

**AGREEMENT
BETWEEN OWNER AND CONSTRUCTION MANAGER AS CONSTRUCTOR
(COST OF THE WORK PLUS A FEE WITH GUARANTEED MAXIMUM PRICE)**

THIS AGREEMENT is dated as of the ____ day of _____, 20__ (“Effective Date”), by and between the City of Olathe, Kansas (“Owner”) and Crossland Heavy Contractors, Inc. (“Construction Manager”). Owner and Construction Manager, in consideration of the mutual covenants hereinafter set forth, agree as follows:

ARTICLE 1 – THE PROJECT

- 1.01 The Project, of which the Work under the Contract Documents is a part, is generally described as follows: Vertical Well Field Improvements Project , PN 5-C-031-18.

ARTICLE 2 – GENERAL PROVISIONS

2.01 *Relationship of the Parties*

The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Engineer(s) and exercise the Construction Manager’s skill and judgement in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner’s interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

2.02 *General Conditions*

For the Preconstruction Phase, EJCDC® C-700, Standard General Conditions of the Construction Contract, as amended with Supplementary Conditions, shall apply only as specifically provided in this Agreement. For the Construction Phase, the General Conditions of the Contract shall be as set forth in EJCDC® C-700, as amended with Supplementary Conditions, which documents are incorporated herein by reference. The term “Contractor” as used in EJCDC® C-700 shall mean the Construction Manager. The term “Contract Price” as used in EJCDC® C-700 shall mean the Guaranteed Maximum Price.

- A. Owner stipulates that if the General Conditions that are made a part of this Contract are based on EJCDC® C-700, Standard General Conditions for the Construction Contract, published by the Engineers Joint Contract Documents Committee®, and if Owner is the party that has furnished said General Conditions, then Owner has plainly shown all modifications to the standard wording of such published document to the Construction Manager in the Supplementary Conditions.

ARTICLE 3 – CONTRACT DOCUMENTS

3.01 *Contents*

- A. The Contract Documents consist of the following:
 - 1. This Agreement (pages 1 to 18, inclusive).
 - 2. General Conditions (pages 1 to 65, inclusive).
 - 3. Supplementary Conditions (pages 1 to 29, inclusive).
 - 4. Addenda issued prior to execution of this Agreement.
 - 5. Any amendments to this Agreement with exhibits.
 - 6. Exhibits to this Agreement (enumerated as follows):
 - a. Exhibit A - Construction Manager's Cost Proposal.
 - b. Exhibit B – Construction Manager's Hourly Rate Schedule.
 - c. Exhibit C – Questionnaire of Personnel Practices and Certificate of Compliance
 - d. Exhibit D – Certificate of Good Standing to Conduct Business in Kansas
 - e. Exhibit E – Insurance Certificate and Endorsements
 - f. Exhibit F – Letter from Surety indicating the bonding capacity of Construction Manager.
 - g. Exhibit G – Non-collusive Affidavit of Prime Bidder.
 - 7. The following which may be identified in the Guaranteed Maximum Price Amendment to this Agreement upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and are not attached hereto:
 - a. Drawings.
 - b. General Requirements.
 - c. Technical Specifications.
 - d. Addenda issued for development of the Guaranteed Maximum Price.
 - e. Construction Manager's Guaranteed Maximum Price proposal.
 - f. Performance & Maintenance bond.
 - g. Statutory bond.
 - 8. The following which may be issued after the Guaranteed Maximum Price Amendment to this Agreement and are not attached hereto:
 - a. Notice to Proceed.
 - b. Work Change Directives.
 - c. Change Orders.
 - d. Field Orders.

- B. The documents listed in Paragraph 3.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. The Contract Documents may only be amended, modified, or supplemented by Amendment to this Agreement during the Preconstruction Phase or through a Change Order as provided in the General Conditions during the Construction Phase.

