



# STAFF REPORT

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## AGENDA TITLE:

Approval of Amendment to Agreement with Swinerton Management & Consulting, Inc.

## RECOMMENDED MOTION:

Approve Amendment to Agreement with Swinerton Management & Consulting, Inc.

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## BACKGROUND

The City entered into an Agreement with Swinerton Management & Consulting, Inc. dated July, 2005. Pursuant to the Agreement Swinerton is providing construction management services related to the new Public Safety Facilities.

The Agreement provides for payment to Swinerton in an amount not to exceed \$579,259. The payment is broken down into different phases as follows:

Preconstruction Phase (assuming 15 months) –

Monthly Tasks - \$90,388

Review Tasks - \$88,893

Bidding Phase - \$43,660

Construction Phase - \$345,518 (assuming 15 months)

Close Out - \$10,800

## ISSUES

As you know, the length of the pre-construction phase for the Public Safety facilities project extended out to be longer than originally anticipated. This was primarily due to changing architects, and also due to planning approval timelines. Swinerton acknowledged this about a year and a half ago and proposed to re-allocate the monthly fees in order to keep the fees within the total contract amount.

Swinerton and the Finance Department are requesting that the Agreement be amended to reflect the changes in the fee structure. Swinerton is also requesting that the cap on

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the fees be increased by \$28,806 to reflect additional fees required by an extension of the overall construction schedule which resulted from having the demolition work proceed independently from the construction – one additional month during the bidding phase (\$9879) and one additional month during construction (\$18,927).

The proposal is to reallocate the fees as follows:

Contract:	<u>Existing</u>	<u>Proposed</u>	
<u>Pre-Construction Phase:</u>			
Monthly Tasks	\$90,388	\$193,998	July 2005 - March 2008
Review Tasks	88,893	88,893	Estimates, Constructability reviews, etc.
Bidding Phase	43,660	39,516	April-July 2008 (includes first 2 months of construction demolition)
<b>Subtotal</b>	<b>222,941</b>	<b>322,407</b>	
<u>Construction Phase:</u>			
Construction	345,518	246,052	\$18,927 per month for 13 months (reduce from 5 to days/week)
Close-out	10,800	10,800	
<b>Subtotal</b>	<b>356,318</b>	<b>256,852</b>	
<b>Total</b>	<b>\$579,259</b>	<b>\$579,259</b>	Amount of current contract
Add'l month of Bidding Phase:		9,879	Add'l month for 2-phases (demo + construction)*
Add'l month of construction:		18,927	Add'l month for 2-phases (demo + construction)*
<b>Revised fee total:</b>		<b>\$608,065</b>	
<b>Total additional fee:</b>		<b>\$28,806</b>	

\* Estimated savings of 2-phase strategy is approximately \$100,000 (\$71,000 with additional fees above)

As you can see, the monthly fee during pre-construction was increased to reflect the changes in preconstruction activities.

Secondly, Swinerton recommends going to a 4-day-per week schedule during the construction phase. Swinerton believes that 32 hours per week is appropriate for a project of this size and type. This change from 40 to 32 hours per week allows for a reallocate of fees from the construction phase to the pre-construction phase.

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This re-allocation results in the total fee (without the 2 additional months) being within the contract amount despite a much longer pre-construction schedule (15 months v. 33 months); and still allows for the on-site representation the project requires.

## FISCAL IMPACT

The proposed amendment results in an increased cost to the City of \$28,806. These funds would come from the bond proceeds authorized for the project.

## STAFF RECOMMENDATIONS

Approve Amendment to Agreement with Swinerton Management & Consulting, Inc.

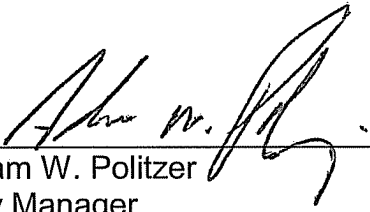
## ATTACHMENTS

- A. Amendment to Agreement with Swinerton Management & Consulting, Inc.
- B. Agreement with Swinerton Management & Consulting, Inc

PREPARED BY:

\_\_\_\_\_  
Mary Wagner, City Attorney

SUBMITTED BY:

  
\_\_\_\_\_  
Adam W. Politzer  
City Manager

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## AMENDMENT

This Construction Management Agreement Amendment ("Amendment") is made and entered into effective as of the second day of September 2008 by and, between **Swinerton Management & Consulting Inc., ("CM")** whose principal address is 260 Townsend Street, San Francisco, CA 94107, and **The City of Sausalito ("Owner")** whose principal address is 420 Litho Street, Sausalito, CA 94965.

This Amendment revises the Construction Management Agreement ("Agreement") between Manager and Owner entered into as of the first day of July 2005.

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Sections 8.1, 8.21, 8.3, and 8.4 shall be replaced in their entirety as follows:

8.1 For the performance of the Basic Services in this Agreement, Owner shall pay CM in accordance this Section 8.1, provided that the total sum to be paid by the Owner to CM for full performance of the Basic Services in this Agreement shall not exceed six hundred eight thousand sixty-five Dollars (\$608,065). This amount includes all costs including subconsultant services. Invoices submitted by CM shall clearly identify the work performed and the applicable phase to which such work applies so as to allow Owner to easily track such amounts.

8.2.1 Monthly Tasks: The following services, as described in Article 3 shall be provided continuously, with compensation on a monthly fixed fee basis:

Overall Project Budget management	\$16,219
Cost management and value engineering review during Design Development phase	27,856
Management and coordination of City's consultants	38,219
Project Schedule management	9,556
Information management and record keeping	44,329
Monthly status reporting to City Manager and City Council, including attendance at public meetings as required	57,819
<b>Total Monthly Tasks (33 months)</b>	<b>\$193,998</b>

Owner shall pay CM as follows, for the services listed in this Section 8.2.1:

May – June 2005:	\$5,328 (work under initial agreement)
July 2005 – March 2006:	\$6,126 per month (monthly fee in original agreement)
April – May 2006:	No payment (no work performed)
June 2006 – July 2007:	\$4,338 per month (reduced monthly fee)
August 2007 – Sept 2008:	\$9,879 per month (agreed-to reallocation: construction phase fee)

8.3 Bidding Phase:

The following services, as described in Article 3 shall be provided continuously, with compensation on a monthly fixed fee basis:

Contractor Outreach / Pre-qualification	9,005
Bid Document Preparation	12,060

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Manage Bid Process	6,834
Bid evaluation	12,558
Assist in negotiation of Contractor Agreement	8,326
Facilitation of kick-off meeting	611
<b>Total Bidding Phase</b>	<b>\$49,394</b>

CM and Owner acknowledge that the assumed duration of the bidding phase is 5 months. Owner shall pay CM \$9,879 per month for 5 months commencing April 2008.

If Owner gives notice to CM that work shall be suspended, as described in Article 10 of this Agreement, Bidding Phase services shall be suspended with no billings to Owner until CM is notified in writing that work is to resume.

If monthly tasks are provided for less than a total of 5 months, CM will invoice Owner for only those months services are provided. If, after providing monthly tasks for a total of 5 months, Owner requires additional monthly tasks, CM and Owner agree to negotiate an equitable charge for any additional services under the provisions of Article 4 of this Agreement.

8.4 Construction Phase:

The following services, as described in Article 3 shall be provided continuously, with compensation on a monthly fixed fee basis:

Site observation of the Work	78,629
Review of Contractor schedule, schedule of values, submittal schedule, etc.	6,212
Facilitation of weekly project meetings with Contractor (bi-weekly w/ Architect)	13,356
Notation and distribution of all meeting notes for project meetings	13,356
Distribution of all communication between Owner, Architect and Contractor	49,696
Cost analysis of any substantial owner revisions and contractor change proposals	46,271
Payment Application Review	6,212
Change Order Request Review	24,848
Change Order Documentation	24,848
Certified Payroll Review	1,553
<b>Total Construction Phase (14 month schedule)</b>	<b>\$264,980</b>

CM and Owner acknowledge that the assumed duration of construction is 14 months. Owner shall pay CM \$18,927 per month for 14 months commencing with start of construction. CM and Owner acknowledge that the duration of construction may change due to site, design, funding, and other considerations yet to be determined. CM and Owner agree to regularly review Contractor's construction schedule, and if necessary adjust the duration of construction for CM services, and negotiate an additional or deductive services amendment under the provisions of Article 4 of this Agreement.

