

# CITY COUNCIL REPORT



Meeting Date: March 19, 2013  
General Plan Element: *Community and Economic Development*  
General Plan Goal: *Sustain Scottsdale as a tourist destination*

## ACTION

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**Design Build Pre-Construction Services for TPC Clubhouse.** Adopt Resolution 9316 authorizing Design Build Pre-Construction services agreement 2012-180-COS in the amount of \$337,108 with Wespac Construction, Inc. for renovations to the Clubhouse at the Tournament Players Club of Scottsdale (TPC).

## BACKGROUND

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The purpose of this action is to approve Design-Build Pre-Construction Services Contract 2012-180-COS with Wespac Construction, Inc. to provide the requisite design services for renovations to the TPC Clubhouse.

The scope of the renovations on the clubhouse will involve remodeling of a large portion of the existing TPC clubhouse as well as a building expansion. Approximately 10,000 square feet of space will be renovated or expanded. Some components of the project include larger locker rooms, expanded multi-purpose room, new arrival area and an expanded covered patio space. ADA accessibility issues will also be addressed. The project will be designed over the next 12 months and constructed in 2014 which will allow the facility to be ready for the February 2015 golf tournament.

## ANALYSIS & ASSESSMENT

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### Recent Staff Action

For Design-Build services on the TPC Clubhouse renovations (SQ004), the City received 8 Statements of Qualifications on November 1, 2012. A five member review panel analyzed the proposals and selected the top 3 teams. These 3 teams were interviewed on Nov. 28, 2012 and ranked according to the attached matrix.

As a result, Wespac Construction, Inc. was selected for the Design-Build contract on the TPC Clubhouse project.

### Significant Issues to be Addressed

Planning and design work will take place from March 2013 through March 2014. Construction will begin in spring 2014 with completion in fall 2014 in order to minimize impacts to high season and tournament play.

Action Taken \_\_\_\_\_

**Community Involvement**

A public meeting will be planned for adjacent property owners during the design phase.

**RESOURCE IMPACTS**

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**Available funding**

Funding for the contracts is available in CIP project P1309, TPC Stadium Course and Clubhouse Renovations.

**Staffing, Workload Impact**

The contract administrator responsible for enforcement of all provisions of the contracts is Gary Meyer, Senior Project Manager, Capital Projects Management Division.

**Maintenance Requirements**

The completed project will be maintained by TPC staff per the current agreement with the City of Scottsdale.

**Future Budget Implications**

The cost of maintenance will be covered by the TPC.

**OPTIONS & STAFF RECOMMENDATION**

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**Recommended Approach**

Adopt Resolution 9316 authorizing Design Build Pre-Construction services agreement 2012-180-COS in the amount of \$337,108 with Wespac Construction, Inc. for renovations to the Clubhouse at the Tournament Players Club of Scottsdale (TPC).

**Proposed Next Steps:**

Upon approval by Council, the Design-Build Manager will proceed with design work for the TPC Clubhouse renovations. A construction contract will be presented to the Council when the design phase is complete.

**RESPONSIBLE DEPARTMENT(S)**

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Public Works Division, Capital Project Management

**STAFF CONTACT**

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Gary Meyer, Senior Project Manager, 480-312-2367, [gmeyer@scottsdaleaz.gov](mailto:gmeyer@scottsdaleaz.gov)

**APPROVED BY**

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Derek Earle, Acting Executive Director, Public Works

(480) 312-2776, [dearle@scottsdaleaz.gov](mailto:dearle@scottsdaleaz.gov)

3.5.2013

Date

## ATTACHMENTS

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1. Resolution 9316
2. Location map
3. Evaluation Matrix – TPC Clubhouse Design-Build
4. Contract 2012-180-COS

RESOLUTION NO. 9316

A RESOLUTION OF THE COUNCIL OF THE CITY OF SCOTTSDALE, MARICOPA COUNTY, ARIZONA, APPROVING DESIGN-BUILD PRECONSTRUCTION CONTRACT NO. 2012-180-COS WITH WESPAC CONSTRUCTION, INC. FOR THE TOURNAMENT PLAYERS CLUB (TPC) CLUBHOUSE RENOVATIONS.

The City wishes to renovate the TPC Clubhouse and has authorized funding of said renovation; and

Wespac Construction, Inc. has offered to provide the City the requisite pre-construction services necessary to renovate the TPC Clubhouse.

BE IT RESOLVED by the Council of the City of Scottsdale as follows:

Section 1. The Mayor of the City of Scottsdale is authorized and directed to execute Design-Build Pre-Construction Services Contract No. 2012-180-COS with Wespac Construction, Inc. to renovate the TPC Clubhouse.

PASSED AND ADOPTED by the Council of the City of Scottsdale this 19<sup>th</sup> day of March, 2013.

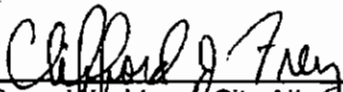
ATTEST:

CITY OF SCOTTSDALE, an  
Arizona Municipal Corporation

\_\_\_\_\_  
Carolyn Jagger, City Clerk

\_\_\_\_\_  
W.J. "Jim" Lane, Mayor

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Bruce Washburn, City Attorney

By: Clifford J. Frey  
Senior Assistant City Attorney



LOOP 101

UNION HILL DRIVE

PRINCESS BOULEVARD

PROJECT AREA

HAYDEN ROAD

SCOTTSDALE ROAD

FRANK LLOYD WRIGHT BOULEVARD

# ATTACHMENT 2

PROJECT TITLE  
TPC Clubhouse & Stadium Course

DEPT. G M CPM	DRAWN NZ	DATE 05/22/12	SCALE NTS	SHT 1 OF 1
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DESIGN FILE: ...G:\120522\_TPC COURSE.dgn

**TPC Clubhouse  
Interview Evaluation Matrix**

Company	Average Score	Rank
Wespac	855	1
Brignall	751	2
Kitchell	747	3

CONTRACT NO. 2012-180-COS



**CITY OF SCOTTSDALE**

**DESIGN-BUILD  
PRECONSTRUCTION CONTRACT  
DESIGN PHASE SERVICES**

**PROJECT NO. P1309**

**T.P.C. SCOTTSDALE  
CLUBHOUSE RENOVATIONS**

**CONTRACT NO. 2012-180-COS**

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**THE CITY OF SCOTTSDALE  
Capital Project Management**

**DESIGN-BUILD  
PRECONSTRUCTION CONTRACT  
DESIGN PHASE SERVICES**

**PROJECT NO. P1309  
CONTRACT NO. 2012-180-COS**

**THIS CONTRACT**, entered this 19th date of March, 2013, by the City of Scottsdale, an Arizona municipal corporation, (the "CITY") and Wespac Construction, Inc, an Arizona Corporation, the Design-Build Manager, the "DBM."

**RECITALS**

- A. The Mayor of the City of Scottsdale, Arizona, is authorized by provisions of the City Charter to execute Contracts for professional services and construction services.
- B. The City intends to construct the TPC Clubhouse Renovations as described in Exhibit A attached, and referred to as the "Project".
- C. To undertake the design of the Project, the DBM has entered into a Contract with Allen + Philp Architects, who is referred to as the "Design Professional".
- D. The City desires to enter into this Preconstruction Contract with the DBM for the Preconstruction/Design phase services identified in this Contract. Upon the execution of this Preconstruction Contract, the City will enter into a separate Design-Build Construction Contract with the DBM for construction services.

**CONTRACT**

FOR AND IN CONSIDERATION of the parties mutual covenants and conditions, it is agreed by the City and the Design-Build Manager as follows:

**ARTICLE 1 – BASIC DESIGN PHASE SERVICES**

**1.1. GENERAL**

- A. The DBM, to further the interests of the City, will perform the services required by, and in accordance with this Contract, to the satisfaction of the Contract Administrator, exercising the degree of care, skill and judgment a professional construction manager performing similar services in Scottsdale, Arizona would exercise at such time, under similar conditions. The DBM will, at all times, perform the required services consistent with sound and generally accepted construction management and construction contracting practice. The services being provided under this Contract will not alter any real property owned by the City.

- B. Initial Program Evaluation: The DBM will provide an initial written evaluation of the City's Project with recommendations as to the consistency and appropriateness of the Project and the Project's budget. The City and the DBM will identify an acceptable time frame by which the DBM will provide initial program evaluation.
- C. Project Meetings: The DBM will attend Project Team meetings, which may include, but are not limited to, monthly Project management meetings, Project workshops, and special Project meetings, Construction Documents rolling reviews.
- D. The DBM will provide design phase services, described in Article 1.5, in a proactive manner and consistent with the intent of the most current Drawings and Specifications. The DBM will promptly notify the City in writing whenever the DBM determines that any Drawings or Specifications are inappropriate for the Project or cause changes in the Scope of Work requiring an adjustment in the cost estimate, Project Schedule, GMP Proposals or in the Contract Time for the Work, to the extent they are established.
- E. The DBM, when requested by the City, will attend, make presentations and participate as may be appropriate in public or community meetings, related to the Project. The DBM will provide drawings, schedule diagrams, budget charts and other materials describing the Project, when their use is required or appropriate in any public agency meetings.

## 1.2. CONSTRUCTION MANAGEMENT PLAN

- A. The DBM will prepare a Construction Management Plan (CMP), which includes, but is not limited to, the DBM's professional opinions concerning: (i) Project milestone dates and the Project Schedule, including the broad sequencing of the design and construction of the Project, (ii) investigations, if any, to be undertaken to ascertain subsurface conditions and physical conditions of existing surface and subsurface facilities and underground utilities, (iii) alternate strategies for fast-tracking or phasing the construction, (iv) the number of separate subcontracts to be awarded to Subcontractors and Suppliers for the Project construction, (v) any Intergovernmental Contracts (IGA's), (vi) permitting strategy, (vii) safety and training programs, (viii) construction quality control, (ix) a commissioning program, (x) the cost estimate and basis of the model, (xi) a matrix summarizing each Project Team member's responsibilities and roles, and (xii) goal compliance strategy.
- B. The DBM will add detail to its previous version of the CMP to keep it current throughout the design phase, so that the CMP is ready for implementation at the start of the construction phase. The update/revisions may take into account (i) revisions in Drawings and Specifications, (ii) the results of any additional investigatory reports of subsurface conditions, drawings of physical conditions of existing surface and subsurface facilities and documents depicting underground utilities placement and physical condition, whether obtained by the City, the Design Professional or the DBM, (iii) unresolved permitting issues, and significant issues, if any, pertaining to the acquisition of land and right of way, (iv) the fast-tracking, if any, of the construction or other chosen construction delivery methods, (v) the requisite number of separate bidding documents to be advertised, (vi) the status of

the procurement of long-lead time equipment (if any) or materials, and (vii) funding issues identified by the City.