ARTICLE 4 – CONSTRUCTION MANAGER’S RESPONSIBILITIES

4.01 The Construction Manager’s responsibilities are set forth in Paragraphs 4.02 and 4.03 below. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

4.02 *Preconstruction Phase*

The Construction Manager shall provide a preliminary evaluation of the Owner’s program, schedule, and construction budget requirements, each in terms of the other. The Preconstruction Phase shall be complete upon the Owner’s acceptance of the Guaranteed Maximum Price and execution of the Guaranteed Maximum Price Amendment, unless otherwise agreed upon by Owner and Construction Manager.

- A. The Construction Manager shall actively engage with the Owner, Engineer(s), and other design professionals in a manner encouraging and supporting collaboration, cooperation, open communication, and trust.
- B. The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules, and regulations, but the Construction Manager shall promptly report to the Owner and Engineer(s) any nonconformity discovered by or made known to the Construction Manager as Request for Information in such form the Engineer may require.
- C. The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi-governmental authorities for inclusion in the Contract Documents.
- D. The Construction Manager shall prepare an initial cost estimate and schedule for the Project based on documents available at the time the cost is prepared. The cost shall be itemized for each division of work and separated by project identified in Article 1, but it shall be assumed the projects will occur concurrently or in immediate sequence for the purposes of developing the costs of general conditions, bonds, insurance, and the Construction Manager’s fee. The Owner and Engineer(s) will review the initial cost estimate and it will serve as a starting point for design development.
- E. As requested and required by the Owner and/or Engineer(s), the Construction Manager shall thoroughly evaluate the design plans and project specifications for completeness, constructability, maintainability, potential conflicts and problems, and errors and shall

provide written comments and discuss the outcome of such reviews with Owner and Engineer(s).

- F. The Construction Manager shall participate in meetings with the Owner and Engineer to discuss such matters as procedures, progress, coordination, scheduling, and value engineering of the Work. The schedule of such meetings shall be determined by the Owner and shall be mutually agreeable with the Construction Manager and Engineer(s). The Construction Manager shall, consistent with the Project requirements, advise the Owner and the Engineer on proposed site use and improvements; selection of materials; building systems, and equipment; constructability; availability of materials and labor; time requirements for procurement installation, and construction; and factors related to construction including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.
 - 1. The Construction Manager shall participate in one (1) kick-off meeting to review communication protocols, preconstruction schedule, and project scopes.
 - 2. The Construction Manager shall participate in three (3) meetings to review the initial cost estimate and to facilitate a value engineering effort to develop and evaluate potential project savings through means of construction, design modifications, alternative materials, and schedule optimization. The Construction Manager shall provide cost evaluations of proposed modifications.
- G. The Construction Manager shall develop a schedule for the construction of the project(s), collaborating with the Owner and Engineer(s) to provide information regarding the availability of materials and labor, procurement of materials and equipment having long-lead times, phased construction, project sequencing, and other factors impacting the time of construction.
- H. The Construction Manager shall identify and evaluate opportunities to accelerate the construction schedule by means of early bid packages or phased construction and determine the benefits and risks of such.
- I. The Construction Manager shall prepare, for the Owner and Engineers' review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction. If the Owner agrees to procure any items prior to the establishment of the Guaranteed Maximum price, the Owner shall procure the items on terms and conditions acceptable to the Construction Manager. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager thereafter shall accept responsibility for them.
- J. The Construction Manager shall collaborate with the Owner and Engineers on developing bid packages, subcontractor lists, and subcontractor prequalification criteria for all scopes of work. The Construction Manager shall actively engage the subcontractor market to heighten interest in the project.
- K. The Construction Manager shall, at an agreed upon time, provide the Owner with a Guaranteed Maximum Price proposal for the complete construction of the Project.
 - 1. The Guaranteed Maximum Price shall be the sum of the Construction Manager's estimate of the cost of the Work as described in Article 13 of the General Conditions, except where modified herein. The Guaranteed Maximum Price shall include

contingencies as described in Paragraph 4.02.K.2 below; the costs of general conditions, bonds, and insurance as described in the Construction Manager's Cost Proposal, and the Construction Manager's fee as described in the Construction Manager's Cost Proposal.