IN WITNESS WHEREOF, the parties heretofore executed this Agreement effective as of the date first written above:

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OWNER:  
City of Sausalito

CM:  
Swinerton Management & Consulting Inc.

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Cheryl Johnson

Title: \_\_\_\_\_

Division Manager

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THE CONSTRUCTION MANAGEMENT ASSOCIATION OF AMERICA, INC.

**CMAA Document A-1 (2003 Edition)**  
Standard Form of Agreement Between  
**OWNER AND CONSTRUCTION MANAGER**  
(Construction Manager as Owner's Agent)

This AGREEMENT is made and entered into as of the first day of July, 2005 (the "Date of this Agreement")

BY and BETWEEN the Owner:

**City of Sausalito, a Municipal Corporation (hereinafter referred to as "Owner")**

and the Construction Manager,:

**Swinerton Management & Consulting, Inc. a California Corporation (hereinafter referred to as the "CM").**

For services in connection with the Project known as:

The construction of new public safety facilities for the City of Sausalito at 333 Johnson and 29 Caledonia Streets, Sausalito, California.

hereinafter called the "Project," as further described in Article 2. The Owner and CM, in consideration of their mutual covenants herein agree as set forth below:

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**ARTICLE 1  
RELATIONSHIP OF THE PARTIES**

1.1 Owner and Construction Manager

1.1.1 Relationship:

The CM shall be the Owner's agent in providing the CM's services described in this Agreement. The CM and the Owner shall perform as stated in this Agreement. Nothing in this Agreement shall be construed to mean that the CM is a fiduciary of the Owner.

1.1.2 Standard of Care:

The CM covenants with the Owner to furnish its services hereunder properly and expeditiously as is consistent with professional skill and care, in accordance with the standards of its profession prevailing in the San Francisco Bay Area as of the date of the performance of the services, and in accordance with all applicable federal, state and local laws and regulations.

1.1.3 Designated Representatives:

1.1.3.1 The Owner's City Manager or her designee is the representative authorized to act on the Owner's behalf with respect to the Project. Notwithstanding the foregoing, CM acknowledges and agrees that certain actions and decisions of Owner must be made by the City Council and/or the Planning Commission at a noticed public meeting and the City Manager in her sole and absolute discretion may determine whether a specific action or decision must be submitted to the City Council and/or the Planning Commission for decision.

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1.1.3.2 John Baker is hereby designated as the Project Executive for CM with overall responsibility for CM's performance of this Agreement. Richard Hannigan is hereby designated as the Project Manager and principle point of contact for purposes of this Agreement. CM shall not remove or reassign Mr. Baker or Mr. Hannigan or any of the other individuals listed in CM's proposal dated March 9, 2005 without the prior written consent of the Owner. When CM is required to attend public forums, planning commission meetings, or city council meetings, Mr. Baker and Mr. Hannigan shall attend such forums/meetings on behalf of CM unless prior written approval from Owner is given authorizing CM to send another representative.

## 1.2 Owner and Architect

### 1.2.1 Owner-Architect Agreement:

The Owner has entered into a separate agreement with BSA Architects dated December 14, 2004 (the "Owner-Architect Agreement") to provide for the design of the Project and certain design-related services during the Construction Phase of the Project.

### 1.2.2 Modification of Owner-Architect Agreement:

The Owner shall have sole and absolute discretion to modify, alter and/or terminate the Owner-Architect Agreement. City shall provide CM with notice of such action.

## 1.3 Owner and Contractors

### 1.3.1 Construction Contract:

The Owner shall have the sole and absolute discretion to enter into a separate contract with one or more Contractors for the construction of the Project.

### 1.3.2 Form of Contract:

CM shall upon Owner's request consult with Owner on the form of the Contract between the Owner and Contractor(s) and the General Conditions to be applied to the Project.

## 1.4 Relationship of the CM to Other Project Participants

### 1.4.1 Working Relationship:

In providing the services described in this Agreement, the CM shall cooperate and maintain a working relationship with the Contractor(s) and Architect.

### 1.4.2 Limitations:

Nothing in this Agreement shall be construed to mean that the CM assumes any of the responsibilities or duties of the Contractor(s) or the Architect. The Contractor will be solely responsible for construction means, methods, techniques, sequences and procedures used in the construction of the Project and for the safety of its personnel, property, and its operations and for performing in accordance with the contract between the Owner and Contractor. The Architect is solely responsible for the design requirements and design criteria of the Project and shall perform in accordance with the agreement between the Architect and the Owner. The CM's services shall be rendered compatibly and in cooperation with the services provided by the Architect under the

Agreement between the Owner and Architect. It is not intended that the services of the Architect and the CM be competitive or duplicative, but rather complementary.

**ARTICLE 2  
PROJECT DEFINITION**

2.1 The term "Project", when used in this Agreement, shall be defined as all work to be finished or provided in accordance with the Contract Documents.

2.2 The Project name and location is as follows:

Public Safety Facilities  
333 Johnson Street and 29 Caledonia Street  
Sausalito, CA

2.3 The Project is intended for use as:

Fire and Police stations for the City of Sausalito.

**ARTICLE 3  
BASIC SERVICES**

3.1 CM's Basic Services:

3.1.1 The CM shall perform the Basic Services described in this Article 3. CM shall be compensated for the Basic Services described in this Article 3 as set forth in Section 8.1 of this Agreement. The Basic Services which are described more fully in this Article 3 include the provision of project management, cost estimation and construction management for the Project. CM shall be responsible for managing its construction management team, developing the processes and procedures for construction administration and management and providing other resources as needed to provide Basic Services. CM shall also be responsible for monitoring the project budget and schedule, conducting project team meetings, providing a quality assurance/quality control program, and communicating with the Owner.

3.1.2 Throughout the life of the Project, CM shall maintain a Project Budget, cost schedule, and cost projections, and report to Owner in writing monthly on the overall cost and anticipated costs of the entire Project. CM shall utilize Owner's existing accounting protocols and reporting formats or such other accounting protocols and/or reporting formats approved by Owner in writing. CM shall estimate expected project cost outlays for construction and other project services and monitor actual cost outlays. CM shall review and verify that contractors' schedule meets the contract requirements.

3.2 Pre-construction Phase:

3.2.1 Value engineering review:

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During Design Development, the CM shall prepare written value engineering reports which shall include specific value-engineering recommendations and analysis of alternative methods, systems, materials, equipment and/or design elements. These reports will include recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction, and factors related to construction cost. Such reports and recommendations shall be delivered to the Owner and the Architect and shall include cost evaluations of alternative materials and systems. CM acknowledges that Owner may incur additional costs under the Owner-Architect Agreement for value engineering changes made after the commencement of the Construction Document Phase, and to that end CM shall utilize best efforts to identify value engineering recommendations which can be made prior to the commencement of the Construction Document Phase. These recommendations will be identified in the report required pursuant to this Section 3.2.1.

### 3.2.2 Constructability Review:

The CM shall review design documents and make written recommendations to the Owner and Architect as to constructability, scheduling, and time of construction; as to clarity, consistency, and coordination of documents. The recommendations resulting from such review shall be provided to the Owner and Architect in writing or as notations on the design documents. These reviews shall take place as follows:

- Conceptual constructability review of Design Development Documents
- Detailed constructability review of 90% Construction Documents

In making reviews and recommendations as to design documentation or design matters the CM shall not be responsible for providing nor will the CM have control over the Project design, design requirements, design criteria or the substance of contents of the design documents. By performing the reviews and making recommendations described herein, the CM shall not be acting in a manner so as to assume responsibility or liability, in whole or in part, for any aspect of the project design, design requirements, design criteria or the substance or contents of the design documents. The CM's actions in making such reviews and recommendations as provided herein are to be advisory only to the Owner and to the Architect.