### 1.3. PROJECT SCHEDULE

- A. The fundamental purpose of the "Project Schedule" is to identify, coordinate and record the tasks and activities to be performed by all of the Project Team members and then for the Project Team to utilize the Deliverables as a basis for managing and monitoring all member's compliance with the schedule requirements of the Project. Each Project Team member is responsible for its compliance with the Project Schedule requirements. The DBM will, however, develop, maintain and manage the "Project Schedule" on behalf of and to be used by the Project Team based on input from the other Project Team members. The Project Schedule is subject to City approval. The Project Schedule will be consistent with the most recent revised/updated Critical Path Method (CPM). The Project Schedule will use the Critical Path Method (CPM) technique, unless required otherwise in writing, by the City. The DBM will use scheduling software to develop the Project Schedule that is acceptable to the City. The Project Schedule will be presented in graphical and tabular reports as agreed upon by the Project Team. If Project phasing as described below is required, the Project Schedule will indicate milestone dates for the phases once determined. The Project Schedule's activities will directly correlate with the Schedule of Values specified in Article 1.7(A).
- B. The DBM will include and integrate in the Project Schedule the services and activities required of the City, the Design Professional and the DBM including all construction phase activities based on the input received from the City and the Design Professional. The Project Schedule will detail activities to the extent required to show: (i) the coordination between conceptual design and various design phase documents, (ii) separate long-lead procurements, if any, (iii) permitting issues, (iv) land and right-of-way acquisition, if any, (v) bid packaging strategy and awards to Subcontractors and Suppliers, (vi) major stages of construction, (vii) start-up and commissioning, and (viii) City's acceptance of the completed Work. The Project Schedule will include by example and not limitation, proposed activity sequences and durations for design, procurement, construction and testing activities, milestone dates for actions and decisions by the Project Team, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead time procurement (if any), milestone dates for various construction phases, total float for all activities, relationships between the activities, City's occupancy requirements showing portions of the Project having occupancy priority, and proposed dates for Substantial Completion and when the Work would be ready for final acceptance.
- C. The Project Schedule will be updated, maintained and managed by the DBM throughout this Contract so that the schedule will not require major changes at the start of the construction phase to incorporate the DBM's plan for the performance of the construction phase Work. The DBM will provide updated revisions to the Project Schedule for use by the Project Team, whenever required, but no less often than at the monthly Project Team meetings. The DBM will include with these submittals a narrative describing its analysis of the progress achieved to-date vs. that planned, any concerns regarding delays or potential delays, and any recommendations regarding mitigating actions.

1. **Project Phasing:** At the City's direction, the DBM will review the design and make recommendations for phased construction. If phased construction is considered appropriate and the City and Design Professional approve, the DBM will review the design and make recommendations regarding the phased issuance of Construction Documents to facilitate phased construction of the Work. The DBM will take into consideration such factors as natural and practical lines of work severability, sequencing effectiveness, access and availability constraints, total time for completion, construction market conditions, labor and materials availability, and any other pertinent factors.

#### **1.4. PROJECT DESIGN**

- A. The DBM will, consistent with applicable state licensing laws, provide through qualified, licensed design professionals employed by the DBM, or procured from qualified, independent licensed design consultants, the necessary Design Services, including Design Build Manager (including landscape Design Build Manager), engineering and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit the DBM to complete the Work consistent with the Contract Documents. The DBM's design professionals will seal with an Arizona registered professional seal all plans, works, and Deliverables prepared by them for this Contract as required by State law.
- B. The DBM will provide a Project Schedule of the design activities within 7 days after the NTP.
- C. The Project Schedule will provide 14 days to be used by the City or its designee for reviews and approvals for any interim design submissions.
- D. Design activities will commence immediately after the Notice To Proceed is issued and the DBM will monitor design efforts to ensure they are in accordance with the Project Schedule and will provide adequate time for the City's review and permitting processes along with construction activities. All work accomplished under the Design phase of the Work will be in accordance with Exhibit "A", Project Description, attached and incorporated by this reference.
- E. Upon the approval of the design/construction documents, the DBM will proceed with the Subcontractor selection process as required by Article 1.11.
- F. The standard of care for all design professional services performed to execute the Work will be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project. Despite the preceding sentence, if the parties agree upon specific performance standards for any aspect of the services, the standards are to be stated in an exhibit to this Contract entitled "Performance Standard Requirements," the design professional services will be performed to achieve these standards.
- G. The DBM will be responsible for the completeness and accuracy of the plans, specifications, supporting data, and other work prepared or compiled under its obligation for this Project and will correct, at its expense, all willful or negligent errors, omissions and acts which may be discovered. Correction of willful or

negligent errors, omissions and acts discovered on DBM or engineering plans and specifications will be the responsibility of the DBM. The cost of the design necessary to correct those errors attributable to the DBM will not be reimbursable costs to the DBM. Any damage incurred by the City as a result of additional construction cost caused by these willful or negligent errors, omissions or acts will not be reimbursed to the DBM to the extent that the willful or negligent errors, omissions and acts fall below the standard of care and skill that a registered professional in Arizona would exercise under similar conditions. The fact that the City has accepted or approved the DBM's product will in no way relieve the DBM of any of its responsibilities.

## 1.5. DESIGN SERVICES

- A. The DBM will provide all interim design submissions and Deliverables as prescribed in the Design Standards and Guidelines provided by the City, and as shown on the Project Schedule.
  1. Within 7 days after a scheduled submission, the DBM and the City will meet and confer about the submissions, with the DBM identifying during these meetings, among other things, the evolution of the design and any significant changes or deviations from the Contract Documents, or previously submitted design submissions.
  2. The DBM will submit and distribute 10 hard copy sets of plans and specifications and one set of plans in AutoCAD format compatible with City of Scottsdale Capital Project Management Department CADD technology.
  3. Minutes of the meetings will be maintained by the DBM and provided within 5 days following the design review meeting to all attendees for review.
  4. The City will review and approve the interim design submissions in a time that is consistent with the turnaround times stated in the DBM's Project Schedule.
  5. The DBM will not cause the design to proceed until the City approves the interim design submissions as provided in this Article. If the DBM allows the design to proceed without City approval, the cost of any resultant redesign is not a reimbursable cost.
  6. The City's review and approval of interim design submissions and the Construction Documents is for the purpose of mutually establishing a conformed set of Construction Documents compatible with the requirements of the Project. Neither the City's review nor approval of any interim design submissions and Construction Documents will be considered to transfer any design liability to the City.
- B. The Project design must meet all applicable (i) Maricopa County Government (MAG) Uniform Standard Technical Specifications and Uniform Standard Details and Drawings, latest revision; (ii) the City of Scottsdale Supplements, latest revision to the MAG Uniform Standard Technical Specifications, Details and Drawings; (iii) all City building standards; and (iv) will include all special provisions provided by the City.

- C. The Project design criteria and specifications will be in accordance with the Design Standards and Guidelines provided by the City. Variances from the standards and guidelines must be identified in writing by the DBM and approved by the City. The DBM will identify conflicts between the Design Standards and Guidelines and the requirements in Article 1.4 above or Legal Requirements and will obtain concurrence with resolution of the conflict. The Design Standard and Guidelines or approval of variances or resolution of conflicts will not be considered to transfer any design liability to the City.
- D. The DBM will not specify any construction materials known to be hazardous or potentially hazardous, including asbestos, lead or any derivative of them unless specifically approved in writing by the City.
- E. The DBM will coordinate with private, public and City utilities (i.e., Information Technology Department, Water Operations Department) regarding standard utility issues and incorporate pertinent information in the plans.
- F. The DBM will be responsible for scheduling, submitting, obtaining approval and retrieving of all required Construction Documents to the various required reviewing agencies.
- G. The DBM will submit to the City Construction Documents stating in detail drawings and specifications describing the requirements for construction.
  - 1. The Construction Documents will be consistent with the latest set of interim design submissions; as these submissions may have been modified in a design review meeting.
  - 2. The DBM will provide the drawings in AutoCAD format compatible with City of Scottsdale Capital Project Management Department's CAD technology using City layering standards.
  - 3. The drawing format will be a 24" x 36" sheet size unless otherwise authorized in writing by the City.
  - 4. The parties will have a design review meeting to discuss, and the City will review and approve, the Construction Documents in accordance with the procedures stated in this Article.
  - 5. Before commencement of construction, the DBM will submit to the City the following:
    - Construction Drawings in AutoCAD format on electronic media (CD-ROM);
    - Five (5) print sets of approved Construction Drawings and 10 half-size sets; and
    - Fifteen (15) sets of specifications.

To the extent not prohibited by Legal Requirements, the DBM may arrange for interim design submissions and Construction Documents for a portion of the construction to permit construction to proceed on that portion before completion of the Construction Documents for the entire construction.

## 1.6. DESIGN DOCUMENT REVIEWS

- A. The DBM will evaluate periodically the availability of labor, materials/equipment, building systems, cost-sensitive aspects of the design; and other factors that may impact the cost estimate, GMP Proposals or the Project Schedule.
- B. The DBM will recommend, with City approval, those additional surface and subsurface investigations that, in its professional opinion, are required to provide the necessary information for the DBM to construct the Project.
- C. The DBM will meet with the Project Team as required to review designs during their development. The DBM will familiarize itself with the evolving documents through the various design phases. The DBM will proactively advise the Project Team and make recommendations on factors related to construction costs, and concerns pertaining to the feasibility and practicality of any proposed means and methods, selected materials, equipment and building systems, and labor and material availability. The DBM will also advise the Project Team on proposed site improvements, excavation and foundation considerations as well as concerns that exist with respect to coordination of the Drawings and Specifications. The DBM will recommend cost effective alternatives.
- D. The DBM will routinely conduct constructability and bid ability reviews of the Drawings and Specifications as necessary to satisfy the needs of the Project Team. The reviews will identify all discrepancies and inconsistencies in the Construction Documents especially those related to clarity, consistency, and coordination of Work of Subcontractors and Suppliers.
  - 1. Constructability Reviews: The DBM will evaluate whether (a) the Drawings and Specifications are configured to enable efficient construction, (b) design elements are standardized, (c) construction efficiency is properly considered in the Drawings and Specifications, (d) module/preassembly design are prepared to facilitate fabrication, transport and installation, (e) the design promotes accessibility of personnel, material and equipment and facilitates construction under adverse weather conditions, (f) sequences of Work required by or inferable from the Drawings and Specifications are practicable, and (g) the design has taken into consideration efficiency issues concerning: access and entrance to the site, lay down and storage of materials, staging of site facilities, construction parking, and other similar pertinent issues.
  - 2. Bid ability Reviews: The DBM will check cross-references and complementary Drawings and sections within the Specifications, and in general evaluate whether (a) the Drawings and Specifications are sufficiently clear and detailed to minimize ambiguity and to reduce scope interpretation discrepancies, (b) named materials and equipment are commercially available and are performing well or otherwise, in similar installations, (c) specifications include alternatives in the event a requirement cannot be met in the field, and (d) in its professional opinion, the Project is likely to be subject to differing site conditions.
  - 3. The results of the reviews will be provided to the City in formal, written reports clearly identifying all discovered discrepancies and inconsistencies in the Drawings and Specifications with notations and recommendations made on the

Drawings, Specifications and other documents. If requested by the City, the DBM will meet with the City and Design Professional to discuss any findings and review reports.

4. The DBM's reviews will be from a contractor's perspective, and though it will serve to reduce the number of Requests for Information (RFIs) and changes during the construction phase, responsibility for the Drawings and Specifications will remain with the Design Professional and not the DBM.
- E. Notification of Variance or Deficiency: It is the DBM's responsibility to assist the Design Professional in ascertaining that, in the DBM's professional opinion, the Construction Documents are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. If the DBM recognizes that portions of the Construction Documents are at variance with applicable laws, statutes, ordinances, building codes, rules and regulations, it will promptly notify the Design Professional and the City in writing, describing the apparent variance or deficiency. However, the Design Professional is ultimately responsible for the compliance with those laws, statutes, ordinances, building codes, rules and regulations.
- F. Alternate Systems Evaluations: The Project Team will routinely identify and evaluate using value engineering principles any alternate systems, approaches, or design changes that have the potential to reduce Project costs while still delivering a quality and functional product. Throughout this Contract and upon the City's instruction, the DBM will provide value engineering at various stages throughout the Project. The Project Team, with approval by the City, will decide which alternatives will be incorporated into the Project. The Design Professional will have full responsibility for the incorporation of the alternatives into the Drawings and Specifications. The DBM will include the cost of the alternatives into the cost estimate and any GMP Proposals.

#### **1.7. COST ESTIMATES**

- A. The DBM will provide a Schedule of Values acceptable to the City including a detailed cost estimate and written review of the documents, within 14 days after the DBM's receipt of the documents required for the various phases of design. The Design Professional and the DBM will reconcile any disagreements on the estimate to arrive at an agreed cost. If no consensus is reached, the City will make the final determination.
- B. If any estimate submitted to the City exceeds previously accepted estimates or the City's Project budget, the DBM will make appropriate recommendations on methods and materials to the City and Design Professional that he believes will bring the Project back into the Project budget. Major milestones on the Project include 30, 60, 90% submittals consistent with the City of Scottsdale's Design Standards and Policies Manual.
- C. In between these milestone estimates, the DBM will periodically provide a tracking report, which identifies the upward or downward movements of costs due to value engineering or scope changes. It will be the responsibility of the DBM to keep the

City and Design Professional informed as to the major trend changes in costs relative to the City's budget.

