

Staff Summary Report



Council Meeting Date: 05/01/08

Agenda Item Number: _____

SUBJECT: Request approval of a construction manager at risk design phase contract with J. Banicki Construction for the ASU Transit Station on University Drive.

DOCUMENT NAME: 20080501PWDR03 PUBLIC TRANSIT (1106)
PROJECT NO. 6002961

SUPPORTING DOCS: Yes

COMMENTS: Total cost for this contract shall not exceed \$72,550.

PREPARED BY: Donna Rygiel, Engineering Contract Administrator (x8520)

REVIEWED BY: Andy Goh, Deputy PW Manager/City Engineer (x8896)

APPROVED BY: Glenn Kephart, Public Works Manager (x8205)

LEGAL REVIEW BY: Teresa Voss, Assistant City Attorney (x8814)

FISCAL NOTE: Sufficient funds are available in Capital Improvement Fund No. 6002961.

RECOMMENDATION: Approve contract and authorize the Mayor to sign all necessary documents for the contract.

ADDITIONAL INFO: The Construction Manager at Risk will be working closely with the design consultant on this project and reviewing the design documents to determine constructability within the cost model and schedule for the project. They will attend project team meetings and workshops, construction document review meetings and partnering sessions.

The fee was negotiated by staff and is considered reasonable for the scope of services. J. Banicki Construction was selected by a review committee as the most qualified firm for these services using a qualification based process set forth in Title 34 of the Arizona Revised Statutes.



CITY OF TEMPE, ARIZONA
PUBLIC WORKS DEPARTMENT
DIVISION OF ENGINEERING

CONTRACT FOR CONSTRUCTION MANAGER AT RISK
DESIGN PHASE SERVICES

THIS CONTRACT is made and entered into on the 1st day of May, 2008 between the City of Tempe ("CITY") and J. BANICKI CONSTRUCTION ("CONSTRUCTION MANAGER AT RISK" OR "CM@RISK").

THE CITY engages the CM@Risk to perform professional construction management design phase services for a project known and described as UNIVERSITY DRIVE / ASU TRANSIT STATION, Project No. 6002961 ("Project").

SECTION I – TERMS AND DEFINITIONS

Addendum – A written modification of a Design Phase Services contract.

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

Amendment – A written modification of the terms of a contract.

Business Day – Any day except Saturdays, Sundays and holidays observed by the City.

Calendar Day – Every day shown on the calendar including Saturdays, Sundays and holidays.

Change Order - A written modification of a Construction Services contract.

City ("Owner") – The City of Tempe, a public body or authority and municipal corporation, with whom the CM@Risk has entered into this Contract and for whom the services are to be provided pursuant to this Contract.

Construction Fee – The CM@Risk's administrative costs, home office overhead and profit, whether at the CM@Risk's principal or branch offices. Examples of the administrative costs and home office costs and any limitations or exclusions are included in the General Conditions of the construction phase.

CM@Risk ("Construction Manager At Risk" Or "Contractor") – The person, firm, corporation or other approved legal entity with whom the City has entered into this Agreement.

Contingency, Contractor's - A fund to cover cost growth during the project used at the discretion of the CM@Risk usually for costs that result from project circumstances. The amount of the CM@Risk's contingency will be negotiated as a separate line item in each GMP package.

Contingency, Owner's – A fund to cover cost growth during the project used at the discretion of the Owner usually for costs that result from Owner directed changes or unforeseen site conditions. The amount of the Owner's contingency will be set solely by the Owner and will be in addition to the project costs included in the CM@Risk's GMP packages.

Contract - This written document, including its exhibits and attachments signed by the City and CM@Risk covering the design phase of the Project and including other documents (the "Contract Documents") itemized and referenced in or attached to and made part of this Agreement.

Contract Documents - This Contract, exhibits, attachments, the Notice to Proceed for design phase services, all Written Amendments and Change Orders to this Contract and any other documents so designated in this Contract.

Contract Time(s) – The number of days or the dates related to the construction phase that as stated in Construction Documents apply to achievement of Substantial Completion and/or completion of the construction Work.

Cost of the Work - The direct costs necessarily incurred by the CM@Risk in the proper performance of the Work. The Cost of the Work shall 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 shall not include the CM@Risk's construction fee, general conditions fee, taxes, bonds, or insurance costs.

Cost Model - A breakdown of the scope of the Project that is initially developed by the CM@Risk during the conceptual design phase and based on information from the Project Team and the CM@Risk's records of similar projects. The model will evolve as the design progresses and be maintained by the CM@Risk throughout the design phase and will include any assumptions and clarifications made by the CM@Risk. The model will support any cost estimates, Alternative Systems Evaluations and eventually any GMP Proposals, when required by the Project Team.

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

Deliverables – The work products prepared by the CM@Risk in performing the scope of work described in this Agreement. Some of the major deliverables to be prepared and provided by the CM@Risk during the design phase include but are not limited to: Construction Management Plan, Cost Model, Project Schedule of Values, Alternative System Evaluations, Procurement Strategies and Plans, Cost Estimates, Construction Market Surveys, Cash Flow Projections, GMP Proposals, Subcontractor Procurement Plan, Subcontractor Agreements, Subcontractor Bid Packages, Supplier Agreements, and others as indicated in this Contract or required by the Project Team.