### 3.2.3 Management and coordination of Owner's consultants:

Upon Owner's written request, CM shall provide direction to Owner's consultant(s) to coordinate geo-technical and hazardous materials reporting, and inspection and/or testing of materials needed for design and construction.

Within ten (10) calendar days of receipt CM shall review Architect's and such other consultant invoices and progress payments as requested by Owner. CM's review shall include a determination as to whether or not the request for payment meets the applicable contract requirements. CM shall notify Owner and the applicable consultant promptly of any deficiency in the request for payment or dispute regarding the amount requested. CM shall make and document rationale for adjustments to the payment requested. CM shall provide review and approval to Owner for each request for payment in form acceptable to Owner. CM shall provide certification to Owner for each request for payment in form acceptable to Owner. CM shall

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establish procedures to ensure that timely payment of all undisputed amounts in made to consultants in accordance with the terms and conditions of the applicable contract.

**3.2.4 Project Schedule Management:**

CM shall prepare, update and maintain a Master Project Schedule which shall be approved by Owner in writing. Such Master Project Schedule shall be tied to specific tasks and deliverables for all participants and shall identify the proposed start and finish dates for each major activity on each contract, including permits, design, bidding, construction, testing and start up. CM shall review the Master Project Schedule with the Architect and the Owner. CM shall update the Master Project Schedule at least monthly to reflect the actual status of major activities as the Project progresses, and shall develop and implement strategies for achieving timely completion of the Project

**3.2.5 Information management and record keeping**

CM shall identify and assist in resolving functional, programmatic and other conflicts and provide Owner with timely reports and updates.

CM shall establish a document tracking system to ensure the timely preparation, logging, filing and tracking of project related correspondence; to assure timely responses; provide a record of communications; to enable efficient document retrieval; and to establish a chronology of events for use during design and construction of the Project and afterwards.

**3.2.6 Monthly status reporting to Owner , including attendance at public meetings as required:**

CM shall prepare written monthly status reports which shall include a monthly update of the Project Schedule which shall include the Architect's' schedule. CM shall also attend and present information at meetings as requested by Owner which shall include without limitation the following public meetings:

- two public forums/workshops during the Conceptual and Schematic Design Phases; and
- two Planning Commission meetings during the Schematic Design Phase; and
- one City Council meeting during the Schematic Design Phase.

**3.2.7 Progress meetings:**

As required, but at least bi-weekly, the CM shall conduct design progress meetings attended by the Owner, Architect and others. Such meetings shall serve as a forum for the exchange of information concerning the Project and the review of design progress. The CM shall prepare and distribute minutes of these meetings to the Owner, Architect and others as necessary and ask for concurrence of those attending the meeting or suggested corrections to the minutes. Minutes shall be filed as approved or amended.

**3.3 Construction Cost Estimating:**

The CM shall prepare an estimate of the construction cost for the following submittals of design drawings and specifications from the Architect:

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- Following the first public forum held during the Conceptual Design Phase, and prior to the second public forum to be held during the Conceptual Design Phase, CM shall prepare a conceptual cost estimate for one development scenario as directed by City.
- Schematic Design Cost Estimate: within 2 weeks of submittal of documents by Architect.
- Update to Schematic Design Cost Estimate: revise the Schematic Design cost estimate as required/directed by Owner.
- Design Development Cost Estimate: within 3 weeks of submittal of documents by Architect.
- Update to Design Development estimate based on Cost Management, Value Engineering and draft bid alternate scenarios, and as required/directed by Owner.
- Construction Documents Cost Estimate at 50% completion: within 4 weeks of submittal of documents by Architect.
- Update to Construction Documents Estimate based on necessary revisions to scope and final bid alternate structure at 100% completion.

All of the construction cost estimates to be provided by CM hereunder shall be detailed Construction Specification Institute (CSI) format estimates based on progress documents prepared by the Architect. These estimates shall include a contingency acceptable to the Owner, CM and the Architect for construction costs appropriate for the type and location of the Project and the extent to which the design has progressed.

The Owner recognizes that the CM will perform in accordance with the standard of care established in this Agreement and that the CM has no control over the costs of labor, materials, equipment or services furnished by others, or over the Contractors' methods of determining prices, or over competitive bidding or market prices. Accordingly, the CM does not guarantee that proposals, bids or actual construction costs will not vary from budget figures included in the Construction Management Plan as amended from time to time.

If the budget figure is exceeded, the Owner may give written consent to increasing the budget, or authorize negotiations or re-bidding of the Project within a reasonable time, or cooperate with the CM and Architect to revise the Project's general scope, extent or character in keeping with the Project's design requirements and sound design practices, or modify the design requirements appropriately. The CM shall facilitate decisions by the Owner and Architect when changes to the design are required to remain within the Project and Construction Budget.

### 3.4 Construction Phase:

#### 3.4.1 Contractor Outreach / Pre-qualification:

Develop contractor pre-qualification process, within Owner guidelines, in order to obtain bids from contractors qualified for this size and type of project. Conduct outreach, advertising, and pre-qualification Request for Qualifications separate from bid process to identify pool of bidders.

#### 3.4.2 Bid Document Preparation:

The CM shall prepare for review by the Owner and the Architect CSI Division 0 and 1 Specifications outlining requirements and procedures for working with the Owner. These include

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work restrictions, insurance and bonding requirements, and Instructions to Bidders. Assemble, along with the Architect, Drawings and Specifications for issuance to bidding contractors. The CM shall manage the bid process and assist the Owner to prepare the General Conditions and Supplemental Conditions of the Construction Contract, and shall provide these to the Architect for inclusion in the Bid Documents. These include work restrictions, insurance and bonding requirements, and Instructions to Bidders. The CM shall assemble, along with Architect, Drawings and Specifications for issue to bidding contractors.

**3.4.3 Bid Process:**

The CM shall issue bid and contract documents, and manage Request for Information and Response process during bid period. The CM shall receive from the Architect a copy of all addenda, and distribute a copy of all addenda to each bidder receiving documents.

**3.4.4 Pre-Bid Conference:**

In conjunction with the Owner and Architect, the CM shall conduct a Pre-Bid Conference. This conference shall be the forum for the Owner, CM and Architect to explain the Project requirements to the bidders, including information concerning schedule requirements, time and cost control requirements, access requirements, the Owner's administrative requirements and technical information.

**3.4.5 Bid evaluation:**

Upon receipt of the bids, the CM shall tabulate and compare bids and ensure that the requisite security has been included. In addition, the CM shall evaluate the bids for completeness and full responsiveness and price, including alternate bid prices and unit prices, and shall make a recommendation to the Owner regarding the award of the Construction Contract. Award documents shall be prepared by CM.

**3.4.6 Assist in negotiation of Contractor Agreement**

The CM shall assist the Owner in the assembly, negotiation, delivery and execution of the Contract Documents. The CM shall issue to the Contractor on behalf of the Owner the Notice of Award and the Notice to Proceed. The CM shall verify that the required permits, bonds, and insurance, have been obtained. Such action by the CM shall not relieve the Contractor of its responsibility to comply with the provisions of the Contract Documents.

**3.4.7 Pre-Construction Conference:**

In consultation with the Owner and Architect, the CM shall conduct a Pre-Construction Conference during which the CM shall review the Project reporting procedures and other rules. The purpose of the conference will be to provide a forum for all essential project participants to meet prior to the start of work. CM shall schedule, prepare an agenda, chair and take minutes of the pre-construction conference. At the conference CM shall address project schedule requirements, coordination issues, and other specifics and inform Contractors of the Project administration procedures.