- D. If requested by the City, the DBM will prepare a preliminary "cash flow" projection based upon historical records of similar type projects to assist the City in the financing process.

**1.8. GUARANTEED MAXIMUM PRICE (GMP)**

- A. At the end of the design phase or at a time determined by the City, the City will request the DBM to provide a GMP, or series of GMP's if the DBM determines phased construction would be in the City's best interest. The approved GMP(s) is provided in Exhibit C, attached and is made a part of this Contract by reference.

The DBM guarantees to bring the completion of the design and construction of the Project within the GMP or DBM alone will be required to pay the difference between the actual cost and the GMP.

- B. Any savings of the DBM's bid contingency used to buy out the construction at the conclusion of the selection of Subcontractors may be used during construction by the DBM as a construction contingency.

Any savings realized during construction may be incorporated into the construction of the Project to fund additional scope items or will be returned to the City upon the City's request.

- C. The GMP is composed of the following not-to-exceed cost reimbursable or lump sum amounts defined below:

1. The Cost of the Work is a negotiated cost and is a not-to-exceed amount defined by the individual work items and their associated negotiated unit prices.
2. The General Conditions Costs are firm fixed lump sum amounts, which will include bonds and insurance premiums based on the full contract price for construction. The Construction Fee is a firm fixed lump sum or fixed percentage to be applied to the Cost of the Work and General Conditions.
3. The DBM's contingency is an amount the DBM may use under the following conditions: (1) At its discretion for increases in the Cost of the Work; or (2) With written approval of the City for increases in General Condition Costs. DBM's contingency is assumed to be a direct Project cost so will receive all markups at the time of GMP submission.
4. Taxes are considered to include all sales, use, consumer and other taxes which are legally enacted when negotiations of the GMP were concluded, whether or not yet effective or merely scheduled to go into effect. Taxes are actual costs and are a not-to-exceed reimbursable amount.

To obtain a State of Arizona Privilege (Sales) Tax License Application, please go to the following website: [http://www.revenue.state.az.us/ADOR\\_Forms/70-79/74-4002\\_fillable.pdf](http://www.revenue.state.az.us/ADOR_Forms/70-79/74-4002_fillable.pdf)

To obtain a City of Scottsdale Transaction (Sales) Tax License Application, please go to the following website:  
<http://www.scottsdaleaz.gov/taxes/salestax.asp>

5. Bonds and Insurance are fixed percentages that will be applied to Cost, General Conditions and Construction Fee as detailed in the GMP Proposal.
  6. When the DBM utilizes Design-Build Manager's Contingency funds; the DBM will make the appropriate changes to the Schedule of Values with the next regular progress Payment Request. The DBM will deduct the amount of the DBM's Contingency funds used from the DBM's Contingency line item and add the same amount to the line item on the Schedule of Values where the funds were used. If the DBM's Contingency funds are used for a new line item that was not given with the original Schedule of Values, that fact will be so indicated.
- D. The City's Contingency is to be used at the sole discretion of the City to cover any increases in Project costs that result from City directed changes or unforeseen site conditions. The City's Contingency will be added to the GMP amount provided by the DBM, the sum of which will be the full contract price for construction. Markups for Construction Fee and taxes will be applied by the DBM at the time that the City's Contingency is used.
- E. GMP's are cumulative except for DBM's Contingency. The amount of the DBM's Contingency for each GMP amendment will be negotiated separately and will reflect the DBM's risk from that point in the Project forward.

#### **1.9. GUARANTEED MAXIMUM PRICE (GMP) PROPOSALS**

- A. The DBM will present the proposed GMP for the entire Work (or portions of the Work) in a format acceptable to the City. The City may request a GMP Proposal for all or any portion of the Project and at any time during the design phase. Any GMP Proposals submitted by the DBM will be based on and consistent with the current updated/revised cost estimate at the time of the request, the associated estimates for construction costs and include any clarifications or assumptions upon which the GMP Proposal(s) are based.
- B. GMP Proposals for the entire Project will be the sum of the maximum Cost of the Work, and also include the DBM's Construction Fee, General Conditions Costs, Taxes, Insurance, Bonds and DBM Contingency.
- C. The DBM, in preparing any GMP Proposal, will obtain from the Design Professional, 6 sets of signed, sealed, and dated plans and specifications (including all addenda). The DBM will prepare its GMP in accordance with the City's request for GMP Proposal requirements based on the most current completed plans and specifications at that time. The DBM will mark the face of each document of each set upon which its proposed GMP is based. The DBM will send one set of those documents to the City's Contract Administrator, keep one set and return the third set to the Design Professional.

- D. The DBM will include an updated/revised Project Schedule with any GMP Proposal(s) that reflects the Scope of Work shown in the current set of design documents upon which the GMP Proposal(s) is based. Any Project Schedule updates/revisions will continue to comply with the requirements of Article 1.3.
- E. In the event the DBM elects, at its sole discretion, to maintain a Contractor's Contingency allowance within the GMP, the criteria for development of that allowance must be acceptable to the City. In addition, the terms and conditions regarding use of that allowance during the construction phase will be established by the City and reflected in the contract for that phase of the Project.
- F. If the Construction Services Contract is negotiated as a not-to-exceed amount, all GMP savings resulting from a lower actual Project cost than anticipated by the DBM, will revert to City.

#### **1.10. GUARANTEED MAXIMUM PRICE (GMP) REVIEW AND APPROVAL**

- A. The DBM will meet with the City and Design Professional to review any GMP Proposal(s) and review the written statement of its basis. In the event the City or Design Professional discovers inconsistencies or inaccuracies in the information presented, the DBM will make adjustments as necessary to the GMP Proposal, its basis, or both.
- B. Upon receipt of any GMP Proposal from the DBM, the City may submit the same documents that were used by the DBM in developing its GMP to an independent third party or to the Design Professional for review and verification. The third party or Design Professional will develop an independent estimate of the Cost of the Work and review the Project Schedule for the associated scope of the GMP Proposals. If the DBM GMP Proposal is greater than that of the independent third party or Design Professional's estimate, the City may require the DBM to reconfirm its GMP Proposal. The DBM will accept the independent third party's or Design Professional's estimate for the Cost of Work as part of its GMP Proposal or present a report identifying, explaining and substantiating the differences within 7 days of the City's request.
- C. If design changes are required during the review and negotiation of GMP Proposals, the City will authorize and cause the Design Professional to revise the Construction Documents to the extent necessary to reflect the agree-upon assumptions and clarifications contained in the final approved GMP Proposal. The revised Construction Documents will be furnished to the DBM. The DBM will promptly notify the Design Professional and City in writing if any revised Construction Documents are inconsistent with the agreed-upon assumptions and clarifications.
- D. The DBM guarantees to complete the Project at a Cost that will not exceed the final approved GMP Proposal amount, and the DBM assumes the responsibility for paying any difference between the actual Cost of the Work and that amount.
- E. The DBM may then be requested to, or at its own discretion, submit a revised GMP Proposal for consideration by the City. At that time the City may do one of the following:

1. Accept the DBM's original or revised GMP Proposal, if within the City's budget, without comment.
2. Accept the DBM's original or revised GMP Proposal that exceeds the City's budget, and indicate in writing to the DBM that the Project Budget has been increased to fund the differences.
3. Reject the DBM's original or revised GMP Proposal in which event, the City may terminate this Contract or elect to not enter into a separate Contract with the DBM for the construction phase associated with the Scope of Work reflected in the GMP Proposal.

#### **1.11. SUBCONTRACTOR AND MAJOR SUPPLIER SELECTIONS**

- A. The DBM will select major Subcontractors and major Suppliers, subject to City's prior approval. This may occur before or after submission of a GMP Proposal. Major Subcontractors may be selected based on qualifications or a combination of qualifications and price. Subcontractors will not be selected based on price alone. Except as noted below, the selection of major Subcontractors/Suppliers is the responsibility of the DBM. In any case, the DBM is solely responsible for the performance of the selected Subcontractors/Suppliers.
  1. The DBM will prepare a Subcontractor/Supplier selection plan and submit the plan to the City for approval or the DBM may use the City's plan as described in Article 1.11(B). This subcontractor selection plan will identify those subcontractor trades anticipated to be selected by qualifications only per Article 1.11(B) and those subcontractor trades anticipated to be selected by qualifications and competitive bid in accordance with Article 1.11(C). This plan will also identify those subcontractors that will not be selected through a formalized qualifications-based selection process. The subcontractor selection plan must be consistent with the selection requirements included in this Contract.
- B. Selection by qualifications only – The City may approve the selection of a Subcontractor(s) or Suppliers(s) based only on their qualifications when the DBM can demonstrate it is in the best interest of the Project.
  1. The DBM will apply the approved subcontractor selection plan in the evaluation of the qualifications of a Subcontractor(s) or Supplier(s) and provide the City with its review and recommendation. The selection plan will be the DBM's own selection plan approved by the City or the City's selection plan as approved in this Article 1.11(B).
  2. The DBM will negotiate costs for services/supplies from the Subcontractor/ Supplier under the approved qualifications only method.
  3. The DBM may elect to comply with the following procedures in its selection of Subcontractor(s) or Suppliers(s) based on qualifications only:
    - a. The Request for Qualifications (RFQ) will contain the best description of the services or material desired; and

- b. A statement that only unpriced statements of qualifications will be considered; and
  - c. State the requirements for the project, such as drawings and descriptive literature; and
  - d. State the criteria for evaluating the qualifications; and
  - e. A closing date and time for receipt of a Statement of Qualifications and the location where the statements should be delivered or mailed; and
  - f. A statement that discussions may be held; and
  - g. A statement that only statements of qualifications determined to be acceptable will be considered for award.
4. The RFQ may be amended after the submission of the statements of qualifications. Any amendment will be distributed only to bidders who submitted statements of qualifications. Those bidders will be permitted to submit new unpriced statements of qualifications or to amend statements already submitted.
5. Statements of Qualifications will not be opened publicly, but will be opened in the presence of the DBM. The contents of unpriced statements of qualifications will not be disclosed to unauthorized persons.
6. Statements of Qualifications will be evaluated solely in accordance with the criteria stated in the RFQ and will be determined to be either acceptable for further consideration or unacceptable. A determination that the statement is unacceptable will be in writing, state the basis of the determination and be retained by the DBM. The DBM will notify the bidder of the determination and the bidder will not be given an opportunity to amend its Statement of Qualifications further.
7. The DBM may conduct discussions with any bidder who submits an acceptable or potentially acceptable Statement of Qualifications. During discussions, the DBM will not disclose any information derived from any other bidder's Statement of Qualifications.
8. The DBM will negotiate costs for services/supplies from the Subcontractors/Suppliers selected under this method.
- C. Selection by qualifications and competitive bid – The DBM will apply the City's subcontractor selection plan stated above if previously approved by the City in the evaluation of the qualifications of a Subcontractor(s) or Supplier(s) by providing the City with its process to prequalify prospective subcontractors and suppliers. Selection may not be based on price alone. All Work for major subcontractors and major suppliers will then be competitively bid to the prequalified subcontractors unless a Subcontractor or Supplier was selected in compliance with Article 1.11(B) above.

