in this Agreement.

C. Increases in living wages pursuant to § 20-80, D.R.M.C., effective after the date of this Agreement shall not be mandatory on either the Consultant or the subcontractors if the term of this Agreement is less than one year. Increases in the living wages pursuant to § 20-80, D.R.M.C., shall be mandatory for the Consultant and the Consultant's subcontractors if the term of this Agreement is longer than one year, effective on the anniversary date of this Agreement. In no event shall any increases in living wages over the amount stated in this Agreement result in any increased liability on the part of the City, and the possibility and risk of any such increase is assumed by the Consultant. Decreases in living wages after the date of this Agreement shall not be permitted.

D. If any worker to whom the living wages are to be paid, employed by the Consultant or any subcontractor to perform work hereunder, has been or is being paid a rate of wages less than that required by this section, the Manager may, at the Manager's option, by written notice to the Consultant, withhold further payment to the Consultant or suspend or terminate the Consultant's right to proceed with the work or such part of the work as to which there has been a failure to pay the required wages. In the event of termination, the Consultant shall be liable to the City for any excess costs occasioned to the City thereby.

24. USE, POSSESSION OR SALE OF ALCOHOL OR DRUGS: The Consultant shall cooperate and comply with the provisions of Executive Order 94 concerning the use, possession or sale of alcohol or drugs. Violation of this provision or refusal to cooperate with implementation of the policy can result in the City barring the Consultant from City facilities or participating in City operations.

25. PROPRIETARY OR CONFIDENTIAL INFORMATION; OPEN RECORDS:

A. **City Information:** The Consultant acknowledges and accepts that, in performance of all Services under the terms of this Agreement, the Consultant may have access

to proprietary data or confidential information that may be owned or controlled by the City, and that the disclosure of such proprietary data or confidential information may be damaging to the City or third parties. The Consultant agrees that all proprietary data or confidential information provided or otherwise disclosed by the City to the Consultant shall be held in confidence and used only in the performance of the Consultant's obligations under this Agreement. The Consultant shall exercise the same standard of care to protect such proprietary data and confidential information as a reasonably prudent consultant would to protect the Consultant's own proprietary data or confidential information. Proprietary data and confidential information shall include, but not limited to, any materials or information which is designated or marked "Proprietary" or "Confidential" by the City or its agents, provided to or made available to the Consultant by the City subject to a confidentiality agreement or notice of confidentiality, or used by the City under a licensing agreement or other authorization by the owner of the materials or information. Proprietary data and confidential information may be in hardcopy, printed, digital or electronic format.

(1) **Use of Proprietary Data or Confidential Information:** Except as expressly provided by the terms of this Agreement and subject to written permission of the Manager, the Consultant agrees that the Consultant shall not disclose, disseminate, transmit, license, sublicense, assign, lease, release, publish, post on the internet, transfer, sell, permit access to, distribute, allow interactive rights to, or otherwise make available the proprietary data or confidential information, or any part thereof, or any repackaged form of the proprietary data or confidential information, or any part thereof, to any other person, party or entity in any form or media for any purpose other than performing the Consultant's obligations under this Agreement. The Consultant further acknowledges 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 or information except as provided in this Agreement.

The Consultant agrees that any ideas, concepts, knowledge, computer programs, or data processing techniques developed by the Consultant or provided by the City in connection with this Agreement, including any proprietary data or any 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 Manager; (2) the Consultant shall retain no copies, recreations, compilations, or decompilations, in whole or in part, of such data or information; (3) the Consultant shall, upon the expiration or earlier termination of the Agreement, destroy (and, in writing, certify destruction) or return all such data or information or work products incorporating such data or information to the City.

(2) **Employees and Subcontractors:** The Consultant shall inform the Consultant's 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 subcontractors unless such subcontractors 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 proprietary data or confidential information. The Consultant is hereby advised to verify the Consultant's work performed in reliance upon the proprietary data or confidential information. 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 a 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., § 24-72-201, *et seq.*, C.R.S., 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 the Consultant's 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 the Consultant's 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 the Consultant's claim of privilege against disclosure under this subsection 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.