2. In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the cost of the Work but not included in a Change Order.
 - a. To the extent that the Drawings and Specifications are anticipated to require further development by the Engineer(s), the Construction Manager shall provide in the contingency for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment all of which, if required, shall be incorporated into a Change Order.
3. Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager.
 - a. Paragraph 7.06 of the General Conditions shall apply to the Preconstruction Phase, except where modified herein.
 - b. The Construction Manager shall submit to Owner a list of pre-qualified subcontractors which the Construction Manager intends to obtain bids. The Construction Manager shall also submit documentation identifying the Construction Manager's subcontractor pre-qualification process.
 - c. If the Construction Manager recommends a specific bidder or subcontractor that may be considered a "related party" according to Paragraph 13.06 of this Agreement, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction according to Paragraph 13.06.
 - d. The Owner may suggest specific subcontractors from whom the Construction Manager shall take bids. If the Construction Manager does not have a reasonable objection to the specific subcontractor, the Construction Manager shall provide the subcontractor with the Construction Manager's pre-qualification documentation in order to provide an opportunity for these subcontractor to become pre-qualified.
 - e. The Construction Manager shall obtain bids from subcontractors and suppliers and after analyzing such bids, shall deliver to the Owner and Engineer(s) a summary of all bids received for review. Additionally, if requested by the Owner, the Construction Manager shall deliver copies of all bids received to the Owner and Engineer(s) for their review. The Owner shall then determine, with the advice of the Construction Manager and Engineer(s), which bids shall be accepted.
 - f. Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a

cost plus a fee basis, the Construction Manager shall provide in the subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager.

4. The Guaranteed Maximum Price proposal shall be itemized for each division of work and for each project, with subtotals given for each project indicated in Article 1. It shall be assumed for the purposes of development of the Guaranteed Maximum Price that the projects indicated in Article 1 will be sequenced to occur as a single effort.
5. The Construction Manager shall refer to Paragraph SC 7.09 of the Supplementary Conditions regarding the Owner's tax-exempt status.
6. The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:
 - a. A list of the Drawings, Specifications, Addenda, and other Contract Documents used in preparation of the Guaranteed Maximum Price proposal.
 - b. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Paragraph 4.02.K.2 to supplement the information provided by the Owner and contained in the Drawings and Specifications. All such clarifications and assumptions shall take precedence over the Engineers' documents used to establish the Guaranteed Maximum Price only to the extent they are clearly annotated in writing and submitted to the Owner and Engineer, and subsequently approved in writing by the Owner.
 - c. The anticipated date of Substantial Completion and Final Completion upon which the proposed Guaranteed Maximum Price is based.
 - d. The date by which the Owner must accept the Guaranteed Maximum Price.
7. The Construction Manager shall meet with the Owner and Engineers to review the Guaranteed Maximum Price proposal. In the event that the Owner or Engineer(s) discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.
8. If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which will be provided to the Engineer(s). The Guaranteed Maximum Price Amendment shall set forth the agreed-upon Guaranteed Maximum Price and information and assumptions upon which it is based, including Contract Time.

4.03 *Construction Phase*

The Construction Phase shall commence upon written Notice to Proceed from the Owner following execution of the Guaranteed Maximum Price Amendment. The Construction Manager

shall not incur any costs related to construction of the Work or the Guaranteed Maximum price prior to the Notice to Proceed unless the Owner provides written authorization for such costs.