1. The DBM will develop Subcontractor and Supplier interest, submit the names of a minimum of 3 qualified Subcontractors or Suppliers for each trade in the Project and solicit bids for the various Work categories. If there are not 3 qualified Subcontractors/Suppliers available for a specific trade or there are extenuating circumstances warranting it, the DBM may request approval by the City to submit less than 3 names. Without first giving written notice to the City, no change in the recommended Subcontractors/Suppliers will be allowed.
  2. If the City objects to any nominated Subcontractor/Supplier or to any self-performed Work for good reason, the DBM will nominate a substitute Subcontractor/Supplier that is acceptable to the City.
  3. The DBM will distribute Drawings and Specifications, and when appropriate, conduct a prebid conference with prospective Subcontractors and Suppliers. The DBM will then review the price bids submitted by Subcontractors and Suppliers and make its selection based on the responsive and responsible bidder with the lowest price.
  4. If the DBM desires to self-perform certain portions of the Work, it will request to be one of the approved Subcontractor bidders for those specific bid packages. The DBM's bid will be evaluated in accordance with the process identified in the Invitation for Bids. If events warrant and the City concurs that in order to insure compliance with the Project Schedule or cost, the DBM may self perform Work without bidding or re-bidding the Work. (For horizontal construction, as defined in A.R.S. §34-101(15), the DBM must self perform not less than 45% percent of the Work as required by A.R.S. §34-605(G) (2).)
- D. If after receipt of sub-bids or after award of Subcontractors and Suppliers, the City objects to any nominated Subcontractor/Supplier or to any self-performed Work for good reason, the DBM will nominate a substitute Subcontractor or Supplier, preferably if the option is still available, from those who submitted Subcontractor bids for the Work affected. Once the substitute Subcontractors and Suppliers are consented to by the City, the DBM's proposed GMP for the Work or portion of the Work will be correspondingly adjusted to reflect any higher or lower costs from any substitution. Under no circumstances will the City's objection or comment on any Subcontractor or Supplier relieve the DBM of its sole responsibility for control over the methods, means and processes by which the Work is accomplished.

#### **1.12. APPROVED ALTERNATES**

- A. Plans and specifications may contain references to equipment or materials (patented or unpatented) or "approved alternate(s)." The references will be regarded as establishing a standard of quality, finish, appearance, performance or as indicating a selection or design based upon compatibility with existing equipment, materials or details of construction inherent to the Project design. These references will not be construed as limiting the selection to a specified item, source or design detail. The use of an alternate or substitute, item or source as an approved alternate will be permitted, subject to the procedure stated in A.R.S. §34-104.

- B. The DBM/Subcontractor, as applicable, will submit a written Proposal for substitution to the DBM and Contract Administrator at least 8 days before the original deadline for receiving Bids. Requests for substitution submitted to the City's contracted Consultant or other City Staff will not be reviewed. The submittal envelope must be clearly marked with Bid Number and "REQUEST FOR APPROVED ALTERNATE." Requests must be time stamped by the DBM and Contract Administrator by 4:00 P.M. (approved alternate date). The Proposal must include all information necessary for proof of quality and suitability for substitution including benefits, engineering design and data (calculations) and detailed plan modifications which may be required by the substitution. The Bidder will submit additional information and samples when required.
- C. The DBM and the Contract Administrator will evaluate the information submitted, perform tests when necessary and make comparisons in order to approve or reject the Proposal. If rejected, the DBM will give notice of rejection to the Bidder submitting the Proposal.
- D. The DBM, if the Proposal is accepted, will issue a written addendum to the Invitation for Bid specifying the approved alternates and distribute the modification in the same manner as the original bidding documents.

The Specifications may reference equipment or materials "or alternate." The reference to "or alternate" will be construed to mean "or approved alternate" in every instance. Use of an alternate or substitute item will be allowed only if approval was received as outlined in this Article.

- E. Construction Document references to equipment, materials or patented processes by manufacturer, trade name, make or catalog number may be permitted, unless indicated that no substitutes or alternates may be permitted, subject to the following:
  - 1. The DBM will certify that the substitution will perform the functions and achieve the results called for by the general design, be similar and of equal substance, and be suited to the same use as that specified.
  - 2. The submittal will state any required changes in the Construction Documents to adapt the design to the proposed substitution.
  - 3. The submittal will contain an Itemized estimate of all costs and credits that will result directly or indirectly from the acceptance of the substitution including cost of design, license fees, royalties, and testing. The submittal will also include any adjustment in the Contract Time created by the substitution. Substitutions will only be considered if they do not extend Contract Time.

## **ARTICLE 2 – PERIOD OF SERVICES**

- 2.1. The DBM will perform preconstruction and design phase services in this Contract in accordance with the terms and conditions of Article 1 and the most current update/revised Project Schedule. Failure on the part of the DBM to adhere to the Project Schedule requirements for activities for which it is responsible will be sufficient grounds for termination of this Contract by the City.

- 2.2. If the date of performance of any obligation or the last day of any time period provided for in this Contract should fall on a Saturday, Sunday, or legal holiday for the City, then the obligation will be due and owing, and the time period will expire, on the first day which is not a Saturday, Sunday or legal City holiday. Except as may otherwise be provided in this Contract, any performance provided for will be timely made if completed no later than 5:00 p.m. (Local time) on the day of performance.

### ARTICLE 3 – CONTRACT AMOUNT AND PAYMENTS

#### 3.1. CONTRACT AMOUNT

- A. Based on the preconstruction services fee proposal submitted by the DBM and accepted by the City (which by reference is made a part of this Contract); the City will pay the DBM a fee not to exceed \$337,108 or option to provide hourly fee plus expenses as follows:

For the basic services described in Article 2, the DBM will receive a fee not to exceed:	\$ 321,908
<u>Additional services and allowances:</u>	<u>\$ 15,200</u>
Total Contract Amount, not to exceed,	\$ 337,108

#### 3.2. PAYMENTS

- A. Requests for monthly payments by the DBM for preconstruction/design phase services will be submitted to the Contract Administrator on the City's "Payment Request" form and will be accompanied by a progress report, detailed invoices and receipts, if applicable. Any requests for payment will include, as a minimum, a narrative description of the tasks accomplished during the billing period, a listing of any Deliverables submitted, and copies of any Subcontractors' requests for payment, plus similar narratives and listings of Deliverables associated with their Work. Payment for services negotiated as a lump sum will be made in accordance with the percentage of Work completed during the preceding month. Services negotiated, as a not-to-exceed fee will be paid in accordance with the work effort expended on that service during the preceding month.
- B. The fees for the DBM and any Subcontractors will be based upon the hourly rate schedule included as Exhibit B attached.
- C. The DBM will pay all sums due Subcontractors for services and reimbursable expenses within 7 calendar days after the DBM has received payment for those services from the City. In no event will the City pay the DBM more than 90% percent of the Contract Amount until final acceptance of all design phase services and award of the final approved GMP. Upon City Council award of the Design-Build Construction Services Contract, final payment will be made to the DBM for the remaining 10% percent of the contract amount.
- D. The DBM agrees that no charges or claims for costs or damages of any type will be made by it for any delays or hindrances beyond the reasonable control of the

City during the progress of any portion of the services specified in this Contract. These delays or hindrances, if any, will be solely compensated for by an extension of time for a reasonable period as may be mutually agreed between the parties. It is agreed, however, that permitting the DBM to proceed to complete any services, in whole or in part after the date to which the time of completion may have been extended, will in no way act as a waiver on the part of the City of any of its legal rights.

- E. If any service(s) executed by the DBM is abandoned or suspended in whole or in part, for a period of more than 180 days through no fault of the DBM, the DBM is to be paid for the services performed before the abandonment or suspension. If the City suspends the Work for 181 consecutive days or more, the suspension will be a Contract termination for convenience.

#### **ARTICLE 4 – CITY'S RESPONSIBILITIES**

**4.1 The City, at no cost to the DBM, will furnish the following information:**

- A. One copy of data the City determines pertinent to the Work. However, the DBM will be responsible for searching the records and requesting information it considers reasonably required for the Project.
- B. All available data and information pertaining to relevant policies, standards, criteria, studies, etc.
- C. The name of the City employee or City's representative who will serve as the Contract Administrator during the term of this Contract is stated in Article 5.13(A). The Contract Administrator has the authority to administer this Contract and will monitor the DBM's compliance with all terms and conditions of this Contract. All requests for information from or decisions by the City on any aspect of the Work or Deliverables will be directed to the Contract Administrator.

**4.2 The City additionally will:**

- A. Supply, without charge, all necessary copies of programs, reports, drawings, and specifications reasonably required by the DBM except for those copies whose cost has been reimbursed by the City.
- B. Provide the DBM with adequate information in its possession or control regarding the City's requirements for the Project.
- C. Give prompt written notice to the DBM when the City becomes aware of any default or defect in the Project or non-conformance with the Drawings and Specifications.
- D. Notify the DBM of changes affecting the budget allocations.

**4.3 The City's Contract Administrator, will have authority to approve the Project Budget and Project Schedule, and render decisions and furnish information the Contract Administrator considers appropriate to the DBM.**

## **ARTICLE 5 – CONTRACT CONDITIONS**

### **5.1 PROJECT DOCUMENTS AND COPYRIGHTS**

- A. **City Ownership of Project Documents:** All work products (electronically or manually generated) including but not limited to: cost estimates, studies, design analysis, original mylar drawings, Computer Aided Drafting and Design (CADD) file diskettes, and other related documents which are prepared in the performance of this Contract (collectively referred to as Project Documents) are to be and remain the property of the City and are to be delivered to the Contract Administrator before the final payment is made to the DBM. In the event these Project Documents are altered, modified or adapted without the written consent of the DBM, which consent the DBM will not unreasonably withhold, the City agrees to hold the DBM harmless to the extent permitted by law, from the legal liability arising out of or resulting from the City's alteration, modification or adaptation of the Project Documents.
- B. **DBM to Retain Copyrights:** The copyrights, patents, trade secrets or other intellectual property rights associated with the ideas, concepts, techniques, inventions, processes or works of authorship developed or created by the DBM, its Subcontractors or personnel, during the course of performing this Contract or arising out of the Project will belong to the DBM.
- C. **License to City for Reasonable Use:** The DBM grants, and will require its Subcontractors to grant, a license to the City, its agents, employees, and representatives for an indefinite period of time to reasonably use, make copies, and distribute as appropriate the Project Documents, works or Deliverables developed or created for the Project and this Contract. This license will also include the making of derivative works. In the event that the derivative works require the City to alter or modify the Project Documents, then Article 5.1(A) applies.
- D. **Documents to Bear Seal:** When applicable and required by state law, the DBM and its Subcontractors will endorse, by an Arizona professional seal, all plans, works, and Deliverables prepared by them for this Contract.

### **5.2 COMPLETENESS AND ACCURACY OF DBM'S WORK**

The DBM will be responsible for the completeness and accuracy of its reviews, reports, supporting data, and all other design phase Deliverables prepared or compiled in compliance with its obligations under this Contract and will at its sole expense correct its Work or the Deliverables. The fact that the City has accepted or approved the DBM's Work or the Deliverables will in no way relieve the DBM of any of its responsibilities under the Contract, nor does this requirement to correct the Work or Deliverables constitute a waiver of any claims or damages otherwise available by law or Contract to the City.

### **5.3 ALTERATION IN CHARACTER OF WORK**

- A. In the event an alteration or modification in the character of Work or Deliverables results in a substantial change in this Contract, materially increasing or decreasing

the scope of services, cost of performance, or Project Schedule, the Work or Deliverables will be performed as directed by the City. Before any altered or modified Work begins, a Change Order or Amendment will be approved and executed by the City and the DBM. This Change Order or Amendment will not be effective until approved by the City.

- B. Additions to, modifications, or deletions from this Project may be made, and the compensation to be paid to the DBM may accordingly be adjusted by mutual Contract of the contracting parties.
- C. No claim for extra Work done or materials furnished by the DBM will be allowed by the City except as provided in this Contract, nor will the DBM do any Work or furnish any material(s) not covered by this Contract unless the work or material is first authorized in writing. Work or material(s) furnished by the DBM without first delivering written authorization will be at the DBM's sole responsibility, cost, and expense, and the DBM agrees that without first delivering written authorization, no claim for compensation for the Work or materials furnished will be made.