26. INTELLECTUAL PROPERTY RIGHTS: The Parties intend that all property rights to any and all materials (in hard copy or electronic form), including but not limited to text, logos, documents, booklets, manuals, references, guides, brochures, advertisements, URLs or domain names, web pages, music, sketches, plans, drawings, prints, photographs, specifications, software, data, products, ideas, inventions, and any other work or recorded information created by the Consultant and paid for by the City pursuant to this Agreement, in preliminary or final forms and on any media whatsoever (collectively, "Materials"), shall belong to the City. The Consultant shall disclose all such Materials to the City and shall assign such rights over to the City upon completion of the project. To the extent permitted by the U.S. Copyright Act, 17 USC § 101, *et seq.*, the Materials are a "work made for hire" and all ownership of copyright in the Materials shall vest in the City at the time the Materials are created. To the extent that the Materials are not a "work made for hire," the Consultant hereby sells, assigns and transfers all right, title and interest in and to the Materials to the City, 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.

27. SOFTWARE PIRACY PROHIBITION: The Consultant shall perform no Services under this Agreement that results in or from the acquisition, operation, maintenance, or use of computer software in violation of United States copyright laws or applicable licensing restrictions. The Consultant hereby covenants and agrees that, for the term of this Agreement and any extensions, the Consultant has in place appropriate systems and controls to prevent such violations of federal law and licensing restrictions. If the City determines that the Consultant is in violation of this provision, the City may exercise any remedy available at law or equity or under this Agreement, including immediate termination of the Agreement and any remedy consistent with United States copyright laws or applicable licensing restrictions. The indemnification provision of this Agreement shall be applicable to any such violations by the Consultant.

28. 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 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 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 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 either the E-Verify Program.

(4) It is prohibited from using either the E-Verify Program procedures to undertake pre-employment screening of job applicants while performing its obligations under the Agreement, and it is required 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 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 Consultant is liable for any violations as provided in the Certification Ordinance. If 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 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 Consultant from submitting bids or proposals for future contracts with the City.

29. LEGAL AUTHORITY: The Consultant assures and guarantees that the Consultant possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement.

The person or persons signing and executing this Agreement on behalf of the Consultant, do hereby warrant and guarantee that he/she or they have been fully authorized by the Consultant to execute this Agreement on behalf of the Consultant and to validly and legally bind the Consultant to all the terms, performances and provisions herein set forth.

The City shall have the right, at its option, to either temporarily suspend or permanently terminate this Agreement, if there is a dispute as to the legal authority of either the Consultant or the person(s) signing the Agreement to enter into this Agreement.

30. NO CONSTRUCTION AGAINST DRAFTING PARTY: The Parties acknowledge that each of them and their respective counsel have had the opportunity to review this Agreement and that this Agreement shall not be construed against any party merely because this Agreement or any of its provisions have been prepared by a particular party.

31. CONTRACT DOCUMENTS; ORDER OF PRECEDENCE: This Agreement consists of Sections 1 through 38 which precede the signature page (“Agreement Text”), and the

following exhibits and attachments which are incorporated herein and made a part hereof by reference:

Exhibit A	Scope of Services
Exhibit B	Schedule and Rates
Exhibit C	Work Order
Exhibit D	Work Order Change
Exhibit E	Certificate of Insurance

In the event of (i) an irreconcilable conflict between a provision of the Agreement Text and any of the listed exhibits or attachments or among provisions of any exhibits or attachments, such that it is impossible to give reasonable effect to all, the order of precedence to determine which document shall control to resolve such conflict, is as follows, in descending order:

Agreement Text	
Exhibit A	Scope of Services
Exhibit B	Schedule and Rates
Exhibit C	Work Order
Exhibit D	Work Order Change
Exhibit E	Certificate of Insurance

32. SURVIVAL OF CERTAIN 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 expiration or earlier termination of this Agreement, shall survive such expiration or termination and shall continue to be enforceable as provided herein. Without limiting the generality of the foregoing, the 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.