Design Engineer ("Design Professional") – The person firm or corporation named as such in this Agreement who has the rights, duties, responsibilities, and limits of authority as set forth in this Agreement and in the Design Engineer's or Design Professional's Agreement.

Design Engineer's Consultant – A person, firm, or corporation having a contract with the Design Engineer to furnish services required of the Design Engineer, as the Design Engineer's independent professional associate or consultant with respect to the Project.

Drawings – Documents, which visually represent the scope, extent and character of the Work to be furnished and performed by the CM@Risk during the construction phase and which have been prepared or approved by the Engineer and the City. Includes Drawings that have reached a sufficient stage of completion and have been released by the Engineer solely for the purposes of review and/or use in performing constructability or biddability 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." Shop drawings are not Drawings as so defined.

Effective Date of this Agreement – The date specified in this Agreement on which the Agreement becomes effective, but if no such date is specified, the date on which the last of the two parties signs this Agreement.

General Conditions Costs – Includes, but is not limited to, the following types of costs for the CM@Risk during the construction phase: payroll costs for the project manager 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 functions (e.g., loading/unloading, clean-up); 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 CM@Risk or subcontractors; taxes on the Work and for which the CM@Risk is liable; and fees for permits and licenses. Certain limitations and exclusions are described in the General Conditions for the construction phase.

Guaranteed Maximum Price (GMP) Proposal – The offer or proposal of the CM@Risk submitted on the prescribed form setting forth the GMP prices for the entire Work or portions of the Work to be performed during the construction phase. The GMP Proposal(s) are set forth in Exhibit "A".

Laws and Regulations; Laws or Regulations – Any and all applicable laws, rules, regulations, ordinances, codes and orders of any and all governmental bodies, agencies, authorities and courts having jurisdiction.

Notice of Award – The written notice by the City to the CM@Risk stating that upon compliance by the CM@Risk with the conditions precedent enumerated therein, within the time specified, the City will sign and deliver this Agreement.

Notice to Proceed – A written notice given by City to the CM@Risk fixing the date on which the CM@Risk will start to perform the CM@Risk's obligations under this Agreement.

Progress Payment Application – The form that is accepted by the City and used by the CM@Risk in requesting progress payments or final payment and which will include such supporting documentation as is required by the Contract Documents and/or the City.

Project – The total design and construction of which the design phase services and construction phase Work to be provided may be the whole or a part.

Project Team – Design phase services team consisting of the Design Professional, CM@Risk, City’s Water Utilities Department 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.

Shop Drawings – all drawings, diagrams, illustrations, schedules and other data or information specifically prepared or assembled by or for the CM@Risk and submitted by the CM@Risk to illustrate some portion of the Work.

Specifications – The part(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 administrative details applicable thereto.

Subcontractor – An individual, firm, entity or corporation having a direct contract with the CM@Risk who undertakes to perform a part of the design phase services or construction phase Work at the site for which the CM@Risk is responsible. Subcontractors will be selected through the Subcontractor bid process described in Exhibit “B” of this contract.

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 thereof for its intended purposes. This may include, but is not limited to: (a) approval by City Fire Marshall and local authorities including issuance of the Certificate of Occupancy; (b) elevator permit; (c) all systems in place, functional, and displayed to the City or its representative; (d) all materials and equipment installed; (e) all systems reviewed and accepted by the City; (f) draft Operation and Maintenance manuals and record documents reviewed and accepted by the City; (g) City operation and maintenance training completed; (h) Heating, Ventilation and Air Conditioning test and balance completed (provide minimum 30 days prior to projected substantial completion); (i) landscaping and site work; and (j) final cleaning.

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

Total Float – Number of calendar 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 construction, or the various separately identifiable parts thereof, required to be furnished during the construction phase. Work includes and is the result of 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.

SECTION II - SERVICES OF THE CM@RISK

The CM@Risk shall perform the following professional construction management services required by and in accordance with this Agreement and in accordance with the degree of care, skill and judgement that a professional construction manager in Arizona would exercise under similar conditions. The CM@Risk will, at all times, perform the required services consistent with sound and generally accepted construction management and construction contracting practice.

The CM@Risk has assigned James Schumann as the Project Manager for this Contract. Prior written approval is required in the event the CM@Risk needs to change the Project Manager. The CM@Risk shall submit the qualifications of the proposed substituted personnel to the City for approval.

The CM@Risk shall furnish construction administration services as described in Exhibit "A". The Design Phase Services being provided under this agreement will not alter any real property owned by the City.

SECTION III - PERIOD OF SERVICE

The CM@Risk shall complete all design phase services within 90 calendar days of the "Notice to Proceed" date. In the event delays are experienced beyond the control of the CM@Risk, the schedule may be revised as mutually agreed upon by the City and the CM@Risk.