#### 5.4 DATA CONFIDENTIALITY

- A. As used in this Contract, data means all information, whether written or verbal, including plans, photographs, studies, investigations, audits, analysis, samples, reports, calculations, internal memos, meeting minutes, data field notes, work product, proposals, correspondence and any other similar documents or information prepared by or obtained by the DBM in the performance of this Contract.
- B. The parties agree that all data, including originals, images, and reproductions, prepared by, obtained by, or transmitted to the DBM in connection with the DBM's performance of this Contract are confidential and proprietary information belonging to the City.
- C. The DBM will not divulge data to any third party without first obtaining the written consent of the City. The DBM will not use the data for any purposes except to perform the services required under this Contract. These prohibitions will not apply to the following data:
  - 1. Data which was known to the DBM before its performance under this Contract unless the data was acquired in connection with Work performed for the City;
  - 2. Data which was acquired by the DBM in its performance under this Contract and which was disclosed to the DBM by a third party, who to the best of the DBM's knowledge and belief, had the legal right to make the disclosure and the DBM is not otherwise required to hold the data in confidence; or
  - 3. Data, which is required to be disclosed by the DBM by virtue of law, regulation, or court.
- D. In the event the DBM is required or requested to disclose data to a third party, or any other information to which the DBM became privy as a result of any other Contract with the City, the DBM will first notify the City as stated in this Article of

the request or demand for the data. The DBM will timely give the City sufficient facts, so that the City can have a meaningful opportunity to either first give its consent or take any action that the City may consider appropriate to protect the data or other information from disclosure.

- E. The DBM, unless prohibited by law, will promptly deliver, as stated in this Article, a copy of all data to the City within 10 calendar days after completion of services. All data will continue to be subject to the confidentiality provisions of this Contract.
- F. The DBM assumes all liability for maintaining the confidentiality of the data in its possession and agrees to compensate the City if any of the provisions of this Article are violated by the DBM, its employees, agents or Subconsultants. Solely for the purposes of seeking injunctive relief, it is agreed that a breach of this Article will be considered to cause irreparable harm that justifies injunctive relief in court.

## **5.5 PROJECT STAFFING**

- A. Before the start of any Work or Deliverables under this Contract, the DBM will submit to the City an organizational chart for the DBM staff and Subcontractors and detailed resumes of key personnel listed in its response to the City's Request for Qualifications or subsequent fee proposals (or revisions), who will be involved in performing the services described in the Contract. Unless otherwise informed, the City acknowledges its acceptance of personnel to perform these services under this Contract. In the event the DBM desires to change any key personnel from performing the services under this Contract, the DBM will submit the qualifications of the proposed substituted personnel to the City for prior approval. Key personnel will include, but are not limited to, principal-in-charge, contract administrator, superintendent, project director, design professionals or those persons specifically identified to perform services of cost estimating, scheduling, value engineering, and procurement planning. The City must approve all key personnel.
- B. The DBM will maintain an adequate number of competent and qualified persons, as determined by the City, to ensure acceptable and timely completion of the scope of services described in this Contract throughout the period of those services. If the City objects, with reasonable cause, to any of the DBM's staff, the DBM will take prompt corrective action acceptable to the City and, if required, remove the personnel from the Project and replace or add new personnel acceptable to the City.

## **5.6 INDEPENDENT CONTRACTOR**

The DBM is and will be an independent contractor and not an employee or agent of the City and whatever measure of control the City exercises over the Work or Deliverables in compliance with this Contract will be as to the results of the Work only. No provision in this Contract will give or be construed to give the City the right to direct the DBM as to the details of accomplishing the Work or Deliverables. These results will comply with all applicable laws and ordinances.

## **5.7 ABANDONMENT, TERMINATION AND CANCELLATION**

- A. The City has the right to terminate this Contract or abandon any portion of the Project for which services have not been performed by the DBM.
- B. Termination for Convenience: The City reserves the right to terminate this Contract or any part of this Contract for its sole convenience with 30 days prior written notice. In the event of termination, the DBM will immediately stop all Work, and will immediately cause any of its suppliers and Subcontractors to cease Work. As compensation in full for services performed to the date of termination, the DBM will receive a fee for the percentage of services actually completed. This fee will be in the amount to be mutually agreed upon by the DBM and the City, based on the agreed Scope of Work. If there is no mutual agreement, the Contract Administrator will determine the percentage of completion of each task detailed in the Scope of Work and the DBM's compensation will be based upon this determination. The City will make this final payment within 60 days after the Design Professional has delivered the last of the partially completed items. The DBM will not be paid for any Work done upon receipt of the notice of termination, nor for any costs incurred by the DBM's suppliers or Subcontractors, which the DBM could reasonably have avoided.
- C. Cancellation for Cause: The City may also cancel this Contract or any part of this Contract after first giving 7 days written notice for cause in the event of any default by the DBM, or if the DBM fails to comply with any of the terms and conditions of this Contract. Unsatisfactory performance, despite a reasonable opportunity to cure as judged by the Contract Administrator, and failure to provide the City, upon request, with adequate assurances of future performance will all be causes allowing the City to cancel this Contract for cause. In the event of cancellation for cause, the City will not be liable to the DBM for any amount, and the DBM will be liable to the City for any and all damages sustained by reason of the default, which gave rise to the cancellation.

In the event the DBM is in violation of any Federal, State, County or City law, regulation or ordinance, the City may cancel this Contract immediately upon giving notice to the DBM.

In the event the City cancels this Contract or any part of the services as provided in this Contract, the City will notify the DBM in writing, and immediately upon receiving this notice, the DBM will discontinue advancing the Work under this Contract and proceed to close its operations, and the expenditure, if any, of costs resulting from this cancellation, abandonment or cancellation.

Upon termination, cancellation or abandonment, the DBM will deliver to the City all drawings, special provisions, field survey notes, reports, and estimates, entirely or partially completed, in any format, including but not limited to, written or electronic media, together with all unused materials supplied by the City. Use of incomplete data will be the City's sole responsibility. If through any cause, the DBM fails to fulfill in a timely and proper manner its obligations under this Contract, or if the DBM violates any of the covenants, agreements, or stipulations of this Contract, the City may withhold any payments to the DBM for the purpose of setoff until such time as the exact amount of damages due the City from the DBM is determined by a court of competent jurisdiction.

- D. The City and DBM agree to the full performance of the covenants contained in this Contract, except that the City reserves the right, at its discretion and without cause, to terminate, cancel or abandon any or all services provided for in this Contract, or abandon any portion of the Project for which services have been performed by the DBM.
- E. The DBM, upon termination, cancellation or abandonment, will promptly deliver to the City all reports, estimates and other Work or the Deliverables entirely or partially completed, together with all unused materials supplied by the City.
- F. The DBM will appraise the Work completed and submit an appraisal to the City for evaluation. The City will have the right to inspect the DBM's Work or Deliverables to appraise the Work completed.
- G. The DBM will receive compensation in full for services satisfactorily performed to the date of the cancellation. The fee will be paid in accordance with Article 3 of this Contract, and will be an amount mutually agreed upon by the DBM and the City. If there is no mutual agreement, the final determination will be made in accordance with Article 5.9, "Disputes". However, in no event will the fee exceed that stated in Article 3 or as amended in accordance with Article 5.3, "Alteration in Character of Work". The City will make the final payment within 60 Days after the DBM has delivered the last of the partially or otherwise completed Work items and the final fee has been agreed upon.
- H. If the City improperly cancels the Contract for cause, the cancellation for cause will be converted to a termination for convenience in accordance with the provisions of Article 5.7(B).

## **5.8 FUNDS APPROPRIATION**

If the City Council does not appropriate funds to continue this Contract and pay for charges incurred, the City may terminate this Contract at the end of the current fiscal period. The City agrees to give written notice to the DBM at least 30 days before the end of its current fiscal period and will pay the DBM for all approved charges incurred through the end of this period.

## **5.9 DISPUTES**

In any unresolved dispute arising out of an interpretation of this Contract or the duties required, the final determination at the administrative level will be made by the Contract Administrator.

## **5.10 WITHHOLDING PAYMENT**

The City, in accordance with Title 34 of the Arizona Revised Statutes, reserves the right to withhold funds from the City's progress payments up to the amount equal to the claims the City may have against the DBM, until such time as a settlement on those claims has been reached.

## **5.11 RECORDS/AUDIT**

- A. Records of the DBM's direct personnel payroll, reimbursable expenses pertaining to this Project and records of accounts between the City and the DBM will be kept on a generally recognized accounting basis. The City, its authorized representative, or the appropriate federal agency, reserve the right to audit the DBM's records to verify the accuracy and appropriateness of all pricing data, including data used to negotiate this Contract and any Change Orders. The City reserves the right to decrease the Contract Amount or payments made on this Contract if, upon audit of the DBM's records, the audit discloses the DBM has provided false, misleading, or inaccurate cost and pricing data. If an audit in accordance with this Article, discloses overcharges, of any nature, by the DBM to the City in excess of 1% of the total contract billings, the actual cost of the City's audit will be reimbursed to the City by the DBM. Any adjustments or payments which must be made as a result of audit or inspection of the DBM's invoices or records will be made within a reasonable amount of time (not to exceed 90 days) from presentation of the City's findings to the DBM.
- B. The DBM will include a provision similar to this Article 5.11 in all of its Contracts with Subconsultants, Subcontractors, and Suppliers providing services under this Contract to ensure the City, its authorized representative, or the appropriate federal agency, has access to the Subconsultants', Subcontractors', and Suppliers' records to verify the accuracy of cost and pricing data. The City reserves the right to decrease the Contract Amount or payments made on this Contract if the above provision is not included in Subconsultant, Subcontractor, and Supplier contracts, and one or more of those parties do not allow the City to audit their records to verify the accuracy and appropriateness of pricing data.
- C. This audit provision includes the right to inspect personnel records as required by Article 8.1.

## 5.12 INDEMNIFICATION

- A. To the fullest extent permitted by law, the DBM, its successors, assigns and guarantors, must defend, indemnify and hold harmless the City of Scottsdale, its agents, representatives, officers, directors, officials and employees from and against all allegations, demands, proceedings, suits, actions, claims, damages, losses, expenses, including but not limited to, attorney fees, court costs, and the cost of appellate proceedings, and all claim adjusting and handling expense, related to, arising from or out of, or resulting from any negligent or willful actions, acts, errors, mistakes or omissions to the extent caused by the DBM performing work or services under this Contract, including but not limited to, any Subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable and any injury or damages by any of the DBM employees.

Insurance provisions stated in this Contract are separate and independent from the indemnity provisions of this Article and will not be construed in any way to limit the scope and magnitude of the indemnity provisions. The indemnity provisions of this Article will not be construed in any way to limit the scope and magnitude and applicability of the insurance provisions.

## 5.13 NOTICES

- A. Unless otherwise provided in this Contract, demands under this Contract will be in writing and will be considered to have been duly given and received either (1) on the date of service if personally served on the party to whom notice is to be given, or (2) on the third day after the date of the postmark of deposit by first class United States mail, registered or certified, postage prepaid and properly addressed as follows:

To City:	Gary Meyer City of Scottsdale 7447 E. Indian School Road, Suite 205 Scottsdale, Arizona 85251
To DBM:	Wayne Bogan Wespac Construction, Inc. 9440 N. 26 <sup>th</sup> Street Phoenix, Arizona 85028
To Design Professional:	Kenneth Allen Allen + Philp Architects 7154 E. Stetson Drive #400 Scottsdale, Arizona 85251
Copy to:	Gary Meyer, Contract Administrator Capital Project Management 7447 E. Indian School Road, Suite 205 Scottsdale, Arizona 85251

Notice by facsimile or electronic (e-mail) will not be considered adequate notice as required by this Contract.