33. INUREMENT: The rights and obligations of the Parties herein set forth shall inure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns permitted under this Agreement.

34. TIME IS OF THE ESSENCE: The Parties agree that in the performance of the terms, conditions, and requirements of this Agreement, time is of the essence.

35. SECTION 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.

36. CITY EXECUTION OF AGREEMENT: This Agreement shall not be or become effective or binding on the City until it has been fully executed by all signatories of the City and County of Denver.

37. COUNTERPARTS OF THIS AGREEMENT: This Agreement may be executed in counterparts, each of which shall be deemed to be an original of this Agreement.

38. ELECTRONIC SIGNATURES AND ELECTRONIC RECORDS: The 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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Contract Control Number:

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

CITY AND COUNTY OF DENVER

ATTEST:

By _____

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

By _____

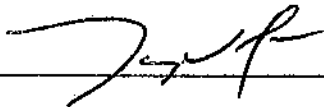
By _____

By _____



Contract Control Number: GENRL-201313638-00

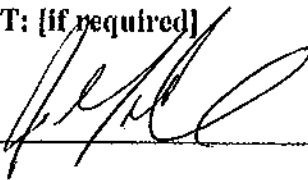
Contractor Name: Architectural Energy Corporation

By: 

Name: Troy Walters
(please print)

Title: Vice President
(please print)

ATTEST: [if required]

By: 

Name: JEREMY GARFIELD
(please print)

Title: DIRECTOR OF SALES
(please print)



EXHIBIT A

SCOPE OF WORK AND TECHNICAL REQUIREMENTS

1. BACKGROUND:

In December of 2011, the City and County of Denver signed on to the Better Buildings Challenge and its goal to reduce energy use 20% by the year 2020. This goal represents a continuation of the City's commitment to reducing energy use in City-owned and operated facilities. With a focus on continual improvement, the City has implemented numerous projects and programs including facility improvements, condition assessments, energy audits, retro-commissioning, and most recently ongoing commissioning.

In order to ensure ongoing support for the City's energy efficiency programs, the City is interested in engaging up to four (4) on-call vendors to provide energy related services as needed at various locations throughout the City. Tasks included under this contract will likely include the following:

1. Assessment of facility staffing, operations, and maintenance
2. Re/retro-commissioning of existing building lighting and HVAC equipment and systems
3. Level I and/or II ASHRAE energy audits
4. Ongoing commissioning planning and implementation
5. Facility condition assessments
6. System and equipment assessment studies and recommendations
7. Technical support including scope development, submittal review, and final commissioning
8. Completion of any relevant utility rebate documentation
9. Other performance reviews or tasks as needed

As a result of this solicitation, the City will have the flexible means of obtaining professional services quickly, efficiently, and cost-effectively by conducting spot market solicitations of the on-call contractors and issuing Task Orders for the completion of specific projects and activities for City agencies as needed.

The Scope of Work below should be considered the minimum project requirements unless otherwise directed by the City.

A.2 SCOPE OF WORK:

A.2.a *Baseline Assessment*

A Contractor may be required to conduct a baseline assessment of staffing and current operations and maintenance practices. An assessment will include, at minimum, a thorough review of staffing levels and skill sets, preventive maintenance (PM) activities, work orders, on-call contracts, and other support. Final assessment should note any deficiencies and include associated recommendations including, but not limited to, staffing levels, capabilities and training, preventive maintenance activities including type, frequency, and priority, and any other recommendations necessary to carry out a high performance building program.

A.2.b Re/Retro-Commissioning of Existing Building Systems

A Contractor may be required to perform a re/retro-commissioning (RCx) study on existing building systems including heating, cooling, air handling systems, lighting, and automated controls. The objective of the RCx process is to ensure that equipment and systems operate as efficiently as possible through no and low cost operational improvements while maintaining or improving occupancy comfort. The Contractor should also identify opportunities for larger scale capital improvements.

At a minimum, RCx efforts will include the following:

- a. Data collection
 - a. Drawings and construction documentation
 - b. Energy data
 - c. Utility information

- b. Utility data analysis (UDA)
 - a. Three years (or as provided) of data - month by month, normalized for billing periods.
 - b. Consumption and demand ratios by energy source (electric, gas, steam, chilled water) and end use (heating, cooling, lighting, etc.)