**3.4.8 Site observation of the Work:**

The CM shall provide and maintain on-site management of the project 40 hours per week, and provide contract administration as an agent of the Owner. CM shall establish coordination and

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communication procedures among the CM, Owner, Architect and Contractor. The CM shall provide overall management control and coordination of Contractor, direct material suppliers or equipment suppliers, inspection and testing companies, State and local authorities, the Architect, and all pertinent Owner departments. CM shall also provide reports required by regulatory agencies with jurisdiction over the Project

Using digital still and/or video photography, CM shall record the conditions of the project before the Contractor starts work and after the work is complete. CM shall also record the Contractor's progress during construction with digital still and/or video photography and shall record items that may have a bearing on claims or disputed extra work. Photographs shall include captions giving the date taken, location, initials of the person taking the photograph, and a brief description on the photograph.

**3.4.9 Review of Contractor's schedule:**

The CM shall review the Contractor's Construction Schedule and shall verify that the schedule is prepared in accordance with the requirements of the Contract Documents and that it establishes completion dates that comply with the requirements of the Master Project Schedule. CM shall also monitor and review the Contractor's schedule, after approval of the baseline schedule, to assess project status with regard to regulatory and other milestone dates, identify delays and potential recovery strategies, and verify that Contractors' schedule meets the contract requirements. CM shall keep the Owner apprised of the construction schedule and changes found in the updates.

**3.4.10 Facilitation of weekly project meetings:**

The CM shall conduct weekly construction coordination meetings with the Contractor, the Owner and the Architect. The purpose of the meetings shall be to discuss schedules; status of RFQ's, RFI's, (as hereinafter defined) and submittals; old and new business concerning the Project; any business appropriate to facilitate construction in accordance with the contract documents, to keep Project participants informed as to the status of the Project, and to discuss and resolve issues that may influence project completion. The CM shall prepare an agenda for the meeting and distribute the agenda to meeting participants. The CM shall prepare and distribute minutes including action item follow up to all attendees, the Owner and Architect and ask for concurrence of those attending the meeting or suggested corrections to the minutes. Minutes shall be filed as approved or amended.

**3.4.11 Communication and Records:**

The CM shall maintain one record copy of all contracts, drawings, specifications, addenda, change orders and other modifications, approved shop drawings, product data, samples and similar required submittals.

**3.4.12 Contract Administration Procedures:**

The CM shall establish procedures for reviewing and processing requests for information (RFIs) and interpretations of the Contract Documents; shop drawings, samples and other submittals; contract schedule adjustments; change order proposals; written proposals for substitutions; payment applications; and the maintenance of logs.

**3.4.13 Review of Requests for Information, Shop Drawings, and Submittals:**

The CM shall review the Contractors' logs regarding requests for information (RFI), shop drawings, and submittals to determine the anticipated effect on compliance with the Project requirements, the Project and Construction Budget, and the Master Schedule. The CM's comments shall not relate to design considerations, but rather to matters of cost, scheduling and time of construction, and clarity, consistency, and coordination in documentation.

CM shall review all RFI's for completeness, verify that RFI's are reasonable and understandable and follow up to obtain clarification from Contractor if required. CM shall provide a technical review of the RFI to determine if the issue is addressed adequately in the Contract documents. CM will notify Contractor and Architect if the RFI is unclear or, in the opinion of CM, the answer is contained in the Contract Documents. CM shall establish RFI issuance and response protocols and form of Contractor's RFI logs. CM will track RFIs by monitoring responses and weekly logs to verify timely response from the Architect.

**3.4.14 Payment Application Review/Certified Payroll**

CM shall develop a procedure that is acceptable to Owner for monthly progress payments and the final payment. The CM shall review the payment applications submitted by the Contractor and determine whether the amount requested reflects the progress of the Contractor's work. CM shall confirm that payment application meets Contract requirements and shall notify Contractor promptly of any deficiency in the payment application or dispute regarding the amount requested. The CM shall make and document rationale for appropriate adjustments to each payment application in form acceptable to the Owner and shall prepare and forward to the Owner a progress payment recommendation. The CM shall review Contractor's certified payroll and confirm that Contractors and subcontractors are maintaining certified payroll reports as required by law and to insure compliance with contract procedures including, without limitation, insurance and worker's compensation requirements.

**3.4.15 Change Order Request Review**

The CM shall establish and maintain a change order control system to assure Owner that any Contractor is not granted additional time or money for meritless change order requests involving work that was included in the original scope of the Contract, and to assure Owner that the associated extra work costs and time extension requests are fair and reasonable to both the Owner and the Contractor. CM shall also provide an easily retrievable system for dealing with all changes on the Project, regardless of who initiates the change.

CM will review potential change orders for contractual and technical merit, in consultation with the Architect where appropriate. The CM shall: prepare independent cost estimates and schedule analysis of work if change affects project time or cost; negotiate change order costs with the contractor as needed; prepare written report to Owner including recommendation regarding time and cost adjustment related to change, if any; prepare change orders, with all required support documentation, for execution by the Owner and Contractor; and keep the Owner apprised of cumulative changes in cost and time and the impact of these on the overall Project budget and schedule.

**3.4.15.1 Owner-initiated Changes**

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All proposed Owner-initiated changes shall first be described in detail by CM in a request for a quote (RFQ) issued to the Contractor for pricing and time extension proposal if necessary. The request shall be accompanied by a written description of the requested change, drawings and specifications prepared by the Architect if required, and any other information CM believes that Contractor should be aware of to fairly price the work and assess schedule impact. The CM shall review the Contractors' proposed time and cost analysis for completeness, accuracy and reasonableness. CM, shall discuss the proposed change order with the Contractor, and endeavor to determine the Contractor's basis for the price and time proposed to perform the work. CM shall negotiate with Contractor for a reasonable price and provide Owner with a written recommendation on the proposed change including a reasonable schedule adjustment.

#### 3.4.15.2 Contractor Requested Changes

The CM shall review the contents of all Contractor requested changes to the contract time or price for merit, endeavor to determine the cause of the request, and assemble and evaluate information concerning the request. The CM shall provide to the Architect a copy of each change request, and the CM shall in its evaluations of the Contractor's request consider the Architects' comments regarding the proposed changes. If the CM determines that the request fails on merit, CM shall prepare a written response to Contractor stating the reasons why the request is denied. All such responses shall be submitted to the Owner. If the CM, upon consultation with and approval from the Owner, determines that the request has merit, the CM shall proceed as follows:

- a. Prepare independent cost estimate and schedule analysis of work.
- b. Negotiate extra work cost and time extension with the Contractor(s)
- c. Prepare written recommendation to Owner regarding time and cost adjustment
- d. Prepare change orders approved by Owner for execution by Owner.

#### 3.4.16 Punch List & Back Check

CM shall coordinate punchlist inspections with Owner, Architect, Contractors and other interested parties. In consultation with the Architect, the CM shall, prior to issue of a Certificate of Substantial Completion prepare a punchlist with all errors, deficiencies and/or omissions noted for the Contractor to correct within a certain timetable. The written list of deficient work (punchlist) will be delivered to the Owner and Contractor within three (3) working days of completion of inspections. CM will inspect items on the punchlist after the Contractor has notified CM that the work is complete. Completed items on the punch list will be initialed and dated as to who did the inspection and the date of the inspection. Upon completion of the punchlist work CM will notify the Owner the work is complete and forward a copy of the final punchlist.

#### 3.4.17 Coordination of Owner's Consultants:

Technical inspection and testing provided by others shall be coordinated by the CM. The CM and Architect shall receive a copy of all inspection and testing reports. The CM shall not be responsible for providing, nor shall the CM control, the actual performance of technical inspection and testing. The CM is performing a coordination function only and the CM is not acting in a manner so as to assume responsibility or liability, in whole or in part, for all or any part of such inspection and testing.

3.4.18 Quality Review:

The CM shall monitor the quality of the construction to assist in guarding the Owner against work by the Contractor that does not conform to the requirements of the Contract Documents. Communication between the CM and Contractor with regard to Quality Review shall not in any way be construed as binding the CM or Owner or releasing the Contractor from performing in accordance with the terms of the Contract Documents. The CM will not be responsible for, nor does the CM control, the means, methods, techniques, sequences and procedures of construction for the Project.