**B. Intellectual Property**

1. The DBM will pay all royalties and license fees associated with its performance of services under this Contract.
2. The DBM will defend any action or proceeding brought against the City based on any claim that the Work, or any part of the Work, or the operation or use of the Work or any part of the Work, constitutes infringement of any United States patent or copyright, issued now or at some later date. The City will give prompt written notice to the DBM of any action or proceeding and will reasonably provide authority, information and assistance in the defense of this action. The DBM will indemnify and hold harmless the City from and against all damages, expenses, losses, royalties, profits and costs, including but not limited to, attorneys' fees and expenses awarded against the City or the DBM in any action or proceeding. The DBM agrees to keep the City informed of all developments in the defense of actions. The City may be represented by, and actively participate through its own counsel in any suit or proceedings if it so desires.
3. If the City is enjoined from the operation or use of the Work, or any part of the Work, as the result of any patent or copyright suit, claim, or proceeding, the DBM will at its sole expense take reasonable steps to procure the right to operate or use the Work. If the DBM cannot procure the right within a

reasonable time, the DBM will promptly, at the DBM's option and at the DBM's expense, (i) modify the Work so as to avoid infringement of any patent or copyright or (ii) replace the Work with Work that does not infringe or violate any patent or copyright.

4. Articles 5.13(B) (2) and 5.13(B) (3) above will not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by the City and not offered or recommended by the DBM to the City or (ii) arising from modifications to the Work by the City or its agents after acceptance of the Work.
5. The obligations stated in this Article 5.13(B) will constitute the sole Contract between the parties relating to liability for infringement or violation of any patent or copyright.

#### **5.14 CONFLICT OF INTEREST**

- A. To evaluate and avoid potential conflicts of interest, the DBM will provide written notice to the City, as stated in this Article, of any Work or services performed by the DBM for third parties that may involve or be associated with any real property or personal property owned or leased by the City. Any notice will be given 7 business days before commencement of the Project by the DBM for a third party, or 7 business days before an adverse action as defined below. Written notice and disclosure will be sent to the Contract Administrator identified in Article 5.13(A).
- B. Actions that are considered to be adverse to the City under this Contract include but are not limited to:
  1. Using data as defined in this Contract acquired in connection with this Contract to assist a third party in pursuing administrative or judicial action against the City; and
  2. Testifying or providing evidence on behalf of any person in connection with an administrative or judicial action against the City; and
  3. Using data to produce income for the DBM or its employees independently of performing the services under this Contract, without first obtaining the written consent of the City.
- C. The DBM represents that except for those persons, entities and projects identified to the City, the services to be performed by the DBM under this Contract are not expected to create an interest with any person, entity, or third party project that is, or may be adverse to the interests of the City.
- D. The DBM's failure to provide a written notice and disclosure of the information as stated in this Article on Conflicts of Interest will constitute a material breach of this Contract.

#### **5.15 CONTRACTOR'S LICENSE**

Before the award of the Contract, the DBM must provide to the City's Capital Project Management Office, its Contractor's License Classification and number and its Federal Tax I.D. number and Federal W-9 Form.

#### **5.16 SUCCESSORS AND ASSIGNS**

This Contract will extend to and be binding upon the DBM, its successors and assigns, including any individual, company, partnership, or other entity with or into which the DBM will merge, consolidate, or be liquidated, or any person, corporation, partnership, or other entity to which the DBM sells its assets. No right covered by this Contract will be assigned in whole or in part without first obtaining the written consent of the City. In no event will any contractual relation be created or be construed to be created as between any third party and the City.

#### **5.17 FORCE MAJEURE**

Neither party will be responsible for delays or failures in performance resulting from acts beyond their control. The acts include, but are not limited to, acts of God, riots, acts of war, epidemics, governmental regulations imposed after the fact, fire, communication line failures, (labor disputes not involving the DBM's own forces), or power failures.

#### **5.18 TAXES**

The fee listed in this Contract includes any and all taxes applicable to the activities authorized by this Contract. The City will have no obligation to pay additional amounts for taxes of any type.

#### **5.19 NON-WAIVER PROVISION**

The failure of either party to enforce any of the provisions of this Contract or to require performance by the other party of any of the provisions of this Contract will not be construed to be a waiver of those provisions, nor will it affect the validity of this Contract or any part of it, or the right of either party to subsequently enforce each and every provision.

#### **5.20 JURISDICTION**

This Contract will be considered to be made under, and will be construed in accordance with and governed by the laws of the State of Arizona, without regard to the conflicts or choice of law provisions. An action to enforce any provision of this Contract or to obtain any remedy will be brought in the Superior Court, Maricopa County, Arizona, and for this purpose, each party expressly and irrevocably consents to the jurisdiction and venue of that Court.

#### **5.21 SURVIVAL**

All warranties, representations and indemnifications by the DBM will survive the completion or termination of this Contract.

#### **5.22 MODIFICATION**

Any amendment, modification or variation from the terms of this Contract must be in writing and will be effective only after approval of all parties signing the original Contract.

#### **5.23 SEVERABILITY**

If any term or provision of this Contract is found to be illegal or unenforceable, then despite that illegality or unenforceability, this Contract will remain in full force and effect and that term or provision will be considered to be deleted.

#### **5.24 INTEGRATION**

This Contract constitutes the entire understanding of the parties and no representations or agreements, oral or written, made before its execution will vary or modify its terms.

#### **5.25 TIME IS OF THE ESSENCE**

Time of each of the terms, covenants, and conditions of this Contract is expressly made of the essence.

#### **5.26 THIRD PARTY BENEFICIARY**

All duties and responsibilities undertaken in compliance with this Contract are for the sole and exclusive benefit of the City and the DBM and not for the benefit of any other party.

#### **5.27 COOPERATION AND FURTHER DOCUMENTATION**

The DBM agrees to provide the City with other duly executed documents as may be reasonably requested by the City to implement the intent of this Contract.

#### **5.28 CONFLICT IN LANGUAGE**

All Work or Deliverables performed will conform to all applicable City of Scottsdale codes, ordinances and requirements as outlined in this Contract. If there is a conflict in interpretation between provisions in this Contract and any Exhibits, the provisions in this Contract will prevail.

#### **5.29 ATTORNEY'S FEES**

In the event either party brings any action for any relief, declaratory or otherwise, arising out of this Contract, or on account of any breach of default of this Contract, the prevailing party will be entitled to receive from the other party reasonable attorney's fees and reasonable costs and expenses, determined by the court sitting without a jury, which will be considered to have accrued on the commencement of the action and will be enforceable whether or not the action is prosecuted to judgment.

#### **5.30 HEADINGS**

The headings used in this Contract, or any other Contract Documents, are for ease of reference only and will not in any way be construed to limit or alter the meaning of any provision.

## ARTICLE 6 – INSURANCE

### 6.1 INSURANCE REQUIREMENTS

- A. Concurrently with the execution of this Contract, the DBM must furnish the City of Scottsdale a certificate of insurance on a standard insurance industry ACORD form. The ACORD form must be issued by an insurance company authorized to transact business in the State of Arizona, or one that is named on the List of Qualified Unauthorized Insurers maintained by the Arizona Department of Insurance.
- B. The DBM, Subcontractors and Subconsultants must procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract are satisfied, insurance against claims for injury to persons or damage to property, which may arise from or in connection with the performance of the Work by the DBM, his agents, representatives, employees, or Subcontractors.
- C. The insurance requirements are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract.
- D. The City in no way warrants that the minimum limits are sufficient to protect the DBM from liabilities that might arise out of the performance of the agreed contract services under this Contract by the DBM, his agents, representatives, employees, Subcontractors or Subconsultants and the DBM is free to purchase any additional insurance as may be determined necessary. The City will not pay for higher limits, but if the DBM pays for insurance with higher limits, the DBM will name the City as an additional insured on any additional insurance.

### 6.2 MINIMUM SCOPE AND LIMITS OF INSURANCE

- A. The DBM will provide coverage and with limits of liability not less than those stated below.

#### 1. Commercial General Liability-Occurrence Form

The DBM must provide coverage at least as broad and with limits of liability not less than those stated below.

#### A. Commercial General Liability-Occurrence Form

General Aggregate	\$2,000,000
Products-Completed Operations Aggregate	\$2,000,000
Personal & Advertising Injury	\$2,000,000
Each Occurrence	\$1,000,000
Fire Damage (Any one fire)	\$100,000
Medical Expense (Any one person)	Optional

**B. Automobile Liability-Any Auto or Owned, Hired and Non-Owned Vehicles**

Combined Single Limit Per Accident For Bodily Injury and Property Damage	\$1,000,000
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**C. Workers' Compensation and Employers Liability**

Workers' Compensation Statutory	
Employers Liability: Each Accident	\$100,000
Disease – Each Employee	\$100,000
Disease – Policy Limit	\$500,000

**6.3 SELF-INSURED RETENTIONS**

Any self-insured retentions and deductibles must be declared to and approved by the City. If not approved, the City may require that the insurer reduce or eliminate the self-insured retentions with respect to the City, its officers, officials, agents, employees, and volunteers.

**6.4 OTHER INSURANCE REQUIREMENTS**

The policies are to contain, or be endorsed to contain, the following provisions:

**A. Contractors Professional Liability:** The DBM must carry Contractors Professional Liability insurance to cover the residual, contingent and passive design exposures of the DBM.

1. The City of Scottsdale, its officers, officials, agents, and employees, are to be named as additional insureds with respect to liability arising out of: activities performed by or on behalf of the DBM, including the City's general supervision of the DBM; products and completed operations of the DBM; and automobiles owned, leased, hired or borrowed by the DBM.
2. Vehicle Liability: The DBM must maintain Business Automobile Liability with coverage at least as broad as Insurance Services Office, Inc. coverage code "1" "any auto" policy form CA 00 01 07 97 or an equivalent.
3. The Commercial General Liability Insurance must contain broad form contractual liability coverage and will not exclude liability arising out of explosion, collapse or underground hazard ("XCU").
4. The City, its officers, officials, agents, and employees must be additional insureds to the full limits of liability purchased by the DBM, even if those limits of liability are in excess of those required by this Contract. The Commercial General Liability policy will be at least as broad as the Insurance Service Office, Inc.'s CG 0 0 01 07 98.

**B. Contractors Professional Limits of Liability:** The DBM must carry limits of \$1,000,000 each Project and \$2,000,000 in the Aggregate under a stand-alone policy or included by endorsement under the Commercial General Liability policy. The DBM, its successors and or assigns, is required to maintain this Professional

Liability insurance as specified in this Contract for a minimum period of 3 years following completion and acceptance of the Work. Certificates of Insurance citing that applicable coverage is in force and contains the provisions required by this Contract must be submitted for the 3 year period.

1. The DBM's insurance coverage must be primary insurance with respect to the City, its officers, officials, agents, and employees. Insurance or self-insurance maintained by the City, its officers, officials, agents, and employees must be in excess of the DBM's insurance and will not contribute to it.
2. The DBM's insurance must apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. The coverage provided by the DBM and its Subcontractors must not be limited to the liability assumed under the indemnification provisions of this Contract.
3. The policies must contain a waiver of subrogation against the City, its officers, officials, agents, and employees for losses arising from Work performed for the City.
4. Workers' Compensation and Employers Liability policies are to contain, or be endorsed to contain, the following: The insurer must agree to waive all rights of subrogation against the City, its officers, officials, agents, and employees for losses arising from Work performed for the City.
5. Claims Made: In the event any insurance policies required by this Contract are written on a "claims made" basis, coverage must extend, either by keeping coverage in force or purchasing an extended reporting option, for 3 years past completion and acceptance of the Work or services evidenced by submission of annual Certificates of Insurance citing applicable coverage is in force and contains the provisions as required in this Contract for the 3 year period.