- c. Kick-off Presentation
 - a. Review field activities with building operators and managers
 - b. Communicate findings of UDA with recommendations of preliminary opportunities
 - c. Review systems to be analyzed during study
 - d. Project schedule
 - e. Communications matrix/protocols
 - f. Report template/outline

- d. Field Investigation
 - a. Automation systems - investigate to assess functionality:
 - i. Schedules
 - ii. Set-points
 - iii. Sequence of operations

 - b. Point-to-point verification
 - i. 100% for major systems/components (e.g.: air handler, boiler, chiller, etc)
 - ii. Minimum 15% sampling of terminal equipment (e.g.: VAV, unit heater, radiant panel, baseboard)

 - c. Functional Performance Testing
 - i. Set-point adjustments
 - ii. Determine functionality of equipment and the efficiency of control programming

 - d. Query building occupants and engineering staff on understanding of systems operations and performance to validate:

- i. Study results
 - ii. Physical observations
 - iii. Existing systems limitations
- e. Maintain master list of observations and deficiencies
- f. Resolve low-cost/no-cost deficiencies and problems
- g. Validate asset inventory and nameplate data in City-provided RCx data template generated from INFOR (City's preventive maintenance and work order database), make any necessary additions
- h. Install City-provided bar codes on all major equipment and record barcode number in data template
- e. Deliverables
 - a. Project Schedule
 - i. Project activities/timeline
 - ii. Milestones
 - 1. Kick-off meeting
 - 2. Preliminary Facility Improvement Measures (FIM) review
 - 3. Draft report to City and Utility (for rebate application)
 - 4. Final Project Presentation and Report
 - b. Communications Protocol
 - i. Matrix
 - ii. Meetings
 - iii. Email/Phone
 - iv. Scheduling/reporting
 - c. Final RCx Report
 - i. Executive Summary
 - ii. Facility description
 - 1. Physical
 - 2. Operational
 - iii. Utility data analysis
 - iv. Mechanical systems descriptions
 - v. Control systems description(s)/plain language sequence of operations
 - vi. Lighting system descriptions
 - vii. FIMs
 - 1. Detailed description of current equipment and configurations
 - 2. Description of recommended improvements w/sufficient detail to allow the City to implement (design level only)
 - 3. Description of source and quantity of energy impact
 - 4. Implementation cost estimate
 - 5. Prioritized Master FIM table
 - viii. Operations and maintenance observations
 - 1. Current staffing
 - 2. Current practices
 - 3. Staff capabilities/systems knowledge & understanding
 - 4. PM practices/systems/routines
 - ix. Building Operating Plan
 - x. Recommendations

d. INFOR Template

- i. Validated/updated asset inventory and equipment nameplate data
- ii. Equipment age and remaining life
- iii. Equipment and systems recommendation including classification
- iv. Prioritization

It is expected that all re/retro-commissioning projects will be completed under Xcel's recommissioning program unless otherwise directed by the City. The Contractor shall be responsible for providing whatever support is necessary to move these projects through Xcel's recommissioning rebate program.

A.2.c ASHRAE Level I and II Energy Audit

1.1 General Information

1.1.1 Contractor's steps in conducting ASHRAE Level I and Level II energy audits for this project will mirror the steps outlined in the "Procedures for Commercial Building Energy Audits," ASHRAE publication RP-669, SP-56. The steps for each building are as follows:

- a. Collect and analyze historical energy use.
- b. Study and observe the building and its operational characteristics.
- c. Identify potential modifications that will reduce energy use and/or cost.
- d. Perform an engineering and economic analysis of potential modifications.
- e. Prepare a rank-ordered list of potential modifications.
- f. Prepare reports to document the analysis processes and results.

