

Terms and Conditions of Agreement for Professional Services

May 9, 2011

1. **Independent contractor.** The Consultant is an independent contractor, and not an employee, agent, or partner of the Purchaser. The Consultant is responsible for the means and methods used in performing the Services.
2. **Licensing.** The Consultant will maintain, at its own expense, all licenses and certifications necessary to perform the Services.
3. **Standard of care.** The Consultant will cause the Services to be provided with all due care that would be followed for a comparable project by a reasonably skilled professional consultant in the same field, working in the same region where the Project is located. The Consultant will comply with all legal requirements applicable to the Services.
4. **Schedule.** The Consultant agrees to perform the Services as expeditiously as is consistent with professional skill and care and the orderly progress of the Project. In addition, the Consultant will comply with any reasonable scheduling requirements that are provided in writing by the Purchaser. If requested by the Consultant, the Purchaser agrees to discuss these scheduling requirements with the Consultant and to make appropriate adjustments, provided that the schedule for the Project must not be adversely affected.
5. **Changes.** The Consultant will accept reasonable changes in the scope of the Services. Such changes will be made only as directed in writing by the Purchaser. If the Consultant's fee is a lump sum amount, it will be equitably adjusted up or down for changes. Not-to-exceed limits will not be adjusted for changes unless the Purchaser so states in writing. No oral modifications to this Agreement will be recognized.
6. **Communications.** All communications between the Consultant and other participants in the Project (e.g., the Owner, the trade contractors, or other consultants) shall be forwarded through the Purchaser.
7. **Confidentiality.** The Consultant shall maintain the confidentiality of information designated as confidential by the Purchaser or the Owner or its representatives, unless the information is already publicly available or known to the Consultant from a non-confidential source. Confidentiality shall not be required if withholding the information would violate the law or create the risk of significant harm to the public.
8. **Conflicts of interest.** Except with the Purchaser's written consent, the Consultant will not engage in any activity, or accept any other assignments, that would reasonably appear to compromise the Consultant's professional independence or judgment with respect to this Project.
9. **EEO.** The Consultant agrees not to discriminate against any individual with respect to hire, discharge, compensation, terms, conditions or privileges of employment, or segregation of facilities because of such individual's race, color, religion, sex, age, disability, or national origin.
10. **Safety.** The Consultant is fully responsible for the safety of its own personnel and for the effect of the Consultant's Services and activities on the safety of others.
11. **Indemnification.** To the fullest extent permitted by law, the Consultant shall defend, indemnify and hold harmless Purchaser and Owner and their agents, employees, owners, officers, members, partners, affiliates, and successors from and against any and all liabilities, claims, causes of action, lawsuits, or expenses involving: (a) Negligence, errors, omissions, or other fault of the Consultant, or persons for whom it is responsible; (b) personal injury or death to any person (including employees of Consultant or persons for whom Consultant is responsible); (c) unsafe conditions caused by the Consultant or persons for whom it is responsible; (d) infringement of intellectual property rights resulting from an item or process furnished, designed, or specified by the Consultant or persons for whom it is responsible; or (e) the Purchaser's legitimate enforcement of this indemnification provision; unless the injuries or damages are caused by the sole or gross negligence, or the willful, wanton or intentional misconduct, of the party seeking to be indemnified. Notwithstanding the foregoing, the Consultant's obligation to indemnify shall be limited by the insurance limits required to be carried by the Consultant under this Agreement, the insurance available to the Consultant under the Agreement, or three times the maximum compensation of the Consultant under the Agreement, whichever of the foregoing amounts is larger. Consultant's obligation to indemnify shall not include any obligation to indemnify which is prohibited by applicable law. In the event an arbitration panel or court of competent jurisdiction determines any of the indemnification obligations of this Agreement are void or unenforceable, in whole or in part, the limitation of liability set forth in the immediately preceding sentence shall not apply, and Consultant agrees to indemnify Purchaser and Owner, their officers and employees, from liabilities, damages, losses and costs, including,

but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness or intentional wrongful misconduct of the Consultant and persons employed or utilized by the Consultant in the performance of this Agreement. The indemnification rights in this Agreement shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist. The indemnification provisions contained in this Agreement shall survive the completion or termination of this Agreement. These indemnification obligations shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Consultant under Workers' or Workmen's Compensation Acts, Disability Acts or other Employee Benefit Acts. Consultant is fully responsible for its officers, employees, agents, and other personnel, as well as its sub consultants or suppliers at any tier and their personnel.