SECTION IV – CM@RISK’S COMPENSATION

- A. The method of payment for this CONTRACT is payment by installments. Total compensation for the services performed shall not exceed \$72,550.00, unless otherwise authorized by the CITY. This fee includes an amount not to exceed \$63,050.00 for design phase services based on hourly rates established in the attached Exhibit "A"; an allowance of \$5,000.00 for sub-consultants; and an allowance of \$4,500.00 for reimbursable expenses, which in no event will ever be more than actual cost.
- B. The City will pay the CM@Risk installments based on monthly progress reports and detailed invoices submitted by the CM@Risk. Such payments will be made within thirty (30) days after receipt of the progress report and detailed invoice.

SECTION V - THE CITY'S RESPONSIBILITIES

- A. The City will designate a project manager for the term of this Agreement. The project manager has the authority to administer this Agreement and will monitor compliance with all terms and conditions stated herein. All requests for information from or a decision by the City on any aspect of the work will be directed to the project manager.
- B. The City will review deliverables by the CM@Risk, provide prompt responses to questions and render decisions to minimize delay in the progress of the CM@Risk work. The City will keep the CM@Risk advised concerning the progress of the City's review of the work. The CM@Risk agrees that the City's inspection, review, acceptance and/or approval of the CM@Risk's work shall not relieve the CM@Risk's responsibility for errors or omissions of the CM@Risk or its subcontractors.
- C. Unless included in the CM@Risk's Services as identified in Section I, the City will furnish the CM@Risk, the following information or services for this Project:
1. One copy of its maps, records, laboratory tests, survey ties and benchmarks, or other data pertinent to the services. However, the CM@Risk shall be responsible for searching the records and requesting specific drawings or information and independently verifying said information.
 2. Available City data on policies, regulations, standards, criteria and studies relevant to the Project.
- D. The City additionally will:
- Contract separately with one or more design professionals to provide architectural and/or engineering design services for the Project (Engineer). The scope of the services for the Engineer will be provided to the CM@Risk for its information. The CM@Risk will have no right to limit or restrict any changes of such services that are otherwise mutually acceptable to the City and Engineer.
- Supply, without charge, all necessary copies of programs and reports reasonably required by the CM@Risk.
- Provide the CM@Risk with adequate information regarding the City's requirements for the Project.
- Give prompt written notice to the CM@Risk when the City becomes aware of any default or defect in the Project or nonconformance with the Drawings and Specifications.
- Notify the CM@Risk of changes affecting budget allocations.
- Give the City's Project Manager authority to approve the Project Budget and Project Schedule, and render decisions and furnish information to the CM@Risk.

SECTION VI - TERMINATION

The City, at its sole discretion, may terminate this Contract for convenience or terminate any portion of the Project for which services have not been performed by the CM@Risk, upon fourteen (14) days written notice delivered to the CM@Risk personally or by certified mail at 120 N. 44th Street, Suite 400, Phoenix, AZ 85034.

Immediately after receiving notice of termination, the CM@Risk shall discontinue the services under this Contract and close operations under this Contract. The CM@Risk shall appraise the services it has completed and submit an appraisal to the City for evaluation. The City shall have the right to inspect the CM@Risk's work to appraise the services completed.

The CM@Risk shall deliver to the City all drawings, special provisions, field survey notes, reports, estimates and any and all other documents or work product generated by the CM@Risk under the Contract, entirely or partially completed, together with all unused materials supplied by the City.

In the event of such termination, the CM@Risk shall be paid for services performed prior to receipt of notice of termination including reimbursable expenses then incurred.

If the remuneration scheduled hereunder is based upon a fixed fee or definitely ascertainable sum, the portion of such sum payable shall be proportionate to the percentage of services completed by the CM@Risk based upon the scope of work set forth in Exhibit "B", and shall be agreed upon mutually by the CM@Risk and the City. However, in no event shall the fee exceed that set forth in Exhibit "A", which is attached hereto and incorporated herein by this reference as if it was fully set forth herein.

The City will make final payment within sixty (60) days after the CM@Risk has delivered all completed Design Phase Services and the final Design Phase Services fee has been agreed upon.

In the event this CM@Risk Contract is terminated, the City shall have the option of completing the work or entering into a CM@Risk Contract with another party for the completion of the work according to the provisions and agreements herein.

SECTION VII - CITY'S RIGHT OF CANCELLATION

All parties hereto acknowledge that this contract is subject to cancellation by the City of Tempe pursuant to the provisions of Section 38-511, Arizona Revised Statutes.

SECTION VIII – INSURANCE

Without limiting any of their obligations or liabilities, the Construction Manager at Risk or "CM@Risk", at its own expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona, Department of Insurance, and with forms reasonably satisfactory to the City. Each insurer shall have a current A.M. Best Company, Inc. rating of not less than A-VII. Use of alternative insurers requires prior approval from the City.

A. General Clauses

Additional Insured. The insurance coverage, except Workers' Compensation and Professional Liability, required by this Contract, shall name the City, its agents, representatives, directors, officials, and employees, as additional insureds, and shall specify that insurance afforded the CM@Risk shall be primary insurance, and that any self insured retention and/or insurance coverage carried by the City or its employees shall be excess coverage, and not contributory coverage to that provided by the CM@Risk.