- A. The Construction Manager shall provide all services required for the complete management and performance of construction of the Project as set forth in Article 7 of the General Conditions and as amended by the Supplementary Conditions.
 - B. The Owner shall authorize the Engineer to provide revisions to the Contract Documents to incorporate the agreed-upon clarifications and assumptions contained in the Guaranteed Maximum Price Amendment and to complete the design as referenced in Paragraph 4.02.K.2.a. The Owner shall promptly furnish the revised Drawings and Specifications to the Construction Manager upon completion.
 - 1. The Construction Manager shall notify the Owner and Engineer of any inconsistencies between the Guaranteed Maximum Price Amendment and the revised Contract Documents.
 - 2. If the inconsistencies affect the Guaranteed Maximum Price or the Contract Time, the Construction Manager shall follow Articles 11 and 13 of the General Conditions.
 - C. The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work.
 - 1. Meetings shall be held on-site on a biweekly basis with Owner's representatives, Construction Manager's superintendent, and the Resident Project Representative.
 - 2. Meetings shall be held monthly with Construction Manager's project manager, Construction Manager's superintendent, Owner's representatives, Resident Project Representative, and Engineer's representatives.
 - D. The Construction Manager shall prepare, submit, and maintain a detailed construction schedule as required in Paragraphs SC 2.03.A.1 and 4.04 of the General and Supplementary Conditions identifying sequencing of construction activities and milestones necessary for the completion of the Work within the Contract Times.
 - E. The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner on a monthly basis.
- 4.04 Paragraph 5.06 of the General Conditions, as amended by the Supplementary Conditions, regarding hazardous environmental conditions at the Site shall apply to both the Preconstruction and Construction Phases.
- 4.05 Paragraph 7.18 of the General Conditions as amended by the Supplementary Conditions, regarding indemnification shall apply to both the Preconstruction and Construction Phases.
- 4.06 Paragraph 7.19 of the General Conditions regarding professional design services shall apply to both the Preconstruction and Construction Phases.

ARTICLE 5 – OWNER'S RESPONSIBILITIES

- 5.01 The Owner's responsibilities for the Preconstruction Phase are outlined in Paragraphs 5.02 through 5.04. The Owner's responsibilities for the Construction Phase are as outlined in Article 9 of the General Conditions.

5.02 *Information and Services Required of the Owner*

- A. The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, budget with reasonable contingencies, space requirements and relationships, flexibility and expandability, special equipment, systems, sustainability and site requirements.
- B. The Owner shall provide access for the Construction Manager to enter public and private property related to the Project and performance of Construction Manager's obligations under this Agreement.
- C. The Owner shall furnish information identified in Article 5 of the General Conditions that are relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. The Construction Manager's reliance on such information is as described in the General Conditions.
- D. The Owner shall establish and periodically update the Owner's budget for the Project, including (1) the budget for the cost of the Work as estimated by the Construction Manager, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If the Owner significantly increases or decreases the Owner's budget for the cost of the Work, the Owner shall notify the Construction Manager and Engineer. The Owner and the Engineer, in consultation with the Construction Manager, shall thereafter agree to a corresponding change in the Project's scope and quality.
- E. Prior to the execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request evidence of financial arrangement in accordance with Article 9.11 of the General Conditions.

5.03 *Owner's Designated Representative*

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or work of the Construction Manager. Except as otherwise provided in Article 10 of the General Conditions, the Engineer does not have such authority. The authority of the Owner's authorized representative to make decisions on behalf of the Owner shall be limited to those decisions customarily allowed in the capacity of the representative's position. Certain decisions of the Owner may require action or approval by other staff, commissions, or the governing body of the City of Olathe. The Owner's representative shall not be required to make decisions on matters which the representative is not authorized to make. It is the responsibility of the Owner's representative to determine which action or approval can be made by the Owner's representative or is required to be made by others. The Construction Manager is entitled to rely upon the action or approval provided by the Owner's representative as binding and authorized action or approval.

5.04 *Legal Requirements*

The Owner shall furnish all Owner-related legal, accounting, insurance, and auditing services that may be necessary at any time for completion of the Project. However, in no event shall any Owner-related legal, accounting insurance, and auditing services be provided on behalf of the

Construction Manager providing such services to the Owner, nor shall the Construction Manager serve any other role than as an independent contractor of the Owner.

ARTICLE 6 – ENGINEER

- 6.01 The Project has been designed by Burns & McDonnell Engineering, Inc.
- 6.02 The Owner has retained Burns & McDonnell Engineering, Inc. (“Engineer”) to act as Owner’s representatives, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work of their respective projects in accordance with the Contract Documents.