- 12. Insurance.** The Consultant agrees to comply with the Insurance Requirements detailed on page 3. The insurance provisions contained in this Agreement are intended to be a separate and distinct obligation on the part of the Consultant. Therefore, these provisions shall be enforceable and Consultant shall be bound thereby regardless of whether or not the indemnity provisions of the Agreement are determined to be enforceable, in whole or in part, in the jurisdiction in which the Agreement is to be performed.
- 13. Payment.** The Consultant may bill monthly for the Services it has performed and any allowable expenses it has incurred. Payments to which the Consultant is entitled will be made within 7 days after payment by the Owner, and no more than 90 days after receipt of the Consultant's bill, unless the Owner withholds payment over an issue with regard to the Consultant's billing or the Services. The Purchaser, the Owner, and its representatives have the right to obtain supporting data and/or audit as reasonably related to fees and expenses that have been billed and/or paid. Bills should be sent in three copies. The Consultant must sign a waiver/release form reasonably acceptable to the Purchaser before receiving final payment.
- 14. Liens.** The Consultant will not allow any liens to be filed or maintained against the Project by itself, or persons for whom it is responsible, except to the extent of wrongful non-payment by the Purchaser.
- 15. No assignment.** Neither party may assign this Agreement, or any of its rights, duties, or obligations, without written approval of the other party.
- 16. Termination.** Either party may terminate this Agreement, with or without cause, on 30 days' written notice. Alternatively, the Purchaser may terminate this Agreement on 72 hours' written notice if the Consultant commits and fails to cure a breach of the Agreement, or if the Purchaser no longer needs the Services. In the event of termination, the Consultant will be entitled to be paid only for Services actually provided, and allowable expenses actually incurred, through the date of termination. To the extent feasible without unreasonably increasing its legal exposure, the Consultant will cooperate in providing materials prepared through the date of termination which give the Purchaser and/or Project Owner the benefit of the partially completed Services. The Indemnification, Insurance, and Payment provisions of this Agreement survive termination.
- 17. Reliance on reports.** Any reports, drawings, specifications, or other documents provided by the Consultant as part of the Services may be relied on by the Purchaser, the Owner, or its representatives.
- 18. Ownership and use of documents.** Any drawings, specifications, or other written designs provided by the Consultant as part of the Services shall be considered authored and owned by the Consultant (unless transfer of ownership is required by Purchaser's contract with the Owner) and may be used by the parties only for purposes of the Project. Otherwise, the reports or other documents provided by the Consultant as part of the Services shall be the property of the Purchaser. The Consultant hereby grants to the Purchaser, the Owner, and its representatives a non-exclusive, royalty-free license to patents now or hereafter owned by the Consultant covering any item, process, or design pertaining to the Project.
- 19. Disputes.** In the event of a dispute, senior officials of the parties will meet in a good faith attempt to resolve the dispute. Any dispute relating to this agreement which remains will be decided by binding arbitration in accordance with the then-applicable Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"). The arbitration will be held at the AAA office closest to the Project. Judgment on the arbitration award may be entered by any court having jurisdiction. If, however, the Purchaser is a party to litigation or a separate arbitration provision, it may elect to join the dispute with the Consultant as part of that litigation or separate arbitration. Pending resolution of a dispute, the Consultant will continue providing the Services and the Purchaser will continue paying amounts to which the Consultant is entitled.