1. **Coverage Term.** All insurance required herein shall be maintained in full force and effect until the Services required to be performed under the terms of this Contract are satisfactorily completed and formally accepted; failure to do so may constitute a material breach of this Contract, at the sole discretion of the City.
2. **Primary Coverage.** The CM@Risk's insurance shall be primary insurance as respects the City and any insurance or self insurance maintained by the City shall be in excess of the CM@Risk's insurance and shall not contribute to it.
3. **Claim Reporting.** The CM@Risk shall not fail to comply with the claim reporting provisions of the policies or cause any breach of a policy warranty that would affect coverage afforded under the policy to protect the City.
4. **Waiver.** The policies for Workers' Compensation and General Liability shall contain a waiver of transfer rights of recovery (subrogation) against the City, its agents, representatives, directors, officers, and employees for any claims arising out of the work of the CM@Risk.
5. **Deductible/Retention.** The policies may provide coverage which contain deductibles or self-insured retentions. Such deductible or self-insured retentions shall not be applicable with respect to the coverage provided to City under such policies. The CM@Risk shall be solely responsible for deductible or self-insured retentions and the City may require the CM@Risk to secure the payment of such deductible or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit.
6. **Policies and Endorsements.** The City reserves the right to request and to receive, within 10 working days, information on any or all of the above policies or endorsements.

7. **Certificates of Insurance.** Prior to commencing Services under this Contract, the CM@Risk shall furnish the City with Certificates of Insurance or formal endorsements as required by the Contract issued by CM@Risk's insurer(s), as evidence that policies providing the required coverages, conditions and limits required by this Contract are in full force and effect. Such certificates shall identify this Contract number and shall provide for not less than thirty (30) days advance written notice by Certified Mail of Cancellation or Termination.
8. **Subconsultants/Subcontractors.** The CM@Risk shall include all subconsultants and subcontractors as insured under its policies or shall furnish separate certificates and endorsements for each subconsultant and subcontractor.

B. Workers' Compensation

The CM@Risk shall carry Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of CM@Risk employees engaged in the performance of the Services and Employer's Liability insurance of not less than \$100,000 for each accident, \$100,000 disease coverage for each employee, and \$500,000 disease policy limits.

In case Services are subcontracted, the CM@Risk will require the subconsultant to provide Workers' Compensation and Employer's Liability to at least the same extent as provided by the CM@Risk.

C. Automobile Liability

The CM@Risk shall carry Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damages of not less than \$1,000,000, each occurrence, regarding any owned, hired and non-owned vehicles assigned to or used in performance of the CM@Risk's services. Coverage will be at least as broad as coverage Code 1 "any auto" (Insurance Service Office policy form CA 0001 1/87 or any replacements thereof). Such coverage shall include coverage for loading and unloading hazards.

D. Commercial General Liability

The CM@Risk shall carry Commercial General Liability insurance with unimpaired limit of not less than \$1,000,000 for each claim with a \$2,000,000 General Aggregate limit. The general aggregate limit shall apply separately to the Services under this Contract or the general aggregate shall be twice the required per claim limit. The policy shall be primary and include coverage for bodily injury including death, property damage, personal injury, products, completed operations and blanket contractual covering, but not limited to, the liability assumed under the indemnification provisions of this Contract, which coverage shall be at least as broad as Insurance Service Office policy form CG 0001 7/98 or any replacement thereof.

In the event the general liability insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the Services as evidenced by annual Certificates of Insurance.

Such policy shall contain a "severability of interests" provision (also known as "cross-liability" and "separation of insured").

E. Contractor Professional Liability

The CM@Risk retained by the City to provide the Services required by the Contract shall maintain Contractor Professional Liability insurance covering errors and omissions arising out of the services performed by the CM@Risk or any person employed by the CM@Risk with an unimpaired limit of not less than \$1,000,000 each claim and \$1,000,000 all claims or 10% of the construction budget, whichever is larger. In the event the insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of Services as evidenced by annual Certificates of Insurance.

F. Property Coverage – Valuable Papers

The CM@Risk shall carry property coverage on all-risk, replacement cost, agreed amount form with Valuable Papers insurance sufficient to assure the restoration of any documents, memoranda, reports or other similar data relating to the Services of the CM@Risk used in the completion of this Contract.

G. Health Insurance Requirements

All Consultants who enter into a Public Works contract in excess of \$30,000.00 with the City of Tempe, after January 1, 2001, must certify that they have, and all of their major sub-consultants will have, health insurance for all employees. Health insurance must be offered to eligible dependents of all such employees. An affidavit must be signed in the form included herein (Page AFF-1). Major sub-consultants are defined as entities doing work in excess of \$30,000.00 as determined at the start of each project. All required health insurance must be maintained during the entire time of the contract with the City.