ARTICLE 7 – COMPENSATION FOR PRECONSTRUCTION PHASE SERVICES

7.01 Compensation

The Owner shall pay the Construction Manager a fixed lump sum amount, including all reimbursable expenses, not to exceed \$20,000.00 for Preconstruction Phase Services.

- A. The fee is based on completion of the Preconstruction Phase services, the services of which are described in Paragraph 4.02 of this Agreement.
- B. Reimbursable expenses must be authorized by the Owner in writing in advance and may include: expense of transportation in connection with the Project; expenses in connection with authorized out-of-town travel, long-distance communications, expenses of printing and reproductions, postage and facsimile transmissions, expenses of renderings and models requested by the Owner, and other costs as authorized by the Owner in writing.
- C. If the Owner authorizes by an amendment to the Agreement, Preconstruction Phase services in addition to the services outlined in Paragraph 4.02 of this Agreement, the Construction Manager’s compensation for Preconstruction Services shall be adjusted by Amendment for any additional services provided by the Construction Manager based upon the actual hours incurred by the Construction Manager’s staff multiplied by the hourly rates for the staff as shown in the Construction Manager’s hourly rate schedule of Exhibit A.

7.02 Payments

- A. The Construction Manager may bill the Owner monthly for completed Preconstruction Services and reimbursable expenses. The invoice submitted by the Construction Manager must itemize the services and reimbursable expenses for which payment is requested.
- B. Owner agrees to pay the Construction Manager within thirty (30) days.

ARTICLE 8 – COMPENSATION FOR CONSTRUCTION PHASE SERVICES

8.01 Contract Price

- A. The Owner shall pay the Construction Manager for completion of the Work as described in Paragraph 4.03 and in accordance with the Contract Documents in current funds. The Owner and Construction Manager agree the amount of the Contract Price will be identified in the Guaranteed Maximum Price amendment.
- B. The Construction Manager guarantees that the Contract Price shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it

is amended from time to time by Change Order. To the extent the cost of the Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

- C. The Guaranteed Maximum Price, Substantial Completion Date, and Final Completion Date are subject to additions and deductions by Change Order as provided in the General Conditions.

8.02 *Construction Manager's Fee*

The Construction Manager's fee shall be computed based upon the cost of the Work, as defined in Article 13 of the General Conditions, multiplied by **5.75 percent (5.75%)**.

- A. The Owner and Construction Manager agree the amount of the Construction Manager's fee will be computed at the time the Guaranteed Maximum Price is developed and the amount will be identified in the Guaranteed Maximum Price Amendment.
- B. The fee shall be identified in the Schedule of Values, earned as work progresses, and billed monthly as part of the Construction Manager's Applications for Payment.

8.03 *General Conditions*

- A. The cost of general conditions shall be computed based upon the cost of the Work, as defined in Article 13 of the General Conditions, multiplied by **8.00 percent (8.00%)**.
 - 1. General conditions cost elements include: payroll costs and other compensation of Construction Manager's officers, executives, principals (of partnerships and sole proprietorships), general managers, safety manager, engineers, architects, estimators, attorneys, auditors, accountants, clerical, purchasing and contracting agents, timekeepers, clerks, information technology, and other principal and branch office staff; expenses of Construction Manager's principal and branch offices other than the Construction Manager's office at the Site; field office and expenses including office furniture, equipment and supplies, temporary utilities, computers, software, telephones, and fax; printing and plan reproduction; postage, express mail, and messenger service; on-Site and off-Site staff vehicles and transportation costs; project staff sustenance cost; job meeting materials; first aid supplies; royalties; general protection and safety; including temporary construction fence, barricades, lights, traffic control, and other devices; winter weather protection and heating; temporary toilets; general light duty tools and supplies of the Construction Manager; general construction photographs; project sign; routine cleanup; final cleanup; operation and maintenance manuals and materials; and warranty inspections and coordination.
 - 2. The Owner and Construction Manager agree the amount of general conditions will be computed at the time the Guaranteed Maximum Price is developed and the amount will be identified in the Guaranteed Maximum Price Amendment.
 - 3. The cost shall be identified in the Schedule of Values, earned as work progresses, and billed monthly as part of the Construction Manager's Application for Payment.