1.2 Level I Energy Audits

1.2.1 Level I – Preliminary Facility Energy Use Analyses

a. Prior to the Walk-Through Analysis described below, Contractor shall gather at least two years of utility data for each building and document general building and equipment characteristics for each facility. This information will be used to develop energy utilization indices (EUIs) and cost indices, analyze building uses and functions, inventory energy consuming equipment and devices, catalogue building automation and control systems, identify changes and modifications, and compare the building under analysis with similar buildings and national energy use databases to assess current energy performance and the benefits of further analysis. Data sources will include the USEPA ENERGY STAR National Energy Performance Rating System and the Vendor's in-house EUI data records (This preliminary phase generally includes telephone interviews with facility manager(s) utilizing standardized questions to validate building, equipment and performance data, and to assess and record persistent operational and maintenance issues and/or problems.

1.2.2 Level I – Walk-Through Assessments and Analyses

a. Based in part on the results from the Preliminary Facility Energy Use Analyses, Contractor shall, in cooperation and coordination with City operations and maintenance staff and City Project Manager(s), prioritize and schedule the facilities for the Walk-Through Assessments and Analyses phase. This phase is conducted in two stages:

- 1) Walk-through assessments
- 2) Level I analyses

During the walk-through assessments, the Contractor's Energy Engineers will validate the data and information gathered in the Preliminary Facility Use Analysis. They will make visual observations and assessments of building envelopes, observe operations and performance, observe equipment and systems (lighting, HVAC, water use, conveyance, etc.) conditions and performance, determine if efficiency may be affected by building functions that differ from the original functional intent of the building, determine if maintenance problems or practices may affect efficiency, observe plug loads, determine the approximate breakdown of energy use for significant end-use categories, identify irregularities found in monthly energy use patterns with suggestions about possible causes, quantify the potential savings from switching to a different utility price structure, and identify low-cost/no-cost FIMs for immediate implementation.

b. The Level I walk-through assessment will, for each facility, be followed by a Level I analysis. The analysis will draw on all the data and information gathered in the Preliminary Facility Energy Use Analysis and the Level I Walk-through Assessment to quantify for each facility the potential for savings and improvements, qualify facilities on the basis of achieving overall City objectives, and select, prioritize and schedule facilities for Level II Energy Audits. The Level I analyses will identify low-cost/no-cost FIMs and evaluate other potential capital improvements that merit further consideration with an initial estimate of potential costs and savings for each facility.

c. If during the course of the Level I audits a facility is identified as meeting the Level II threshold criteria developed jointly by the Contractor and the City (see Section 1.3 below), the Contractor shall notify the City Project Manager(s) within 48 hours in writing of its recommendation to commence Level II auditing activities. The City shall respond in writing within 48 hours with a go or no-go response.

1.3 Level II Energy Audits

1.3.1 The Level II efforts include detailed savings and cost analysis for Level II FIMs, financial analyses (capitalization and budget impact), and the calculations and ranking of other key performance measures and metrics important to the City, both quantitative and qualitative. Additionally, the Contractor will assess the impact of other potential modifications, including planned building changes, occupancy and use changes, changes to operation and maintenance procedures and schedules, and modifications to control systems and sequencing. If required, the contractor shall perform energy simulations on pool enclosures/pool heating systems and compare the current system to the use of a heat pump type system and an air-to-air heat exchange system with and without pool covers at varying operating conditions.

1.3.2 Compared to a Level I audit, the Level II audit involves a higher level of engineering, on-site and analytical/assessment activities. The typical activities included in a Level II Energy Audit include:

- a. A review of mechanical, electrical and control systems design, installed conditions, maintenance practices, and operating methods and parameters.
- b. A review of existing operating and maintenance logs for identification of persistent issues, complaints and problems.
- c. Measurement of key operating parameters through on-site direct metering or logging and comparison to design levels to determine deviations and gaps from original design intent.
- d. Calculation and preparation of a breakdown of the total annual energy use by source into end-use components.
- e. Identification and listing of all possible FIMs to building, equipment, and operations that would save energy. For each FIM alternative, preliminary cost and savings estimates will be prepared.
- f. Collaboratively with the City, the Contractor will review the list of possible FIMs and rank and select those that will be analyzed further and prioritized in the anticipated order of implementation.
- g. For each selected FIM, the Contractor will estimate implementation cost, the potential savings in energy cost, and the FIMs' systemic energy index which accounts for the interdependent effects of multiple FIM implementations, systems and environmental interactions.
- h. Estimating the impact of each FIM on building operations, maintenance costs, and non-energy operating costs.
- i. Estimating the combined energy savings from implementing all selected FIMs (Level I and Level II) and comparing to the potential energy savings projected in the Level I analysis. Estimate total capital investment needed to implement all selected FIMs.