Health insurance is required for all consultant and major sub-consultant employees who work more than one hundred and twenty (120) days in any calendar year. A "work day" consists of any time within a twenty-four hour period, regardless of number of hours that the individual is paid. At this time, health insurance is not required for temporary employees or students working part-time who are enrolled in a recognized educational institution.

The health insurance requirements shall apply to all employees directly involved with this City project including support and administrative personnel.

All complaints concerning violations of the health insurance requirements shall be filed, in writing, with the Public Works Department, within thirty (30) days from discovery of the violation. An administrative hearing will be held before the Public Works Manager, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal from the decision of the Public Works Manager may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Public Works Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.

In the event of a finding of violation of the insurance provisions, the company in violation of the provision shall be barred from bidding on, or entering into, any Public Works contract with the City for a period of three (3) years from the execution of the contract.

All Consultants subject to the health insurance requirements shall post, in English and Spanish, notice of the health insurance requirements at their office and at the job site. Signs for posting will be provided by the City at the Pre-construction Conference for Contractors and sent with the executed contract for Consultants.

SECTION IX - PROJECT DOCUMENTS AND COPYRIGHTS

A. City Ownership of Project Documents

All work products (electronically or manually generated) prepared in the performance of this Contract are the property of the City and are to be delivered to the City before the final payment is made to the CM@Risk.

B. Documents to Bear Seal:

When applicable and required by state law, the CM@Risk and its subconsultants will endorse by professional seal all plans, works, and Deliverables prepared by them for this Contract.

SECTION X - CONFLICT OF INTEREST

The CM@Risk agrees to disclose any financial or economic interest in the Project property, or any property affected by the Project, existing prior to the execution of this Contract. Further, the CM@Risk agrees to disclose any financial or economic interest with the Project property, or any property affected by the Project, if the CM@Risk gains such interest during the course of this Contract.

If the CM@Risk gains financial or economic interest in the Project during the course of this Contract, this may be grounds for terminating this Contract at the sole discretion of the City.

The CM@Risk shall not engage the services on this Contract of any present or former City employee who was involved as a decision maker in the selection or approval processes, or who negotiated or approved billings or contract modifications for this Contract.

SECTION XI - COVENANT AGAINST CONTINGENT FEES

The CM@Risk affirms that he has not employed or retained any company or person, other than a bona fide employee working for the CM@Risk, to solicit or secure this Contract, and that he has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift or any other consideration contingent upon or resulting from the award or making of the Contract. For breach or violation of this clause, the City may terminate this Contract without liability, or in its discretion may deduct from the Contract price or consideration or otherwise recover, the full amount of such fee, commission, percentage brokerage fee, gift or contingent fee.

SECTION XII – INDEMNIFICATION

To the fullest extent permitted by law, the CM@Risk shall defend, indemnify and hold harmless the City, its agents, officers, officials and employees from and against all claims, damages, losses and expenses (including but not limited to attorney's fees, court costs and the costs of appellate proceedings) relating to, arising out of or alleged to have resulted from the negligent acts, errors, mistakes or omissions in the work, services or services of the CM@Risk, its agents, employees or any other person (not the City) for whose negligent acts, errors, mistakes or omissions in the work, services or services the CM@Risk may be legally liable in the performance of this contract. CM@Risk's duty to defend, hold harmless and indemnify the City, its agents, officers, officials and employees shall arise in connection with any claim for damage, loss or expenses that is attributable to bodily injury, sickness, disease, death or injury to, impairment or destruction of any person or property, including loss of use resulting therefrom, caused by any negligent acts, errors, mistakes, omissions, work, services or services in the performance of this contract by CM@Risk or any employee of the CM@Risk, or any other person (not the City) for whose negligent acts, errors, mistakes, omissions, work or services the CM@Risk may be legally liable. The amount and type of insurance coverage requirement set forth herein will not be construed as limiting the scope of the indemnity in this paragraph.

SECTION XIII - DISPUTE RESOLUTION

In the event of a dispute between the parties to this Contract regarding a provision of this Contract, a party's performance of its obligations as stated in this Contract or any other matter governed by the terms of this Contract, the parties will meet in good faith to attempt to resolve the dispute. If the parties fail to resolve the dispute, then the parties agree that the dispute may be resolved through mediation. If mediation is agreed to by the disputing parties, the disputing parties shall mutually agree upon the services of one (1) mediator whose fees and expenses shall be borne equally by the disputing parties. If the dispute is not resolved within a reasonable time, the disputing parties shall be free to use other remedies available to them to resolve the dispute.

SECTION XIV - ADDITIONAL SERVICES

Additional services which are outside the scope of basic services contained in this Contract, shall not be performed by the CM@Risk without prior written authorization from the City. Additional Services, when authorized by an executed contract or an Amendment to this Contract shall be compensated for by a fee mutually agreed upon between the City and the CM@Risk.