It is understood that the CM's action in providing Quality Review as stated herein is a service to the Owner and by performing as provided herein, the CM is not acting in a manner so as to assume responsibility of liability, in whole or in part, for all or any part of the construction for the Project. No action taken by the CM shall relieve the Contractor from its obligation to perform the Work in strict conformity with the requirements of the Contract Documents, and in strict conformity with all other applicable laws, rules and regulations. If the CM observes or otherwise becomes aware of any fault or defect in the Project or any work that does not comply with the requirements of the Contract Documents, the CM shall promptly give written notice thereof to Owner.

CM shall not be responsible for the presence at the site of any asbestos, PCB's, petroleum, hazardous materials and/or radioactive materials, or the consequences of such presence provided, however that CM shall be responsible for any negligent or intentional acts by CM related to such presence. If CM becomes aware of the presence at the site of any asbestos, PCB's, petroleum, hazardous materials and/or radioactive materials, it shall notify Owner.

3.4.19 Contractors' Safety Program:

The CM shall require the Contractor that will perform work at the site to prepare and submit to the CM for general review a safety program, as required by the Contract Documents. The CM shall review the safety program to determine that the programs of the various subcontractors performing work at the site, as submitted, provide for coordination among the subcontractors of their respective programs.

The CM shall not be responsible for Contractor's implementation of or compliance with its safety programs, or for initiating, maintaining, monitoring or supervising the implementation of such programs or the procedures and precautions associated therewith, or for the coordination of any of the above with the other Contractors performing the Work at the site. The CM shall not be responsible for the adequacy or completeness of any Contractor's safety programs, procedures or precautions.

CM acknowledges and agrees that Owner shall not be responsible for the health and safety of its employees and subconsultants during the performance of Services under this Agreement.

3.4.20 Final Completion:

In consultation with the Architect, the CM shall determine when the Project and the Contractors' work is finally completed, and shall provide to the Owner a written recommendation regarding final payment to the Contractor(s). CM shall complete construction contract administration requirements, including accounting and permitting activities under its Basic Services, and shall

organize and deliver to Owner all documentation regarding the construction contract. At a minimum, CM shall:

- Provide summary of all project costs and accounting for each contract.
- Provide Analysis of any unresolved contractor claims.
- Submit Contractors' as-built documents, Operations and Maintenance Manuals and other closing documents.
- Prepare Notice of Completion
- Review, organize and index Operations and Maintenance Manuals.
- Finalize all permits and other regulatory requirements.
- Provide Copy of Contractor,s performance bonds, good for the warranty period.
- Coordinate closeout inspections, documentation and other observations with regulatory agencies having jurisdiction over the Project.

CM shall review the Project documents and prepare a final written monthly report for Owner which shall include at a minimum:

- Names of all organizations involved with the Project, i.e., Owner's staff, construction manager, contractor, subcontractors, equipment and material suppliers, inspectors and any other parties that had a significant part in the construction of the Project.
- Change order history, to include summary statement about each change, amount of each change, identify source of each change (i.e. Owner request, design error, design omission, regulatory requirement, etc.) and other information deemed necessary by Owner.
- Summary of Requests for Information, in tabular or matrix form.
- Summary of outstanding claims not resolved when the notice of completion is filed.
- Summary of final contract amount.
- Status of all permits and communications with regulatory agencies.

#### 3.4.21 Operation and Maintenance Materials and Certificates:

Prior to the final completion of the Project, the CM shall obtain manufacturers' operations and maintenance manuals, warranties and guarantees, and certificates, and transmit these to the Owner.

## ARTICLE 4 ADDITIONAL SERVICES

4.1 At the request of the Owner, the CM shall perform Additional Services and the CM shall be compensated for same as provided in Section 8.2 of this Agreement. The CM shall perform Additional Services only after the Owner and CM have executed a written amendment to this Agreement providing such services. Unless otherwise set forth in Article 3, Basic Services, Additional Services may include, but are not limited to:

4.1.1 Services related to the procurement, storage, maintenance and installation of the Owner-furnished equipment, materials, supplies and furnishings;

- 4.1.3 Services related to space planning;
- 4.1.4 Preparation of space programs;
- 4.1.5 Services related to tenant or rental spaces;
- 4.1.6 Preparation of a Project financial feasibility study;
- 4.1.7 Preparation of financial, accounting or MIS reports not provided under Basic Services;
- 4.1.8 Performance of technical inspection and testing, except for monitoring and review responsibilities as part of Basic Services;
- 4.1.9 Preparation of an Operations and Maintenance Manual;
- 4.1.10 Services related to recruiting and training of maintenance personnel;
- 4.1.11 Services in regard to litigation or alternative dispute resolution between the Owner and the Contractor following completion of the Project;
- 4.1.12 Performing warranty inspections during the warranty period of the Project;
- 4.1.13 Consultation regarding replacement of work or property damaged by fire or other cause during construction and furnishing services in connection with the replacement of such;
- 4.1.14 Service made necessary by the default of the Contractor:
- 4.1.15 Preparation for and serving as a witness in connection with any public or private hearing or arbitration, mediation or legal proceeding;
- 4.1.16 Assisting the Owner with procurement and preparation of contracts in connection with the occupancy of the Project, and providing personnel to oversee the location of furniture and equipment;
- 4.1.17 Services related to the initial operation of any equipment such as start-up, testing, adjusting and balancing.
- 4.1.18 Preparation of Cash Flow schedules, updating the cash flow schedule based on actual costs monthly.
- 4.1.19 Documenting the Contractors' daily activities, manpower, equipment and items considered pertinent to the Project; preparing daily reports based on review of Contractors' daily reports; and providing daily documentation of labor, materials and equipment issues.

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- 4.2 As utilized herein, the term "Services" shall mean and refer to the Basic Services set forth in Article 3 hereof and any Additional Services approved by Owner pursuant to this Article 4.

**ARTICLE 5  
DURATION OF CM'S SERVICES**

- 5.1 The commencement date for the CM's Basic Services shall be the Date of the this Agreement which shall be the date that this Agreement is approved by the City Council and shall continue in full force and effect until completed or otherwise terminated as provided herein.

**ARTICLE 6  
CHANGES IN THE CONSTRUCTION  
MANAGER'S BASIC SERVICES  
AND COMPENSATION**

6.1 Owner Changes

6.1.1 The Owner, without invalidating this Agreement, may make changes in the CM's Basic Services specified in Article 3 of this Agreement. The CM shall promptly notify the Owner of changes that increase or decrease the CM's compensation or the duration of the CM's Basic Services or both. Notwithstanding the foregoing, the Owner shall have the right to terminate and/or suspend performance under this Agreement as set forth in Article 10 hereof.

6.1.2 If the Basic Services to be provided by CM hereunder have not been completed within one hundred sixty (160) weeks of the Date of this Agreement through no fault of the CM, the CM and Owner shall negotiate for an equitable adjustment to the compensation for the outstanding work to be performed; provided, however, that in no event shall any increase in the hourly charges set forth in CM's proposal be raised by more than \$5.00 per hour, per year, past the 160 weeks. A written proposal indicating the requested change in compensation for a change in the scope or duration of Basic Services shall be provided by the CM to the Owner within thirty (30) days of the occurrence of the event giving rise to such request.

6.2 Authorization

6.2.1 Changes in CM's Basic Services and entitlement to additional compensation or a change in duration of this Agreement shall be made by a written amendment to this Agreement executed by the Owner and the CM. The amendment shall be executed by the Owner and CM prior to the CM performing the services required by the amendment.

6.2.2 The CM shall proceed to perform the services required by the amendment only after receiving written notice from the Owner directing the CM to proceed. CM shall not be entitled to receive any compensation for work performed for Additional Services without the Owner's prior written authorization.

6.3 Invoices for Additional Services

The CM shall submit invoices for compensation for Additional Services with its invoice for Basic Services and payment shall be made pursuant to the provisions of Article 8 of this Agreement.