1.3.3 Level II audits will also provide evaluations and listings of potential capital-intensive improvements that may require even more thorough data collection and engineering calculations to reach an investment grade analysis of potential costs, savings and capital investments.

A.2.d Facility Condition Assessment

A Facility Condition Assessment (FCA) involves the systematic observation of building components and systems using a standardized assessment approach. Documenting and tracking the changing condition of the assets enables the budgeting, reporting, forecasting, and benchmarking of maintenance and CIP expenditures, for individual buildings and across a portfolio. At a minimum, an FCA will include the following:

1. Review Documents and Hold a Kick-off Meeting with Staff
 - a. Review building and engineering files, previous reports, test results and studies, building plans and specifications, asset lists (hard copy or electronic), and other pertinent internal/external documents.
 - b. Meet with facility staff to discuss documents, verify equipment to be visited, known building issues, and to obtain building security and access for the field work.
 - c. Coordinate FCA activities with any construction or commissioning activities underway.

2. Conduct an Asset Inventory
 - a. Obtain from CCD a populated electronic data template (“Template,” in Microsoft Excel format) for buildings with existing INFOR asset data, or obtain a blank Template for buildings without INFOR data.
 - b. Through site visits and the documents reviewed above, verify/revise/add/subtract as needed asset data in the Template at system or equipment thresholds defined by CCD.

3. Review Preventative Maintenance Activities and Schedules
For assets addressed in the “Asset Inventory” task (e.g. only those assets that meet the CCD-defined thresholds):
 - a. Review the current preventative maintenance (PM) procedures.
 - b. Determine if the ongoing PMs meet industry standards and/or warranty requirements.
 - c. Provide a Microsoft Word document with all pertinent PMs and redline the PMs with revision recommendations.

4. Provide a Visual Condition Evaluation of Building Equipment
For assets addressed in the “Asset Inventory” task:
 - a. Visually evaluate the condition of each asset.
 - b. Evaluate and define the asset condition per the following, checking all that apply:
 - i. New – under warranty
 - ii. New – not under warranty
 - iii. Excess energy use
 - iv. Unsafe
 - v. Broken
 - vi. Obsolete
 - vii. Beyond useful life
 - viii. Does not comply with code
 - ix. Does not comply with ADA

c. Populate the condition-related fields in the Template. Include condition description(s), life span, how far along an item has progressed through its lifecycle, comments on field condition, etc.

5. Prioritize Deficiencies

For assets addressed in the “Asset Inventory” task:

- a. Prioritize equipment deficiencies according to the criteria in the Template.
- b. For assets with one or more deficiencies:
 - i. Define the priority of the deficiency per definitions provided in the Template.
 - ii. Populate the Template with the appropriate deficiency-related fields.

6. Estimate Correction Costs

For assets addressed in the “Asset Inventory” task and where Priority #1 and #2 deficiencies are identified:

- a. Using a CCD-provided Excel spreadsheet, define the replacement cost (present value) if the expected cost of replacement is to be greater than or equal to \$10,000 (present value). Replacement costs should have a margin of error of +/-10% and be based on recent Contractor experience for similar or identical work.
- b. Populate the Template with the appropriate cost-related fields and attach the cost documents.

Note: Based on the Contractor’s professional judgment, the like-for-like replacement scenario can be substituted with alternate equipment where considerable energy or O&M savings can be realized based on ROI justifications.

7. Place Asset Tracking Barcodes

- a. Tag equipment visited with a barcode.
- b. Use an adhesive barcode (provided by the City) readable by a handheld scanner.
- c. Record the barcode number in the Template for upload into INFOR.