**C. Commercial General Liability and Automobile Liability Coverages**

1. The Commercial General Liability and Automobile Liability policies are to contain, or be endorsed to contain, the following provisions: The City of Scottsdale, its officers, officials, agents, and employees are additional insureds with respect to liability arising out of activities performed by, or on behalf of, the DBM including the City's general supervision of the DBM; Products and Completed operations of the DBM; and automobiles owned, leased, hired, or borrowed by the DBM.
2. The DBM's insurance must contain broad form contractual liability coverage and must not exclude liability arising out of explosion, collapse or underground property damage hazards ("XCU") coverage.
3. The City, its officers, officials, agents, and employees must be additional insureds to the full limits of liability purchased by the DBM even if those limits of liability are in excess of those required by this Contract.

4. The DBM's insurance coverage must be primary insurance with respect to the City, its officers, officials, agents, and employees. Any insurance or self-insurance maintained by the City, its officers, officials, agents, and employees must be in excess of the coverage provided by the DBM and must not contribute to it.
5. The DBM's insurance must apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
6. Coverage provided by the DBM must not be limited to the liability assumed under the indemnification provisions of this Contract.
7. The policies must contain a waiver of subrogation against the City, its officers, officials, agents, and employees, for losses arising from Work performed by the DBM for the City.
8. The DBM, its successors or assigns, is required to maintain Commercial General Liability insurance as specified in this Contract for a minimum period of 3 years following completion and acceptance of the Work. The DBM must submit Certificates of Insurance evidencing the Commercial General Liability insurance during this 3 year period containing all the insurance requirements stated in this Contract including naming the City of Scottsdale, its agents, representatives, officers, directors, officials and employees as Additional Insured as required.
9. Workers' Compensation and Employers Liability Coverage: The insurer must agree to waive all rights of subrogation against the City, its officers, officials, agents, employees, and volunteers for losses arising from Work performed by the DBM for the City.

#### **6.5 SUBCONSULTANT'S AND SUBCONTRACTOR'S INSURANCE**

Unless the DBM's Subconsultants and Subcontractors can provide the same level of coverage as detailed in Article 6.2 and name the City and the DBM as Additional Insureds, the DBM's certificates must include all Subcontractors and Subconsultants as insureds under its policies or the DBM must maintain separate certificates and endorsements for each Subcontractor and Subconsultant. All coverages for Subcontractors and Subconsultants must be in the amounts shown in Article 6.2. Certificates must contain a provision that the insurance will not be cancelled or materially altered without at least 30 days advance notice to the City.

#### **6.6 NOTICE OF CANCELLATION**

Each insurance policy required by the insurance provisions of this Contract must provide the required coverage and must not be suspended, voided, canceled by either party, reduced in coverage or in limits except until after 30 days written notice has first been given, by certified mail, return receipt requested to:

The City of Scottsdale Risk Management Office  
7447 E. Indian School Road, Suite 225  
Scottsdale, Arizona 85251

## **6.7 ACCEPTABILITY OF INSURERS**

Insurance is to be placed with insurers duly licensed or approved unlicensed companies in the State of Arizona and with an A. M. Best's rating of no less than B++6. The City in no way warrants that the above required minimum insurer rating is sufficient to protect the DBM from potential insurer insolvency.

## **6.8 VERIFICATION OF COVERAGE**

- A. The DBM must furnish the City Certificates of Insurance (ACORD form or equivalent approved by the City) and with original endorsements effecting coverage as required by this Contract. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. Any policy endorsements that restrict or limit coverages must be clearly noted on the Certificate of Insurance.
- B. All certificates and endorsements are to be received and approved by the City before Work commences except for Builders' Risk Insurance. Each insurance policy required by this Contract must be in effect at or before the earlier of commencement of Work under the Contract Documents or the signing of this Contract, except for Builders' Risk Insurance which must be in effect before the start of Work and remain in effect for the duration of the Project. Failure to maintain the insurance policies as required by this Contract or to provide evidence of renewal is a material breach of this Contract.
- C. All Certificates of Insurance required by this Contract must be sent directly to the City of Scottsdale, Capital Project Management. **The project number and project description must be included on the Certificates of Insurance.** The City reserves the right to require complete, certified copies of all insurance policies required by this Contract, at any time.

## **6.9 APPROVAL**

Any modification or variation from the insurance requirements in this Contract must be approved by the Scottsdale Risk Management Office, whose decision is final. This action will not require a formal contract amendment, but may be made by administrative action.

## **ARTICLE 7 – INTELLECTUAL PROPERTY**

- 7.1 The DBM must pay all royalties and license fees associated with its performance of services.
- 7.2 The DBM must defend any action or proceeding brought against the City based on any claim that the Work, or any part of it, or the operation or use of the Work or any part of it, constitutes infringement of any United States patent or copyright, now or subsequently issued. The City will give prompt written notice to the DBM of any action

or proceeding and will reasonably provide authority, information and assistance in the defense of any action or proceeding. The DBM will indemnify and hold harmless the City from and against all damages and costs, including but not limited to attorneys' fees and expenses awarded against the City or the DBM in any action or proceeding. The DBM agrees to keep the City informed of all developments in the defense of these actions.

- 7.3 If the City is enjoined from the operation or use of the Work, or any part of the Work, as the result of any patent or copyright suit, claim, or proceeding, the DBM must at its sole expense take reasonable steps to procure the right to operate or use the Work. If the DBM cannot so procure this right within a reasonable time, the DBM must promptly, at the DBM's option and at the DBM's expense, (i) modify the Work so as to avoid infringement of any patent or copyright or (ii) replace the Work with Work that does not infringe or violate any patent or copyright.
- 7.4 Articles 7.1 and 7.2 above will not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by the City and not offered or recommended by the DBM to the City or (ii) arising from modifications to the Work by the City or its agents after acceptance of the Work.
- 7.5 The obligations contained in this Article 7 will constitute the sole Contract between the parties relating to liability for infringement or violation of any patent or copyright.

#### **7.6 EFFECTIVE DATE**

This Contract will be in full force and effect only when it has been approved and executed by the duly authorized City officials.

### **ARTICLE 8 – FEDERAL AND STATE LAW**

#### **8.1 COMPLIANCE WITH FEDERAL AND STATE LAWS**

The DBM understands and acknowledges the applicability to it of the American with Disabilities Act, the Immigration Reform and Control Act of 1986 and the Drug Free Workplace Act of 1989. The DBM agrees to comply with these laws in performing this Contract and to permit the City to verify compliance. The DBM will also comply with A.R.S. § 34-301, "Employment of Aliens on Public Works Prohibited", and A.R.S. § 34-302, as amended, "Residence Requirements for Employees". The DBM will include the terms of this provision in all contracts and subcontracts for work performed under this Contract, including supervision and oversight.

**Under the provisions of A.R.S. § 41-4401, the DBM warrants to the City that the DBM and all its subcontractors will comply with all Federal Immigration laws and regulations that relate to their employees and that the DBM and all its subcontractors now comply with the E-Verify Program under A.R.S. § 23-214(A).**

A breach of this warranty by the DBM or any of its subcontractors will be considered a material breach of this Contract and may subject the DBM or Subcontractor to penalties up to and including termination of this Contract or any subcontract.

The City retains the legal right to inspect the papers of any employee of the DBM or any subcontractor who works on this Contract to ensure that the DBM or any subcontractor is complying with the warranty given above.

The City may conduct random verification of the employment records of the DBM and any of its subcontractors to ensure compliance with this warranty. The DBM agrees to indemnify, defend and hold the City harmless for, from and against all losses and liabilities arising from any and all violations of these statutes.

The City will not consider the DBM or any of its subcontractors in material breach of this Contract if the DBM and its subcontractors establish that they have complied with the employment verification provisions prescribed by 8 USCA § 1324(a) and (b) of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. § 23-214(A). The "E-Verify Program" means the employment verification pilot program as jointly administered by the United States Department of Homeland Security and the Social Security Administration or any of its successor programs.

The provisions of this Article must be included in any contract the DBM enters into with any and all of its subcontractors who provide services under this Contract or any subcontract. "Services" are defined as furnishing labor, time or effort in the State of Arizona by a contractor or subcontractor. Services include construction or maintenance of any structure, building or transportation facility or improvement to real property. The DBM will take appropriate steps to assure that all subcontractors comply with the requirements of the E-Verify Program. The DBM's failure to assure compliance by all its' subcontractors with the E-Verify Program may be considered a material breach of this Contract by the City.

## **8.2 CONTRACTS WITH SUDAN AND IRAN**

In accordance with A.R.S. § 35-391.06 and 35-393.06, the Contractor certifies that it does not have scrutinized business operations in Sudan or Iran, as defined in A.R.S. § 35-391(15) and 35-393(12).

## **8.3 EQUAL EMPLOYMENT OPPORTUNITY**

During the performance of this Contract the DBM will follow the Federal government's Affirmative Action guidelines to ensure that employees or applicants applying for employment will not be discriminated against because of race, color, religion, sex or national origin. The DBM will include the terms of this provision in all contracts and subcontracts for work performed under this Contract, including supervision and oversight.

## **8.4 NO PREFERENTIAL TREATMENT OR DISCRIMINATION**

In accordance with the provisions of Article II, Section 36 of the Arizona Constitution, the City will not grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin.

## **8.5 COMPLIANCE WITH AMERICANS WITH DISABILITIES ACT**

The DBM acknowledges that, pursuant to the Americans with Disabilities Act (ADA), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. The DBM will provide the services specified in this Contract in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. The DBM agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Contract, and further agrees that any violation of this prohibition on the part of the DBM, its employees, agents or assigns will constitute a material breach of this Contract.

## ARTICLE 9 – TERMS AND DEFINITIONS

**Addenda** – Written or graphic instruments issued before the submittal of the GMP Proposal(s), which clarify, correct or change the GMP Proposal(s) requirements.

**Contract ("Contract")** – This written document signed by the City and the DBM covering the design phase of the Project, and including other documents itemized and referenced in or attached to and made a part of this Contract.

**Alternate Systems Evaluations** – Alternatives for design, means and methods or other scope of work considerations that are evaluated using value engineering principles and have the potential to reduce construction costs while still delivering a quality and functional Project that meets City requirements.

**Change Order** – A written order signed by an authorized representative of the City and which approves changes in the total compensation or time allowed for completion of services consistent with S.R.C. Sec. 2-200.

**City ("Owner")** – means the City of Scottsdale, an Arizona municipal corporation. Regulatory activities handled by the City of Scottsdale Development Services, Planning and Fire Departments or any other City department are not subject to the responsibilities of the City under this Contract.

**Contingency, DBM** – means an agreed upon amount, either lump sum or a percentage of the Cost of the Work, that is included in the GMP and to be used by the DBM in accordance with the General Provisions in the Design-Build Construction contract, exclusive of City initiated changes and unknown site conditions. Generally, Contractor's Contingency recognizes that the Drawings and the Specifications may still be less than 100% complete after the City's final acceptance of the GMP. The amount of the DBM's Contingency will be negotiated as a separate line item in each GMP package. Use and management of DBM's Contingency is described in Article 1.8(C) (3).

**Contingency, City's** – The City may, at its discretion, order changes in the scope of the Project. The City's Contingency is a fund to cover cost growth during the Project used at the discretion of the City usually for costs that result from the City's direct changes or unforeseen site conditions. The amount of the City's Contingency may be set solely by the City and will be in addition to the Project costs included in the DBM's GMP packages. Use and management of the City's Contingency is described in Article 1.8(D). The City's Contingency is an amount to cover changes initiated by the City, which may be incorporated into the GMP as an allowance at the City's discretion.

**Construction Documents** – The plans, specifications and drawings prepared by the Design Professional after correcting for permit review requirements and incorporating addenda and approved Change Orders.

**Construction Fee** – The DBM's administrative costs, home office overhead, and profit, whether at the DBM's principal or branch offices. This includes the administrative costs and home office costs and any limitations or exclusions that may be included in the General Conditions for the construction phase.

**Contract Amount** – The final approved not-to-exceed budget for this Contract as identified in Article 3.1(A).

**Contract Documents** – means the following items and documents in descending order of precedence executed by the City and the DBM: (i) all written modifications, addenda and Change Orders; (ii) this Preconstruction Contract, including all exhibits and attachments; (iii) the Design-Build Construction Contract; (iv) written Supplementary Conditions; (v) Construction Documents; and (vi) GMP Plans and Specifications.