SECTION XV - ALTERATION IN CHARACTER OF WORK

In the event an alteration or modification in the character of work or Deliverable results in a substantial change in this Contract, thereby materially increasing or decreasing the scope of Services, costs of performance or Project Schedule, the work or Deliverable will nonetheless be performed as directed by the City. However, before any altered or modified work begins, a Change Order or Amendment will be approved and executed by the City and the CM@Risk. Such Change Order or Amendment will not be effective until approved by the City. Additions to, modifications or deletions from the Project provided herein may be made, and the compensation to be paid to the CM@Risk may be adjusted accordingly by mutual agreement of the contracting parties. No claim for extra work done or materials furnished by the CM@Risk will be allowed by the City except as provided herein, nor will the CM@Risk do any work or furnish any material(s) not covered by this Contract unless such work or material is first authorized in writing by the City. Work or material(s) furnished by the CM@Risk without such prior written authorization will be at the CM@Risk's sole jeopardy, cost and expense, and the CM@Risk hereby agrees that without prior written authorization no claim for compensation for such work or materials furnished will be made.

SECTION XVI - SUCCESSORS AND ASSIGNS

This Contract shall not be assignable except at the written consent of the parties hereto and it shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

SECTION XVII - SPECIAL PROVISIONS

The CM@Risk shall comply with all applicable Federal, State, and local laws and ordinances at the time the plans are sealed, will not discriminate against any person in the performance of this Contract and shall comply with the terms and intent of Title VII of the Civil Rights Act of 1964, P.L. 88-354, as amended.

The CM@Risk further agrees to insert the foregoing provisions in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials. Any violation of such provisions shall constitute a material breach of this Contract.

This Contract shall be in full force and effect only after it has been approved by the City Council of the City of Tempe, Arizona, and when executed by the duly authorized City officials and the duly authorized agent of the CM@Risk.

SECTION XVIII - COMPLETENESS AND ACCURACY OF CM@RISK'S WORK

The CM@Risk will be responsible for the completeness and accuracy of its reviews, reports, supporting data and other design phase Deliverables prepared or compiled pursuant to its obligations under this Contract and will at its sole expense correct its work or Deliverables. The fact that the City has accepted or approved the CM@Risk's work or Deliverables will not relieve the CM@Risk of any of its responsibilities under the Contract nor does this requirement to correct the work or Deliverable constitute a waiver of any claims or damages otherwise available by law or Contract to the City.

SECTION XIX - DISSEMINATION OF DATA

As used in the Contract, data means all information, whether written, electronic or verbal, including plans, photographs, studies, investigations, audits, analyses, 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 CM@Risk in the performance of this Contract.

The parties agree that all data, including originals, images and reproductions prepared by, obtained by or transmitted to the CM@Risk in connection with the CM@Risk's performance of this Contract belongs to the City.

The CM@Risk will not divulge data to any third party without prior written consent of the City. The CM@Risk 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 provided the CM@Risk has first given the required notice to the City:

Data which was known to the CM@Risk prior to its performance under this Contract unless such data was acquired in connection with work performed for the City;

Data which was acquired by the CM@Risk in its performance under this Contract and which was disclosed to the CM@Risk by a third party, who to the best of the CM@Risk's knowledge and belief had the legal right to make such disclosure and the CM@Risk is not otherwise required to hold such data in confidence; or

Data which is required to be disclosed by the CM@Risk by law, regulation or court order.

In the event a third party requires or requests the CM@Risk to disclose data or any other information to which the CM@Risk became privy as a result of any other contract with the City, the CM@Risk will first notify the City as set forth in this Section of the request or demand for the data. The CM@Risk will timely give the City sufficient facts such that the City can have a meaningful opportunity to either first give its consent or take such action that the City may deem appropriate to protect such data or other information from disclosure.

The CM@Risk, unless prohibited by law, within ten days after completion of services for a third party on real or personal property owned or leased by the City, will promptly deliver, as set forth in this section, a copy of all data to the City. All data will continue to be subject to the provisions of this Section.

The CM@Risk assumes all liability for maintaining the data in its possession and agrees to compensate the City if any of the provisions of this section are violated by the CM@Risk, its employees, agents or subconsultants or subcontractors. Solely for the purposes of seeking injunctive relief, it is agreed that a breach of this section will be deemed to cause irreparable harm that justifies injunctive relief in court.

SECTION XX - PROJECT STAFFING

Prior to the start of any work or Deliverable under this Contract, the CM@Risk will submit to the City, an organization chart for the CM@Risk staff and subconsultants and detailed resumes of key personnel listed in its response to the City's Request for Qualifications or subsequent fee proposals (or revisions thereto), that will be involved in performing the Services prescribed in the Contract. Unless otherwise informed, the City hereby acknowledges its acceptance of such personnel to perform such services under this Contract. In the event the CM@Risk desires to change such key personnel from performing such services under this Contract, the CM@Risk 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, project manager, superintendent, project director or those persons specifically identified to perform Services of cost estimating, scheduling, value engineering and procurement planning.

The CM@Risk 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 CM@Risk's staff, the CM@Risk will take prompt corrective action acceptable to the City and, if required, remove such personnel from the Project and replace with new personnel acceptable to the City.

SECTION XXI - INDEPENDENT CONTRACTOR

The CM@Risk is and will be an independent contractor and whatever measure of control the City exercises over the work or Deliverable pursuant to the 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 CM@Risk as to the details of accomplishing the work or Deliverable. These results will comply with all applicable laws and ordinances.