8. Conduct BAS Review and Assessment

a. Review (if available) the Building Automation System (BAS) to understand the programming, level of control and automation, and control optimization strategies.

b. Provide a plain-language description of the controls logic including:

- i. Schedules
- ii. Set points (adjustable and programmed)
- iii. System interactions
- iv. Reset strategies and variables

c. Provide recommendations for optimization of the controls strategies and sequences.

9. Complete Basic Functional Testing of Major Energy-Using Equipment

Utilizing the BAS (where possible) or on-board controls of equipment where no BAS is present. Test and document to the maximum extent possible the operation of major energy-using systems (e.g. HVAC) to understand:

- a. How the systems are being controlled;
- b. The effectiveness and adequacy of the current control sequences; and,
- c. The potential for optimization of the current control sequences.
- d. Resolve low-cost/no-cost deficiencies and problems

10. Provide a Summary Report in PDF Format for Each Building

Summary report will include the following sections:

- a. Introduction
- b. Description of scope and activities
- c. Building attributes
 - i. General
 - ii. Envelope
 - iii. Lighting
 - iv. Mechanical systems
 - v. Building control methods
 - vi. Miscellaneous
- d. Summary of findings
 - i. Template completion
 - ii. Deficiency identification
 - iii. Costs estimates
 - iv. Preventative maintenance suggested alterations
- e. Suggestions on how CCD can improve the FCA process
- f. Attachments (provide a list in the report, but provide the attachments in the format specified below)
 - i. List of barcodes applied to reviewed equipment;
 - ii. Additional pictures, if any, in JPEG format;
 - iii. Template in Microsoft Excel format;
 - iv. Preventative maintenance review with redlines PMs in Microsoft Word;
 - v. Cost correction spreadsheets in Microsoft Excel;
 - vi. BAS summary (if applicable) in PDF; and
 - vii. Functional test results in PDF (if applicable).

11. Participate in a Closeout Meeting

SUMMARY OF FCA DELIVERABLES

- 1. Completed activities listed above under “Scope of Work”
- 2. Populated Template
- 3. Summary Report with attachments as appropriate

A.2.e FCA Project Management

The City may require administrative and/or management support for the Facility Assessment. Tasks may include at minimum:

- Manage FCA field activities
- Facilitate meetings and ongoing communication with program stakeholders
- Review and approve project deliverables
- Interact with Infor provider to ensure timely and accurate upload of FCAP data
- Manage project budgets
- Provide periodic updates to City stakeholders
- Document closeout of low cost/no cost facility improvements

A.2.f Ongoing Commissioning Plan

The ongoing commissioning plan and monitoring activities should be designed to ensure that implemented improvements and their associated cost savings are sustained over time.

The OCx plan should include, at minimum, the following:

1. Description of OCx monitoring activities, frequency, and responsible parties
2. Performance metrics and tracking and reporting tools. Metrics should include actual energy use and cost savings, maintenance savings, and any other items relevant to the OCx program. Tracking should include methodology to verify actual energy and cost savings.
3. If necessary, a staffing plan for the facilities team including recommended staffing levels and appropriate skill sets if the existing level of expertise is not adequate. Include a separate recommendation for a third party to continue OCx monitoring activities in the event that hiring additional staff is not feasible and current staffing levels and skill sets are not adequate.
4. Recommendation for the use of asset monitoring and diagnostics software. The City owns INFOR 10 EAM Asset Sustainability Edition. As part of the OCx plan, the Contractor shall develop a recommendation for equipment monitoring and rule sets associated with optimal equipment and system operation (see more below).

A.2.g INFOR 10 EAM Asset Sustainability Edition

As discussed above, the City uses INFOR to track all work orders and PMs. The City owns the Asset Sustainability Edition, an asset monitoring and diagnostics software with the ability to provide real-time monitoring of equipment operation and energy use. Depending on the project scope, the Contractor may be required to provide recommendations for implementation of this program including equipment and points to be monitored, rule sets for monitored equipment, sub-metering, set up and use of threshold alarms, etc. Recommendations could include monitoring for both system and asset level. The Contractor shall provide a summary report on the asset monitoring program including a description of what was implemented, how it works, threshold alarms, and any other relevant information.