**Contract Time(s)** – The number of days or the dates related to the contract time for the Preconstruction Design Phase Services Contract.

**Cost of the Work** – The direct costs necessarily incurred by the DBM in the proper performance of the Work. The Cost of the Work will include direct labor costs, subcontract costs, costs of materials and equipment incorporated in the completed construction, costs of other materials and equipment, temporary facilities, building permit fees, materials testing, and related items. The Cost of the Work will not include the DBM's construction fee, general conditions fee, taxes, bonds, or insurance costs.

**Day** – Calendar day(s) unless otherwise specifically noted in the Contract Documents.

**Deliverables** – The work products prepared by the DBM in performing the Scope of Work described in Exhibit A of this Contract. Major deliverables to be prepared and provided by the DBM during the preconstruction design phase may include, but are not limited to: Plans and Specifications, Construction Management Plan, Project Schedule, Schedule of Values, alternative system evaluations, procurement strategies and plans, cost estimates, construction market surveys, cash flow projections, GMP Proposals, Subcontractor procurement plan, Subcontractor Contracts, Subcontractor bid packages, Supplier Contracts, and others as indicated in this Contract or required by the Project Team.

**DBM** – The person, firm, corporation, or other approved legal entity with which the City has entered into this Contract.

**Design Fee** – means the DBM's administrative costs, home office overhead and profit, whether at the DBM's principal or branch offices for the design phase. This includes the administrative costs and home office costs and any limitations or exclusions that may be included in the General Conditions for the design phase.

**Design Services** – means all professional services to be performed or procured by the DBM to provide the required Project design under this Contract and any subsequent amendments.

Design Team -- refers to licensed design professionals that have been selected to work on the Project by the DBM. The Design Team has a services contract to furnish design and may or may not provide professional inspections for the Project. The Design Team is lead by \_\_\_\_\_, a \_\_\_\_\_.

Drawings (Plans) -- Documents, which visually represent the scope, extent and character of the Work to be furnished and performed by the DBM during the construction phase and which are to be prepared or approved by the Design Professional, the DBM and the City. Drawings include such documents that have reached a sufficient stage of completion and released by the Design Professional solely for the purposes of review and/or use in performing constructability or bid ability reviews and in preparing cost estimates (e.g. conceptual design Drawings, preliminary design Drawings, detailed design Drawings at 30%, 60%, 90% or 100%), but "*not for construction*". Drawings do not include shop drawings.

Effective Date of this Contract -- The date specified in this Contract on which the Contract becomes effective. If no such date is so specified, the effective date is the date on which the City executes this Contract.

General Conditions Costs -- Costs incurred by the DBM during the construction phase includes, but is not limited to the following types of costs: payroll costs for contract administrator or construction manager but not both for Work conducted at the site; payroll costs for the superintendent and full-time general foremen; payroll costs for management personnel resident and working on the site; workers not included as direct labor costs engaged in support (e.g. loading/unloading, clean-up, etc.); administrative office personnel; costs of offices and temporary facilities including office materials, office supplies, office equipment, minor expenses; utilities, fuel, sanitary facilities and telephone services at the site; costs of liability insurance premiums not included in labor burdens for direct labor costs, costs of bond premiums, costs of consultants not in the direct employ of the DBM or Subcontractors, fees for permits and licenses.

GMP Plans and Specifications -- The plans and specifications provided pursuant to Article 1.9 upon which the Guaranteed Maximum Price Proposal is based.

Guaranteed Maximum Price or "GMP" -- means the sum of the maximum cost price of the Work as given in the GMP proposal; the DBM's Construction Fee; General Conditions; Taxes, Bonds, Insurance Costs; and the DBM's Contingency as more fully described in Article 1.8 of this Contract.

Guaranteed Maximum Price (GMP) Proposal -- The offer or proposal of the DBM submitted on the prescribed form stating the GMP prices for the entire Work (which includes the Work, Fee, General Conditions, Taxes, Bonds, Insurance and DBM Contingency) or portions of the Work to be performed during the construction phase. The GMP Proposal(s) are to be developed in compliance with Article 1.9 of this Contract.

Legal Requirements -- means all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any government or quasi-governmental entity having jurisdiction over the Project or Site, the practices involved in the Project or Site, or any Work.

Notice to Proceed (NTP) -- A written notice given by the City to the DBM fixing the date on which the DBM will start to perform the DBM's obligations under the Preconstruction Services Contract.

**Payment Request** – The form that is accepted by the City and used by the DBM in requesting progress payments or final payment and which will include any supporting documentation as is required by the Contract Documents and/or the City.

**Preconstruction Services** – means advice given during the design phase. Preconstruction Services will be contracted for between the City and the DBM, as required by A.R.S. § 34-603(E). Services may include the following: design review, project scheduling, constructability reviews, alternate systems evaluation, cost estimates, GMP preparation, and subcontractor bid phase services.

**Project** – The scope of work as described in the Recital above and Exhibit "A" attached.

**Project Team** – Design phase services team consisting of the Design Professional, DBM, Contract Administrator, City's representatives and other stakeholders who are responsible for making decisions regarding the Project.

**Samples** – Physical examples of materials, equipment, or workmanship representative of a part of the construction phase Work and which establish the standards by which that portion of the construction phase Work will be evaluated.

**Schedule of Values (SOV)** – means the Document specified in the construction phase, which divides the Contract Price into pay items, so that the sum of all pay items equals the Contract Price for the construction phase Work, or for any portion of the Work having a separate specified Contract Price. The SOV may or may not be output from the Progress Schedule depending on whether the Progress Schedule is cost-loaded or not.

**Shop Drawings** – means drawings, diagrams, schedules and other data specially prepared for the Work by the DBM or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

**Specifications** – The section(s) of the Contract Documents for the construction phase consisting of written technical descriptions of materials, equipment, construction systems, standards and workmanship as applied to the Work and certain applicable administrative details.

**Subcontractor** – means any person or entity retained by the DBM as an independent contractor to perform a portion of the Work and will include materialmen and suppliers. All Subcontractors must be selected in accordance with the selection procedures stated in Article 1.11.

**Subconsultant** – A person, firm or corporation having a Contract with the DBM to furnish services required as its independent professional associate or consultant with respect to the Project.

**Substantial Completion** – When the Work, or when an agreed upon portion of the Work, is sufficiently complete so that the City can occupy and use the Project or a portion of the Project for its intended purposes. This may include, but is not limited to: (a) approval by City Fire Marshall and local authorities (Certificate of Occupancy); (b) issuance of elevator permit; (c) demonstration to the City that all systems are in place, functional, and displayed to the City or its representative; (d) installation of all materials and equipment; (e) City review and acceptance of all systems; (f) City review and acceptance of draft O&M manuals and record documents; (g) City operation and maintenance training completed; (h) HVAC test and balance completed

(provide minimum 30 days before the projected substantial completion); (i) completed landscaping and site work; and (j) final cleaning.

Supplier – A manufacturer, fabricator, supplier, distributor, materialmen or vendor having a direct contract with the DBM or with any Subcontractor to furnish materials or equipment to be incorporated in the construction phase Work by the DBM or any Subcontractor.

Total Float – Number of Days by which the design phase services or construction phase Work or any part of the same may be delayed without necessarily extending a pertinent schedule milestone in the Project Schedule.

Work – The entire completed design and construction or the various separately identifiable parts thereof, required to be furnished during the design and construction phase. Work includes and is the result of completing the design work, performing or furnishing labor and furnishing and incorporating materials, resources and equipment into the construction, and performing or furnishing services and documents as required by the Contract Documents for the construction phase.

THE PARTIES have executed this Contract on the 19th day of March, 2013.

**DESIGN-BUILD MANAGER:**  
Wespac Construction, Inc.

\_\_\_\_\_  
Its: \_\_\_\_\_

**CITY OF SCOTTSDALE,**  
an Arizona municipal corporation

\_\_\_\_\_  
W.J. "Jim" Lane  
Mayor

\_\_\_\_\_  
Carolyn Jagger  
City Clerk

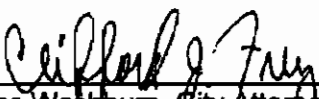
\_\_\_\_\_  
Derek Earle, Acting Executive Director, Public Works

\_\_\_\_\_  
Edward M. Howard  
Risk Management Director

**RECOMMENDED:**

\_\_\_\_\_  
Gary Meyer, Sr. Project Manager

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Bruce Washburn, City Attorney

By: Clifford J. Frey  
Senior Assistant City Attorney

**EXHIBIT A**  
**SCOPE OF WORK**

Following is a brief description of the Project for which the design phase services specified in this Contract are to be performed:

The clubhouse renovation project involves the remodeling and renovation of the majority of the existing TPC clubhouse as well as a building expansion. Approximately 10,000 square feet of space will be renovated or expanded. The project includes an enlarged men's locker room, expanded multipurpose room, new men's arrival area, and an expanded exterior covered patio space. The scope of the project involves lighting & mechanical upgrades, building additions, ADA accessibility upgrades, renovations to existing rooms, enhanced exhibit space and landscape modifications.

The DBM will design and construct the improvements described above. During construction, the clubhouse will be closed to allow for construction activities.

Design phase services by the DBM include the following:

- Prepare schematic, design and construction documents
- Submit and procure all construction permits (city, county and state)
- Provide detailed cost estimating and knowledge of marketplace conditions;
- Provide project planning and scheduling;
- Provide value engineering services;
- Provide alternate systems evaluation and constructability studies;
- Advise City of ways to gain efficiencies in project delivery;
- Provide long-lead procurement studies and initiate procurement of long-lead items;
- Provide complete GMP proposals with assumptions and clarifications to City contract; and
- Incorporate the owner's sensitivity to quality, safety, and environmental factors;

**EXHIBIT B  
HOURLY RATE SCHEDULE**

The schedule of hourly labor rates for employees of the Design Builder and its Subconsultants follow and are based on the approved proposal submitted to the City on the 26<sup>th</sup> day of February, 2013.

<b>Name</b>	<b>Title</b>
Wayne Bogan	Preconstruction Manager
Keith Doyle	Project Manager
Kyle Herschberger	Project Engineer/Assistant Project Manager
Mark Hanna	Project Superintendent
Jay Coffey	General Superintendent
Arthur Gudith	Chief Estimator
Phil Smith	Senior/Lead Estimator
Tracey Schust	Project Administrator

**Note: Any changes in Project Staffing will require City of Scottsdale approval.**

**Hourly Rate Schedule**

<b>Title/Name</b>	<b>Direct Rate (\$/Hr)</b>	<b>Total Rate (\$/Hr)</b>
Preconstruction Manager/Wayne Bogan	\$94.00	\$117.00
Project Manager/Keith Doyle	\$66.00	\$82.00
Project Engineer/Kyle Herschberger	\$47.00	\$59.00
Project Superintendent/Mark Hanna	\$66.00	\$82.00
General Superintendent/Jay Coffey	\$72.00	\$90.00
Chief Estimator/Arthur Gudith	\$78.00	\$98.00
Senior/Lead Estimator/Phil Smith	\$59.00	\$74.00
Project Administrator/Tracey Schust	\$34.00	\$43.00

**Allen + Philp Rate Schedule**

<b>Name</b>	<b>Direct Rate (\$/Hr)</b>	<b>Total Rate (\$/Hr)</b>
Dino Ortis	\$148.00	\$185.00
Project Architect	\$140.00	\$175.00
Senior Designer	\$132.00	\$165.00
Senior Interior Designer	\$132.00	\$165.00
Project Manager	\$120.00	\$150.00
Designer	\$96.00	\$120.00
Interior Designer	\$72.00	\$90.00
BIM Operator	\$72.00	\$90.00
Office Manager	\$72.00	\$90.00
Secretarial	\$40.00	\$50.00
Clerical Support	\$28.00	\$35.00