8.04 *Bonds and Insurance*

- A. The cost of bonds and insurance provided by the Construction Manager shall be computed at the following rates: Insurance at **0.5%**; Bonds at **0.8%**.

1. The Owner and Construction Manager agree the amount of bonds and insurance will be computed at the time the Guaranteed Maximum Price is developed and the amount will be identified in the Guaranteed Maximum Price Amendment.
2. The cost shall be identified in the Schedule of Values and may be billed when the cost is incurred as part of the Construction Manager's Application for Payment.

8.05 *Changes in the Work*

- A. The Contract Documents may be amended or supplemented as provided for in the General Conditions.
- B. Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price amendment may be determined in accordance with Articles 11 and 13 of the General Conditions.
- C. For changes in the Work that either increase or decrease the Guaranteed Maximum Price, the Construction Manager's fee shall be equitably adjusted at the rate identified in Paragraph 8.02.
- D. For changes in the Work that either increase or decrease the Guaranteed Maximum Price, the cost of general conditions shall be equitably adjusted at the rate identified in Paragraph 8.03.
- E. For changes in the Work that either increase or decrease the Guaranteed Maximum Price, the cost of bonds and insurance shall be equitably adjusted at the rates identified in Paragraph 8.04.
- F. For changes in the Work of subcontracts that either increase or decrease the Guaranteed Maximum Price, the Subcontractor's fee shall be determined in accordance with Article 11 of the General Conditions and the Construction Manager's fee shall be equitably adjusted at the rate identified in Paragraph 8.02.

8.06 *Progress Payments*

- A. Construction Manager shall submit Applications for Payment in accordance with Article 15 of the General Conditions except where modified herein. Applications for Payment will be processed as provided in the General Conditions.
 1. The format of the progress payments will be as set forth by the Owner.
 2. The period covered by each Application for Payment shall be a minimum of four (4) weeks.
 3. The Owner will provide the Construction Manager with a schedule identifying dates established by the Owner for the issuance of progress payments. The Owner, Engineer, and Construction Manager will review this schedule and develop a project specific schedule identifying dates for the submittal and review of the Construction Manager's Applications for Payment and the Owner's subsequent payment to the Construction Manager.
 4. The Application for Payment shall be deducted by the shortfall, if any, indicated by the Construction Manager in the documentation required by Paragraph 8.08.A to substantiate prior Applications for Payment, or resulting from error subsequently discovered by the Owner's auditors in such documentation.

5. The Owner and Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments to Subcontractors.
- B. Owner shall make progress payments on account of the Contract Price on the basis of Construction Manager's Applications for Payment as provided in the schedule referenced in Paragraph 8.06.A.3, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. All such payments will be measured by the Schedule of Values established as provided in the General Conditions.
 1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Owner may withhold, including but not limited to liquidated damages, in accordance with the Contract.
 - a. 95% percent of Work completed (with the balance being retainage) and
 - b. 95% percent of cost of materials and equipment not incorporated in the Work (with the balance being retainage).
 - C. Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Construction Manager to 97% of the Work completed, less such amounts set off by Owner pursuant to Paragraph 15.01.E of the General Conditions, and less 200% of Engineer's estimate of the value of Work to be completed or corrected as shown on the punch list of items to be completed or corrected prior to final payment.

8.07 *Final Payment*

- A. Upon final completion and acceptance of the Work in accordance with Paragraph SC 15.06.A of the Supplementary Conditions, Owner shall pay the remainder of the Contract Price as recommended by Engineer as provided in Paragraph 15.06.B of the General Conditions.

8.08 *Accounting Records and Auditing*

- A. With each Application for Payment, the Construction Manager shall be prepared to make available to the Owner but not submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Engineer to demonstrate that cash disbursements already made by the Construction Manager on account of Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for the period covered by the present Application for Payment.
- B. The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Agreement and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda, and other data relating to the Contract. The

Construction Manager shall preserve these records for a period of three (3) years after final payment, or for such longer period as may be required by law.