**ARTICLE 7  
OWNER'S RESPONSIBILITIES**

7.1 The Owner shall provide to the CM copies of documents in Owner's possession regarding the Owner's knowledge of and requirements for the Project. The CM shall not be responsible for the accuracy and completeness of all reports, data, and other information furnished by Owner pursuant to this Paragraph 7.1. The Owner shall examine information submitted by the CM and shall render decisions pertaining thereto within a reasonable period of time. CM expressly acknowledges and agrees that certain decision hereunder may in the sole and absolute discretion of Owner be submitted to the City Council for determination and/or direction and such action can only be taken at a duly noticed public meeting.

7.2 If the Owner has actual knowledge of any fault or defect in the Project or any work that does not comply with the requirements of the Contract Documents, the Owner shall give prompt written notice thereof to the CM.

7.3 The Owner shall furnish required information and approvals and perform its responsibilities and activities in a timely manner to facilitate orderly progress of the work in cooperation with the CM consistent with this Agreement and in accordance with the planning and scheduling requirements and budgetary restraints of the Project.

7.4 The Owner shall approve the Project and Construction Budget and any subsequent revisions as provided in Paragraph 3.2.3.2 of this Agreement.

7.5 At the request of the CM, one copy of the Contract Documents shall be furnished by the Owner to the CM at the Owner's expense.

7.6 The Owner shall be responsible for securing, submitting and paying for necessary approvals, easements, assessments, and permits required for the construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

7.7 The Owner, its representatives and consultants shall issue directives to the Contractor only through the CM, and CM shall be notified of the substance of any communication which occurs without the CM. CM expressly acknowledges and agrees that this provision does not apply to the conversations with the Contractor and Owner acting in a regulatory capacity such as building inspection.

7.8 The Owner shall send to the CM and shall request that the Architect send to the CM copies of all notices and communications sent to or received by the Owner or the Architect relating to the Project. During the Construction Phase of the Project, the Owner shall require that

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the Contractor submit all notices and communications relating to the Project directly to the CM, and the CM shall provide Owner with a copy of such communications.

7.9 The Owner shall notify the CM of any differences in payment to the Contractor that differ from those recommended by the CM on the basis of the Contractor's applications for payment.

7.10 In the case of the termination of the Architect's services, the Owner shall be responsible for engaging the services of a new Architect in its sole and absolute discretion. Responsibilities of the new Architect with respect to the Project and status under the new Agreement with the Owner shall be similar to that of the Architect under the Owner-Architect Agreement and the Contract Documents, taking into consideration the Work remaining to be completed.

**ARTICLE 8  
COMPENSATION FOR CM SERVICES  
AND PAYMENT**

8.1 For the performance of the Basic Services in this Agreement, Owner shall pay CM in accordance this Section 8.1, provided that the total sum to be paid by the Owner to CM for full performance of the Basic Services in this Agreement shall not exceed five hundred seventy nine thousand two hundred fifty nine Dollars (\$579,259). This amount includes all costs including subconsultant services. Invoices submitted by CM shall clearly identify the work performed and the applicable phase to which such work applies so as to allow Owner to easily track such amounts.

8.2 Pre-Construction Phase:  
Compensation for Basic Services described in Article 3 shall be as follows and shall be invoiced as follows:

8.2.1 Monthly Tasks: The following services, as described in Article 3 shall be provided continuously, with compensation on a monthly fixed fee basis:

Overall Project Budget management	\$18,360
Cost management and value engineering review during Design Development phase	8,578
Management and coordination of City's consultants	18,360
Project Schedule management	4,590
Information management and record keeping	27,540
Monthly status reporting to City Manager and City Council, including attendance at public meetings as required	18,360
<hr/> Subtotal Monthly Tasks	<hr/> 95,788
Less hourly billed prior to July 1 2005	5,400
<hr/> Total Monthly Tasks (15 months)	<hr/> \$90,388

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Owner shall pay CM \$6,026 per month commencing August, 2005 for the services listed in this Section 8.2.1. If Owner gives notice to CM that work shall be suspended, as described in Article 10 of this Agreement, Monthly Tasks shall be suspended with no billings to Owner until CM is notified in writing that work is to resume.

If monthly tasks are provided for less than a total of 15 months, CM will invoice Owner for only those months services are provided. If, after providing monthly tasks for a total of 15 months, Owner requires additional monthly tasks, CM and Owner agree to negotiate an equitable charge for any additional services under the provisions of Article 4 of this Agreement.

8.2.2 Review Tasks: Owner shall pay CM the following amounts for each of the following tasks, as described in Article 3, upon completion by CM and delivery to Owner:

Conceptual Cost Estimate for one development scenario at Concept Phase	\$5,540
Schematic Design Cost Estimate	11,080
Update to Schematic Design estimate as required	3,580
Design Development Cost Estimate	11,080
Update to Design Development estimate based on Cost Management, Value Engineering and draft bid alternate scenarios	11,080
Conceptual constructability review at Design Development phase	3,588
Construction Documents Cost Estimate at 50% complete	16,080
Update to Construction Documents Estimate based on necessary revisions to scope and final bid alternate structure	11,080
Detailed constructability review at 90% Construction Documents phase	15,785
<b>Total Review Tasks</b>	<b>\$88,893</b>

8.3 Bidding Phase:

Owner shall pay CM the following amounts for each of the following tasks, as described in Article 3, upon completion by CM:

Contractor Outreach / Pre-qualification	\$7,960
Bid Document Preparation	10,660
Manage Bid Process	6,040
Bid evaluation	11,100
Assist in negotiation of Contractor Agreement	7,360
Facilitation of kick-off meeting	540
<b>Total Bidding Phase</b>	<b>\$43,660</b>

8.4 Construction Phase:

The following services, as described in Article 3 shall be provided continuously, with compensation on a monthly fixed fee basis:

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CMAA Document A-1 (2003 Edition)

Site observation of the Work	\$130,613
Review of Contractor schedule, schedule of values, submittal schedule, etc.	8,100
Facilitation of weekly project meetings with Contractor (bi-weekly w/ Architect)	17,415
Notation and distribution of all meeting notes for project meetings	17,415
Distribution of all communication between Owner, Architect and Contractor	64,800
Cost analysis of any substantial owner revisions and contractor change proposals	32,250
Payment Application Review	8,100
Change Order Request Review	32,400
Change Order Documentation	32,400
Certified Payroll Review	2,025
<b>Total Construction Phase (14 month schedule)</b>	<b>\$345,518</b>

CM and Owner acknowledge that the assumed duration of construction is 14 months. Owner shall pay CM \$24,680 per month for 14 months commencing with start of construction. CM and Owner acknowledge that the duration of construction may change due to site, design, funding, and other considerations yet to be determined. CM and Owner agree to review Contractor's construction schedule upon award of the contract for construction, and if necessary adjust the duration of construction for CM services, and negotiate an additional or deductive services amendment under the provisions of Article 4 of this Agreement.

8.5 Close out phase

Owner shall pay CM the following amount for the following task, as described in Article 3, upon completion by CM and delivery to Owner:

Punch List & back check (in coordination w/ Architect)	10,800
<b>Total Close-out Phase</b>	<b>\$10,800</b>

8.6 Payments:

Payments shall be made monthly, not later than thirty (30) days after receipt of the CM's invoice by the Owner.

8.6.1 No deductions shall be made from the CM's compensation due to any claim of the Architect, Contractor or others not a party to this agreement or due to any liquidated damages, retainage or other sums withheld from payments to Contractor or others not a party to this Agreement. Owner reserves the right to withhold payments, in whole or in part, from CM in the event of a dispute concerning the performance of CM. Owner agrees that fifteen (15) working days written notice will be provided to CM advising of the withholding of payment. Owner will promptly release any withheld payments when the dispute is resolved. Payments made to CM shall not be construed as acceptance of any services to be performed by CM hereunder.

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8.6.2 Payments of undisputed amount due the CM that are unpaid for more than sixty (60) days from the date of the CM's invoice shall bear interest at the monthly rate of 1.5% from the due date, compounded monthly. In addition after such sixty (60) day period, the CM may, after giving seven (7) business days written notice to the Owner, suspend services under this Agreement until the CM has been paid in full all amounts due for services, expenses and charges, including accrued interest.