20. **Remedies.** The parties waive consequential, punitive, and exemplary damages against each other for matters relating to this Agreement, except to the extent a third party claims such damages against one party due to the fault of the other party.
21. **Governing law.** This Agreement is governed by the law of the state where the Project is located, except that arbitration is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*
22. **Third-party beneficiaries.** There are no third-party beneficiaries to this Agreement, except that the Owner and its representatives may rely on the Services provided by the Consultant.
23. **No counteroffers.** The Consultant will be deemed to accept the terms of this Agreement by beginning work or by signing and returning the PS Order. No different or additional terms and conditions proposed by the Consultant will be accepted or incorporated into this Agreement unless specifically approved in writing by the Purchaser.

**Insurance Requirements
of Agreement for Professional Services**

May 9, 2011

1. **Coverages and limits.** The Consultant will obtain policies of insurance as follows:

<u>Policy</u>	<u>Minimum Limits</u>	
Worker's Compensation	Statutory	
Employer's Liability	Per Accident	\$1 Million
Automobile Liability covering owned, non-owned and hired automobiles of the Consultant.	Per Accident	\$1 Million
Commercial General Liability ("CGL")	General Aggregate	\$1 Million
	Products/Completed Operations Aggregate	\$1 Million
	Personal/Advertising Injury	\$1 Million
	Each Occurrence	\$1 Million
Professional Liability	Per Claim	\$1 Million

2. **Standards for insurers.** The insurance companies must be licensed to operate in the state where the Services are being performed and carry a Best's rating of A-VII or better.
3. **Certificate and endorsements required.** The Consultant must furnish, before beginning any of the Services, a certificate on an ACORD form or other form acceptable to Purchaser and copies of any additional insured endorsements showing evidence of the coverages, limits of liability, and policy expiration dates. The certificates must also indicate:
- Any coverage exclusions or deviations between the CGL policy and the 1988 ISO CGL OCCURRENCE form or subsequent versions.
 - That the Purchaser and the Owner are additional insureds on the CGL policy with respect to liability arising out of activities, "operations" or "work" performed by or on behalf of Consultant using an additional insured endorsement at least as broad as CG2010 11 85 as determined by Purchaser, provided that in no case shall any additional insured endorsement exclude coverage for Purchaser's or Owner's own negligence nor limit coverage for Purchaser or Owner only to potential liability incurred solely as a result of Consultant's acts or omissions and that nothing in the additional insured endorsement shall limit Purchaser's or Owner's products-completed operations coverage to only those liabilities resulting from Consultant's "ongoing operations"; and
 - Any deductibles over \$10,000 applicable to any coverage.
4. **Umbrella/excess.** Limits for Automobile Liability and CGL may be attained by a combination of an underlying policy with an umbrella and/or excess policy.
5. **Duration.** Completed operations coverage under the CGL policy must be maintained for at least two years after completion of the Services. Professional Liability coverage must be maintained for at least three years after completion of the Services. Otherwise, the coverages must be in force when the Services are being performed.
6. **Coverage primary.** The General Liability and Umbrella policies must be primary and not excess over or contributory with any other valid, applicable, and collectible insurance or self-insurance in force for the Purchaser or the Owner, regardless of whether such coverage is written on a primary, excess or contributory basis. Each policy shall be endorsed so that the issuing insurance company will provide thirty (30) days written notice of cancellation to the Purchaser and any additional insureds. Consultant also agrees to provide Purchaser with written notice of any cancellation, non-renewal or material modification to any of the policies required under this PS Order.
7. **Subrogation waiver – insured property damage.** The parties and their insurers waive subrogation rights against each other, but only for property damage to property covered by valid and collectible property insurance. If the policies of insurance referred to in this document require an endorsement to provide for continued coverage where there is a waiver of subrogation, such endorsements must be obtained.
8. **Not a liability cap.** The minimum limits of insurance identified above do not limit the liability of the Consultant.

We suggest you provide a copy of these requirements to your agent when requesting a certificate.