- C. The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 30 days of delivery of the final accounting to the Owner by the Construction Manager. Based upon such cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting and provided the conditions of Paragraph SC 15.06.A of the Supplementary Conditions have been met, the Engineer will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate of Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Engineer's reasons for withholding certificate as provided in Paragraph 15.01.C of the General Conditions. The Engineer is not responsible for verifying the accuracy of the Construction Manager's final accounting.
- D. If the Owner's auditors report the cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount pursuant to Paragraph 12.01.D of the General Conditions. A request for mediation shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Engineer's final Certificate for Payment. Failure to request mediation within this period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Engineer's final Certificate for Payment.

ARTICLE 9 – INTEREST

- 9.01 All amounts not paid when due shall bear interest at the rate prescribed under K.S.A. 16-1901 et seq., and any amendments thereto.

ARTICLE 10 – BONDS AND INSURANCE

10.01 Bonds

- A. The Construction Manager shall furnish a Performance and Maintenance Bond and a Statutory Bond as required in the General Conditions and Supplementary Conditions. The amount of each bond shall be equal to one-hundred percent (100%) of the Guaranteed Maximum Price.
- B. The Construction Manager shall deliver the required bonds to the Owner no later than ten (10) days after the Owner's approval of the Guaranteed Maximum Price Amendment. In no case shall the Construction Manager commence Work at the project site until such time as the bonds have been received and approved by Owner.

10.02 Insurance

- A. The Construction Manager shall be required to maintain and carry in force for all phases of the Contract insurance coverage of the types and meeting or exceeding the minimum coverage amounts identified in the General Conditions and Supplementary Conditions.

ARTICLE 11 – DISPUTE RESOLUTION

11.01 Any Claim between Owner and Construction Manager for all phases of the Contract shall be resolved in accordance with Articles 12 and 17 of the General Conditions.

ARTICLE 12 – TERMINATION OR SUSPENSION

12.01 Article 16 of the General Conditions shall apply to all phases of the Project, except where modified herein.

12.02 *Termination During Preconstruction Phase*

- A. Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven (7) days of written notice to the Construction Manager for the Owner's convenience and without cause.
- B. In the event of a termination of this Agreement pursuant to Paragraph 12.02.A, the Construction Manager shall be equitably compensated for Preconstruction Phase services performed prior to receipt of a notice of termination. In no event shall the Construction Manager's compensation under this Paragraph exceed the compensation set forth in Paragraph 7.01.A of this Agreement.
- C. If the Owner terminates the Contract pursuant to Paragraph 12.02.A and Owner has authorized in writing pursuant to Paragraph 4.03 for Construction Manager to incur costs associated with the cost of the Work prior to the commencement of the Construction Phase, the Owner shall pay to the Construction Manager the cost of the Work incurred by the Construction Manager to the date of termination and the Construction Manager's fee, general conditions, bonds and insurance as outlined in Paragraphs 8.02, 8.03, and 8.04. In this case, all other provisions of Article 16 of the General Conditions shall apply.

12.03 *Termination During Construction Phase*

- A. Following execution of the Guaranteed Maximum Price Amendment, the Contract may be terminated as provided in Article 16 of the General Conditions, subject to the provisions herein.
- B. If the Owner terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager pursuant to Paragraphs 16.02 and 16.03 of the General Conditions, as amended by the Supplementary Conditions, shall not exceed the amount of the Cost of the Work incurred by the Construction Manager to the date of termination and the Construction Manager's fee, general conditions, bonds and insurance as outlined in Paragraphs 8.02, 8.03, and 8.04. In this case, all other provisions of Article 16 of the General Conditions shall apply.

ARTICLE 13 – MISCELLANEOUS

13.01 *Terms*

- A. Terms used in this Agreement will have the meanings stated in the General Conditions and the Supplementary Conditions.