SUMMARY OF POTENTIAL PROJECT DELIVERABLES

1. Baseline assessment report for a facility
2. Re/retro-commissioning or energy audit report for a facility
3. FCA template and report
4. Ongoing commissioning plan for a facility
5. INFOR 10 EAM Asset Sustainability Edition monitoring recommendations and summary report for a facility
6. Engineering analysis report
7. Completed utility rebate documents
8. Project scope of work, submittal comments, or final commissioning report

EXHIBIT B

PRICING

Architectural Energy Corporation

	Hourly Billing Rate
Director / Principal Engineer	\$155
Manager / Senior Engineer	\$140
Engineer II	\$120
Associate Engineer	\$110
Associate Analyst / Project Coordinator / Admin	\$85

Exhibit C

Exhibit D

WORK/TASK ORDER CHANGE NAME OF PROJECT:

CONTRACT NO.

FACILITIES MANAGEMENT DIVISION

DEPARTMENT OF GENERAL SERVICES, 201 W. COLFAX AVE., DEPT. 904, DENVER, CO 80202, (720)-865-8680, FAX (720) 865-7585

CONTRACTOR/CONSULTANT:

CONTRACT NO.:

WORK/TASK ORDER NUMBER:

WORK/TASK ORDER CHANGE NO.:

BID/PROPOSAL REQUEST NO.:

PEOPLESOFT CHARTFIELD STRING:

CONTRACT NUMBER:

It is hereby mutually agreed that when this WORK/TASK ORDER CHANGE has been signed by the contracting parties, the following described changes shall be executed by the Contractor/Consultant without changing the terms of the Contract except as herein stipulated and agreed:

Modifications to the Work/Task Order as described:

The additional sum, as indicated herein below, constitutes full and complete consideration, payment and satisfaction to the Contractor/Consultant for the above described changes to the work order, and the Contractor/Consultant hereby agrees to make no further claims, demands, or requests of any kind whatsoever for further monies, extensions of time, other consideration for the above described changes to the work order.

THE CONTRACTOR/CONSULTANT AGREES to furnish all services, material and labor and perform all work/tasks required to complete the above described changes in accordance with requirements for similar work/tasks covered by the Work/Task Order, except as otherwise stipulated herein, for the following considerations:

Add to the Work/Task Order the sum of: XXXXXXXXXXXXXXXXXXXXXXXXXX and No/100 (\$0.00).

Increase / Decrease the Work/Task Order Completion Time _____ Calendar days or Revised Completion Date: _____

Contractor/Consultant: _____

Accepted for Contractor/Consultant by: _____ Title _____ Date _____

WORK/TASK ORDER NO. _____ COST SUMMARY
(By Project Manager)

Original Work/Task Order Amount	\$
Previous Work/Task Order Change Additions	\$
SUB-TOTAL	\$
Previous Work/Task Order Change Deductions	\$
Net Prior to this Work/Task Order Change	\$
This Work/Task Order Change - Add <Deduct>	\$
REVISED TOTAL WORK/TASK ORDER AMOUNT	\$

COST SUMMARY CONTRACT NO.

Total of All Work/Task Orders Issued	\$
Previous Additions/Deductions	\$
Net Prior to this Change	\$
This Change -- <input type="checkbox"/> Add or <input type="checkbox"/> Delete	\$
Revised Contract Amount	\$
Maximum Contract Amount	\$
Amount Available	\$

USING AGENCY

I hereby certify that funds are available that will be reserved to pay the Contractor in full for the work to be performed under this WORK/TASK ORDER CHANGE .

By Using Agency - Administrative or Budget Office Date

APPROVALS

Approved by Division of Small Business Opportunity Date

Approved by Project Manager Date

Approved by Director of Facilities Management Date

Approved by Manager of General Services Date

Approved as to Form by City Attorney Date

Exhibit E