SECTION XXII - SUBCONSULTANTS

Prior to beginning the work or Deliverable, the CM@Risk will furnish the City for approval, the names of all subconsultants to be used on this Project. Subsequent changes are subject to the approval of the City.

SECTION XXIII - WITHOLDING PAYMENT

The City, pursuant to and in accordance with Arizona Revised Statutes sections 34-601 et seq., as they may be amended from time to time, reserves the right to withhold funds from the City's progress payments up to the amount equal to resolve claims the City may have against the CM@Risk, until such time as the settlement on those claims has been reached.

SECTION XXIV - RECORDS/AUDIT

A. Records of the CM@Risk's direct personnel payroll and reimbursable expenses pertaining to this Project and records of accounts between the City and CM@Risk will be kept following generally accepted and recognized accounting methods. The City, its authorized representative and/or the appropriate federal agency, reserve the right to audit the CM@Risk'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 Contract amount and/or payments made on this Contract if, upon audit of the CM@Risk's records, the audit discloses that CM@Risk has provided false, misleading or inaccurate cost and pricing data.

B. The CM@Risk will include a provision similar to paragraph XXV. A. in all of its agreements with subconsultants, subcontractors and suppliers providing services under this Contract to ensure the City, its authorized representative and/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 Contract Amount and/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.

SECTION XXV - NOTICES

Unless otherwise provided herein, demands under this contract will be in writing and will be deemed to have been duly given and received either (a) on the date of service if personally served on the party to whom notice is to be given or (b) 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	Andy Goh, P.E. Deputy Public Works Manager/ City Engineer City of Tempe Public Works Engineering Division 31 East 5 th Street Tempe, Arizona 85281
To CM@Risk	Matt Smith J. Banicki Construction 6423 South Ash Avenue Tempe, Arizona 85283
To Engineer:	James Schumann TranSystems 120 North 44 th Street, Suite 400 Phoenix, Arizona 85034
Copy to:	Chris Kabala City of Tempe Public Works Engineering Division 31 East 5 th Street Tempe, Arizona 85281

SECTION XXVI - COMPLIANCE WITH FEDERAL LAWS

The CM@Risk understands and acknowledges the applicability of the Americans With Disabilities Act, the Immigration Reform and Control Act of 1986 and the Drug Free Workplace Act of 1989. The CM@Risk agrees to comply with these and all laws in performing this contract and to permit the City to verify such compliance.

SECTION XXVII- CONFLICT OF INTEREST

To evaluate and avoid potential conflicts of interest, the CM@Risk will provide written notice to the City, as set forth in this section, of any work or services performed by the CM@Risk for third parties that may involve or be associated with any real property or personal property owned or leased by the City. Such notice will be given seven days prior to commencement of the Project by the CM@Risk for a third party or seven days prior to an adverse action as defined below. Written notice and disclosure will be sent to:

Andy Goh, P.E.
Deputy Public Works Manager/ City Engineer
Public Works Department/ Engineering Division
City of Tempe
31 E. 5th Street
Tempe, AZ 85281

Actions considered to be adverse to the City under this Contract include but are not limited to:

- (a) Using data as defined in the Contract, acquired in connection with this Contract, to assist a third party pursuing administrative or judicial action against the City;
- (b) Testifying or providing evidence on behalf of any person in connection with an administrative or judicial action against the City; and
- (c) Using data to produce income for the CM@Risk or its employees independently of performing the Services under this Contract, without the prior written consent of the City.

The CM@Risk represents that except for those persons, entities and projects previously identified in writing to the City, the Services to be performed by the CM@Risk 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.

The CM@Risk's failure to provide a written notice and disclosure of the information as set forth in this section will constitute a material breach of this Contract.

SECTION XXVIII - CONTRACTOR'S LICENSE AND PRIVILEGE TAX LICENSE

Prior to award of the Contract, the CM@Risk must provide to the City's Public Works/ Engineering Department, its Contractor's License Classification and number, its City of Tempe Privilege Tax License number and its Federal Tax I.D. number.

SECTION XXIX- FORCE MAJEURE

If either party is delayed or prevented from the performance of any service, in whole or part, required under this Contract by reason of acts of God or other cause beyond the control and without fault of that party (financial inability excepted), performance of that act will be excused, but only for the period of the delay. The time for performance of the act will be extended for a period equivalent to the period of delay.

SECTION XXX - 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 as a waiver of such provisions nor will it affect the validity of this Contract or any part thereof or the right of either party to thereafter enforce each and every provision.

SECTION XXXI - JURISDICTION

This contract will be deemed 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 thereof. An action to enforce any provision of this Contract or to obtain any remedy with respect hereto will be brought in the Superior Court, Maricopa County, Arizona, and for this purpose, each party hereby expressly and irrevocably consents to the jurisdiction and venue of such court.

SECTION XXXII - SURVIVAL

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

SECTION XXXIII - MODIFICATION

No supplement, modification or amendment of any term of this Contract will be deemed binding or effective unless in writing and signed by the parties hereto and in conformation with provisions of this Contract except as expressly provided herein to the contrary.