13.02 *Titles, Subheads, and Capitalization*

- A. Title and subheadings as used herein are provided only as a matter of convenience and shall have no legal bearing on the interpretation of any provision of this Agreement. Some terms are capitalized throughout this Agreement but the use of or failure to use capital shall have no legal bearing on the interpretation of such terms.

13.03 *Ownership and Use of Documents*

- A. The Engineer(s) and their respective subconsultants shall be deemed the authors and owners of their respective technical documents including Drawings and Specifications. Provided all payments have been made to Engineer in accordance with its agreement with Owner, the technical documents are the Owner's exclusive property. The Owner owns all copyrights in and to the technical documents. The Construction Manager, Subcontractors, and material or equipment suppliers shall not own or claim a copyright in the technical documents. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Owner's reserved rights.

13.04 *Assignment of Contract*

- A. Unless expressly agreed to elsewhere in the Contract, no assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, money that may become due and money that is due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

13.05 *Successors and Assigns*

- A. Owner and Construction Manager each represent that they are duly authorized to enter into the Contract, and binds itself, its successors, assigns, and legal representatives to the other party hereto, its successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

13.06 *Related Party Transactions*

- A. For the purposes of this paragraph, the term "related party" shall mean a parent, subsidiary, affiliate, or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "related party" includes any member of the immediate family of any person identified above.
- B. If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods, or services from the related party, as Subcontractor, according to the terms of the Agreement and General Conditions. If the

Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods, or service from some person or entity other than a related party according to the terms of the Agreement and General Conditions.

13.07 Severability

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Construction Manager, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

13.08 No Third Party Beneficiaries

- A. Nothing contained herein shall create a contractual relationship with, or any rights in favor of, any third party.

13.09 Independent Contractor

- A. The Construction Manager is an independent contractor and as such is not an agent or employee of the City of Olathe, Kansas.

13.10 Affirmative Action/Other Laws

- A. Construction Manager shall observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and shall not discriminate against any person in the performance of work under the present contract because of race, religion, color, sex, disability, national origin, ancestry, or age;
- B. During the performance of this Agreement, the Construction Manager agrees that:
 - 1. In all solicitations or advertisements for employees, the Construction Manager shall include the phrase, "equal opportunity employer," or similar phrase to be approved by the commission;
 - 2. If the Construction Manager fails to comply with the manner in which the Construction Manager reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Construction Manager shall be deemed to have breached the present contract and it may be cancelled, terminated, or suspended, in whole or in part, by the Owner without penalty;
 - 3. If the Construction Manager is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the commission which has become final, the Construction Manager shall be deemed to have breached the present contract and it may be cancelled, terminated, or suspended, in whole or in part, by the contracting agency; and
 - 4. The Construction Manager shall include the provision of this Paragraph 13.10 in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or vendor.
- C. The provisions of this paragraph shall not apply to a contract entered into by the Owner with Construction Manager if:

1. Construction Manager employs fewer than four employees during the term of such contract; or
 2. Construction Manager's contract with the Owner totals \$10,000 or less in aggregate.
- D. The Construction Manager further agrees and acknowledges that it shall abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 et seq.) and the applicable provision of the Americans With Disabilities Act (42 U.S.C. 1201 et seq.) as well as all other federal, state, and local laws, ordinances, and regulations applicable to this project and to furnish any certification required by any federal, state, or local governmental agency in connection therewith.

13.11 Construction Manager's Certifications

- A. Construction Manager certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 13.11:
1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the bidding process or in the Contract execution;
 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition;
 3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
 4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, Owner and Construction Manager have signed this Agreement.

OWNER:

CONSTRUCTION MANAGER:

City of Olathe, Kansas

By: _____

Title: City Manager

Attest: _____

Title: _____

Address for giving notices:

P.O. Box 768

Olathe, KS 66051-0768

By: _____

Title: _____

(If Construction Manager is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)

Attest: _____

Title: _____

Address for giving notices:

Construction Manager's Phone Number

License No.: _____

(where applicable)

Agent for service of process:

If Owner is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of this Agreement.)

Approved as to form:

Deputy City Attorney