#### 8.7 Direct Expenses

CM shall invoice Owner a fixed fee for Direct Expenses of \$100 per month, with a total not-to exceed amount of \$3,500. Direct Expenses shall include any and all expenses of CM, its employees and subconsultants, including without limitation:

- Local, long distance and cellular telephone calls;
- Transportation expenses within the San Francisco Bay Area;
- Handling, shipping, mailing and reproduction of materials and documents;
- Office Supplies;
- Computer equipment rental or service fees;
- Computer software used by CM;
- Gross receipts taxes, sales or use taxes, service taxes and other similar taxes required to be paid as a result of this Agreement.

8.8 Site Office Space: Owner shall provide CM office space, during construction, on or adjacent to site at Owner's expense. Office space shall consist of on-site space, space provided by contractor, or space in proximity to construction site located in Owner's offices.

8.9 CM's Account Records: Records of the CM's personnel expense, independent engineers', architects' and other consultants' fees and direct expenses pertaining to the Project shall be maintained on the basis of generally accepted account practices and shall be available for inspection by the Owner or the Owner's representative at mutually convenient times for a period of two (2) years after completion of the Construction Phase Basic Services.

## ARTICLE 9 INSURANCE AND INDEMNITY

### 9.1 Required Insurance

9.1.1 Required Coverage. CM, at its sole cost and expense, shall obtain and maintain in full force and effect throughout the entire term of this Agreement the following described insurance coverage, insuring not only CM and its subconsultants, if any, but also, with the exception of workers' compensation, employer's liability, and professional liability insurance, Owner, its elected and appointed officials, officers, agents, employees, contractors and volunteers and each of them:

#### POLICY

#### MINIMUM LIMITS OF LIABILITY

- |     |  |  |
|-----|--|--|
| (1) | Workers' Compensation  | Statutory  |
| (2) | Comprehensive Automobile Insurance Services Office, form #CA 0001 (covering Automobile Liability, code 1 (any auto). | Bodily Injury/Property Damage<br>\$1,000,000 each accident   |
| (3) | General Liability Insurance Services Office Commercial General Liability coverage (occurrence form CG 0001)          | \$2,000,000 per occurrence. If Commercial General Liability Insurance or other form with a general aggregate limit shall apply separately to this project location or the general aggregate limit shall be twice the required occurrence limit |

9.1.2 Deductibles and Self-insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the Owner.

9.1.3 Required Provisions. The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

(a) For any claims related to the Project, CM's insurance coverage shall be endorsed to name the Owner, its elected and appointed officials, officers, agents, employees, contractors and volunteers as additional insureds.

(b) For any claims related to this Project, CM's insurance coverage shall be primary insurance as respects the Owner, its elected and appointed officials, officers, agents, employees, contractors and volunteers. Any insurance or self-insurance maintained by the Owner, its elected and appointed officials, officers, agents, employees, contractors or volunteers shall be excess of CM's insurance and shall not contribute with it.

(c) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the Owner its elected and appointed officials, officers, agents, employees, contractors or volunteers.

(d) CM's insurance shall 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.

(e) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested has been given to the Owner.

9.1.4 Professional Liability Insurance. In addition to the coverages described above, CM shall obtain and maintain Professional Liability Insurance for the Project, written on a "Claims Made Basis," with limits of liability in amounts not less than \$1,000,000, insuring CM and its employees against liabilities arising out of or in connection with the negligent acts, errors, or omissions of any of the foregoing in connection with the carrying out of the services to be provided hereunder. CM shall extend the reporting period, to the extent available, by endorsement or otherwise, for claims two (2) years from the date construction of the Project is substantially complete. Such professional liability policies shall include coverage for liability assumed by CM under this Agreement when such liability is attributable to the negligent acts, errors or omissions of CM.

9.1.5 Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Owner.

9.1.6 Verification of Coverage. CM shall furnish Owner with original certificates and endorsements effecting coverage required by this Agreement. The endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All endorsements are to be received and approved by the Owner before work commences. CM's insurer must provide complete, certified copies of all required insurance policies, including endorsements effecting the coverage required by these specifications.

## 9.2 Indemnity

To the fullest extent permitted by law, CM shall indemnify and hold harmless the Owner, its elected and appointed officials, employees, agents, officers, contractors and volunteers from and against any and all liabilities, losses, claims, demands, actions, penalties, costs and expenses including reasonable attorneys' fees and all legal expenses and fees incurred through appeal and all interest thereon accruing or resulting to persons, firms or any other legal entity on account of any damages or losses to property or persons including injuries or death or economic losses caused by or arising from the willful or negligent act, error or omission of the CM, or the CM's consultants, or any other party for whom the CM is legally liable, in performance of services under this Agreement.

## ARTICLE 10 TERMINATION AND SUSPENSION

### 10.1 Termination

10.1.1 This Agreement may be terminated by the Owner for any reason by giving seven (7) days written notice to the CM. Upon receipt of such notice CM shall immediately discontinue its performance under this Agreement and cause any consultants to do the same.

10.1.2 This Agreement may be terminated by CM upon a material breach of this Agreement by Owner should such breach continue for thirty (30) days after written notice thereof from CM to Owner. If the material breach cannot reasonably be cured within thirty (30) days, this Agreement

shall not be terminated by CM if Owner commences to cure within said thirty (30) day period and diligently prosecutes such curing to completion.

10.1.3 In the event of termination under this Section 10.1, the CM shall be paid its compensation for services performed to the date of termination.

## 10.2 Suspension

10.2.1 The Owner may, in writing, order the CM to suspend all or any part of the CM's services for the Project for the convenience of the Owner or for stoppage beyond the control of the Owner or the CM. If the performance of all or any part of the services for the Project is so suspended so as to cause the term of this Agreement to exceed the time set forth in Section 6.1.2 of this Agreement, an adjustment in the CM's compensation shall be made as set forth in that Section, for the increase, if any, in the cost of the CM's performance of this Agreement caused by such suspension, as mutually agreed to in writing by Owner and CM.

10.2.3 Persons assigned by the CM to another project during such suspension periods and not available to return to the Project upon cessation of the suspension shall be replaced and approved in writing by Owner.

10.3 Upon such suspension or termination, CM shall turn over to the Owner immediately any and all copies of studies, sketches, drawings, computations and other data, whether or not completed, prepared by or on behalf of CM, or given to CM or its subconsultants prepared in connection with this Agreement. Such materials shall become the permanent property of Owner. CM, however, shall not be liable for Owner's use of incomplete materials, or for Owner's use of complete documents if used for other than the project contemplated by this Agreement.

## ARTICLE 11 DISPUTE RESOLUTION

11.1 The Owner and the CM shall submit all unresolved claims, counterclaims, disputes, controversies, and other matters in question between them arising out of or relating to this Agreement or the breach thereof ("disputes"), to mediation prior to either party initiating any other dispute resolution action. The mediation shall be conducted by a third-party professional mediation service experienced in handling construction disputes, or other mediation method or service acceptable to the parties. Owner and the CM shall agree in writing as to the identity of the mediator and the rules and procedures of the mediation. Any such mediation shall take place in Marin County, California.

11.2 Owner and CM may agree in writing that any disputes which they are unable to resolve by mediation as aforesaid may be decided by arbitration. The Owner and the CM shall agree in writing as to the identity of the arbitrator(s) and the rules and procedures of the arbitration.

11.3 No arbitration arising out of, or relating to, this Agreement may include, by consolidation, joinder or in any other manner, any person or entity who is not a party to this

Agreement unless both parties agree otherwise in writing. No consent to arbitration in respect of a specifically described dispute will constitute consent to arbitrate any other dispute which is not specifically described in such consent or which is with any party not specifically described therein.

11.4 Unless otherwise agreed in writing, the CM shall continue to carry out its responsibilities under this Agreement during any dispute, and the Owner shall continue to make payments in accordance with this Agreement.

## ARTICLE 12 ADDITIONAL PROVISIONS

### 12.1 Limitation and Assignment

12.1.1 The Owner and the CM each binds itself, its successors and assigns to the terms of this Agreement.

12.1.2 CM shall not assign or transfer its interest in this Agreement without the prior written consent of the Owner, provided, however, that the CM may, without approval of the Owner, assign accounts receivable to a commercial bank for securing loans.

12.1.3 Each party represents and warrants to the other that the execution of this Agreement has been approved by each entity and that the person signing the Agreement on behalf of such party is duly authorized to do so.

12.1.4 Subconsultants; Employees. CM shall be responsible for employing or engaging all persons and subconsultants necessary to perform the services of CM hereunder, and CM agrees to be responsible for their performance. CM shall give its attention to the fulfillment of the provisions of this Agreement by all of its employees and subconsultants, if any, and shall keep the work under its control. If any employee or subconsultant of CM fails or refuses to carry out the provisions of this Agreement, Owner reserves the right to require that such employees or subconsultants be removed immediately from the work under this Agreement.

### 12.2 Interest of CM.

12.2.1 No Conflict of Interest. CM (including principals, associates and professional employees) covenants and represents that it presently has no investment or interest, and shall not acquire any investment or interest, direct or indirect, financial or otherwise, which would conflict in any manner or degree with the performance of the services hereunder. CM further covenants and represents that it does not now have and shall not acquire any source of income, business entity, interest in real property or investment which would be affected in any manner or degree by the performance of CM's services hereunder. CM further covenants and represents that no person having any such investment or interest shall perform any services under this Agreement.

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12.2.2 Independent Contractor. It is expressly agreed that, in the performance of the services hereunder, CM shall at all times be deemed an independent contractor and not an agent or employee of Owner. CM, its officers, employees, agents and subconsultants shall have no power to bind or commit the Owner to any decision or course of action, and shall not represent to any person that they have such power.

### 12.3 Governing Law

12.3.1 This Agreement shall, unless otherwise provided, be governed by the law of the State of California. In the event that suit shall be brought by either party to this Agreement, the parties agree that venue shall be exclusively vested in the State courts of the County of Marin or where appropriate, in the United States District Court, Northern District of California.

12.3.2 Should any legal proceeding be commenced between the parties to this Agreement seeking to enforce any of its provisions the prevailing party in such a proceeding shall be entitled, in addition to such other relief as may be granted, to a reasonable sum for attorneys' fees which shall be determined by the court or forum in such a proceeding or in a separate action brought for that purpose. For purposes of this provision, "prevailing party" shall include a party which dismisses an action for recovery hereunder in exchange for payment of the sum allegedly due, performance of covenants allegedly breached, or consideration substantially equal to the relief sought in the action or proceeding.

12.4 Extent of Agreement. This Agreement constitutes the entire agreement between the parties and incorporates all prior agreements and understandings in connection with the subject matter hereof. This Agreement may be amended only by a written amendment signed by the Owner and CM. Nothing contained in this Agreement is intended to benefit any third party other than the Architect, but only as specifically indicated herein. The Contractor and its subcontractors and suppliers are not intended third party beneficiaries of this Agreement.

12.5 Compliance with laws. CM shall comply with all applicable federal, state and local laws, codes, ordinances, regulations, orders and decrees in effect during the performance of the Basic Services and any Additional Services authorized by Owner. CM represents and warrants to Owner that it has all licenses, permits, qualifications, insurance and approvals which are legally required for CM to practice its profession. CM represents and warrants to Owner that CM shall, at its own cost and expense, keep in effect or obtain at all times during the term of this Agreement any licenses, permits, insurance and approvals which are legally required for CM to practice its profession or are necessary and incident to the due and lawful prosecution of the services it performs under this Agreement. CM shall maintain a City of Sausalito business license. CM shall at all times during the term of this Agreement, and for one year thereafter, provide written proof of such licenses, permits, insurance and approvals upon request by the Owner. The Owner is not responsible or liable for CM's failure to comply with any or all of the requirements contained in this Section 12.5.

12.6 Ownership of Documents. All documents, photographs, electronic files, reports and other material prepared by or on behalf of CM under this Agreement, (collectively the "Documents") shall be and remain the property of Owner whether the Project is completed or not.

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CM shall have the right to retain copies of all documents, photographs, electronic files, reports and other material prepared by or on behalf of CM under this Agreement. All Documents in paper and electronic form shall be delivered to Owner on the earlier of (a) thirty five (35) days after the Notice of Completion for the Project is recorded, or (b) the date of termination of this Agreement for any reason. CM shall deliver the Documents to Owner at any time within five (5) days of a written request by Owner. The Documents may be used by Owner and its agents, employees, representatives, and assigns, in whole or in part, or in modified form, for all purposes Owner may deem appropriate in connection with the Project, without further employment of or payment of any compensation to CM.

#### 12.7 Inspection and Audit.

12.7.1 CM shall furnish Owner with every reasonable opportunity for Owner to ascertain that the services of CM are being performed in accordance with the requirements and intentions of this Agreement. All work done and all materials furnished, if any, shall be subject to the Owner's inspection and approval. The inspection of such work shall not relieve CM of any of its obligations to fulfill its agreement as prescribed.

12.7.2 CM shall keep such business records pursuant to this Agreement as would be kept by a reasonably prudent practitioner of consultant's profession and shall maintain such records for at least four (4) years following the completion of the Services or earlier termination of this Agreement. All accounting records shall be kept in accordance with generally accepted accounting practices. Representatives of Owner shall have the right to audit and review all such documents and records at any time, upon reasonable notice, during CM's regular business hours.

12.8 Waivers. The waiver by either party of any breach or violation of any term, covenant or condition of this Agreement or of any provisions, ordinance or law shall not be deemed to be a waiver of such term, covenant, condition, ordinance or law or of any other term, covenant, condition, ordinance or law. The subsequent acceptance by either party of which may become due hereunder shall not be deemed to be a waiver of any preceding breach or violation by the other party of any term, covenant or condition of this Agreement or of any applicable law or ordinance.

12.9 Nondiscrimination. No discrimination shall be made by CM in the employment of any person under this Agreement on the basis of race, color, national origin, ancestry, religion, age, sex, sexual orientation, marital status, disability or place of birth.

12.10 Time of Essence. CM understands and agrees that time is of the essence in the performance of the Services and completion of the Project. CM will put forth its best effort to perform and complete services according to the Project schedule.

#### 12.11 Severability

12.11.1 If any portion of this Agreement is held as a matter of law to be unenforceable, the remainder of this Agreement shall be enforceable without such portion.

#### 12.12 Meaning of Terms



CMAA Document A-1 (2003 Edition)

12.12.1 References made in the singular shall include the plural and the masculine shall include the feminine or the neuter.

12.12.2 The meaning of terms used herein shall be consistent with the definitions expressed in the CMAA Standard Form Agreements, Contracts and General Conditions.

12.13 Notices

12.13.1 Whenever any provision of the Contract Documents requires the giving of written notice, it shall be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended or if delivered or sent by registered or certified mail, postage prepaid, addressed as follows:

To the Owner:

City of Sausalito  
420 Litho Street  
Sausalito, California 94965  
Attention: City Manager

To the CM:

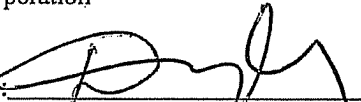
Swinerton Management & Consulting, Inc.  
260 Townsend Street  
San Francisco, CA 94107

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IN WITNESS WHEREOF, the parties have duly executed this Contract as of the date set forth on page 1 hereof.

**OWNER:**

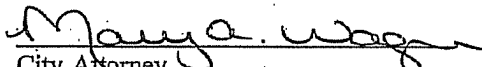
**CITY OF SAUSALITO**, a municipal corporation

By:   
Michael Kelly, Mayor

**ATTEST:**

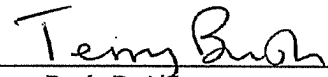
  
Deputy City Clerk

**APPROVED AS TO FORM:**

  
City Attorney

**CM:**

**SWINERTON MANAGEMENT & CONSULTING SERVICES**, a California Corporation

By:   
Terry Bush, President