SECTION XXXIV - SEVERABILITY

If any provision of this contract or the application thereof to any person or circumstance is held invalid, illegal or unenforceable to any extent, the remainder of this Contract and the application thereof will not be affected and will be enforceable to the fullest extent permitted by law.

SECTION XXXV - INTEGRATION

This Contract contains the full agreement of the parties hereto. Any prior or contemporaneous written or oral agreement between the parties regarding the subject matter hereof is merged and superseded hereby.

SECTION XXXVI - TIME IS OF THE ESSENCE

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

SECTION XXXVII - THIRD PARTY BENEFICIARY

This Contract will not be construed to give any rights or benefits in the Contract to anyone other than the City and the CM@Risk. All duties and responsibilities undertaken pursuant to this Contract will be for the sole and exclusive benefit of the City and the CM@Risk and not for the benefit of any other party.

SECTION XXXVIII - COOPERATION AND FURTHER DOCUMENTATION

The CM@Risk agrees to provide the City such other duly executed documents as may be reasonably requested by the City to implement the intent of this Contract.

SECTION XXXIX - CONFLICT IN LANGUAGE

All work of Deliverables performed will conform to all applicable City of Tempe 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.

IN WITNESS WHEREOF, the parties have executed this Contract this _____ day of _____, 2008.

CITY OF TEMPE, ARIZONA

By _____
Mayor

By _____
Public Works Manager

ATTEST:

Recommended By:

City Clerk

Deputy PW Manager/City Engineer

APPROVED AS TO FORM:

City Attorney

The CM@Risk warrants that the person who is signing this CONTRACT on behalf of the CM@Risk is authorized to do so and to execute all other documents necessary to carry out the terms of this CONTRACT.

CONSTRUCTION MANAGER AT RISK

J. Banicki Construction

By _____
Name

Its _____
Title

Federal I.D. No. / Social Security No.

Certified to be a true and exact copy.

Karen M. Fillmore
Records Specialist

J. BANICKI CONSTRUCTION

**UNIVERSITY DRIVE / ASU TRANSIT STATION
PROJECT NO. 6002961**

CONSTRUCTION MANAGER AT RISK DESIGN PHASE SERVICES

EXHIBIT "B"

I- GENERAL SCOPE OF SERVICES

Project Meetings: The CM@Risk will attend Project Team meetings including, but not limited to, monthly Project management meetings, Project workshops, special Project meetings, Construction Documents rolling reviews and partnering sessions.

The CM@Risk will provide design phase services, described herein, in a proactive manner and consistent with the intent of the most current Drawings and Specifications. The CM@Risk will promptly notify the City in writing whenever the CM@Risk determines that any Drawings or Specifications are inappropriate for the Project and/or cause changes in the Scope of Work requiring an adjustment in the Cost Model, Project Schedule, GMP Proposals and/or in the Contract Time for the Work.

The CM@Risk when requested by the City or at its own initiative, if sanctioned by the City, will attend, make presentations and participate as may be appropriate in public agency and or community meetings relevant to the Project. The CM@Risk 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.

II- CONSTRUCTION MANAGEMENT PLAN

The CM@Risk will prepare a Construction Management Plan (CMP) which will detail but not necessarily be limited to the CM@Risk's determination concerning: (1) Project milestone dates and the Project Schedule including the broad sequencing of the design and construction of the Project; (2) alternate strategies for fast-tracking and/or phasing the construction; (3) the number of separate subagreements to be awarded to subcontractors and suppliers for the Project construction; (4) permitting strategy; (5) safety and training programs; (6) construction quality control; (7) a commissioning program, plant start-up and training; (8) the Cost Model and basis of the model; and (9) a matrix summarizing each Project Team member's responsibilities and roles.

The CM@Risk 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 will take into account: (a) revisions in Drawings and Specifications; (b) the CM@Risk's examination of 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 conditions whether obtained by the City, Engineer or the CM@Risk; (c) unresolved permitting issues, and significant issues, if any, pertaining to the acquisition of land and right-of-way; (d) the fast-tracking of any of the construction or other chosen construction delivery methods; (e) the requisite number of separate bidding documents to be advertised; (f) the status of the procurement of long-lead time equipment, if any, and/or materials; and (g) funding issues identified by the City.

III- PROJECT SCHEDULE

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 schedule as a basis for managing and monitoring compliance by all Team members with the schedule requirements of the Project. Each Project Team member is responsible for its compliance with the schedule requirements of the Project. The CM@Risk will, however, develop and maintain 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 will be consistent with the most recent revised/updated CMP. The Project Schedule will use the Critical Path Method (CPM) technique unless the City by written notice requires a different method. The CM@Risk will use scheduling software to develop a Project Schedule that is acceptable to the City. The Project Schedule shall 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 Section V.

The CM@Risk will include and integrate in the Project Schedule the services and activities required of the City, Engineer and CM@Risk including all construction phase activities. The Project Schedule will detail all activities to the extent required to show: (a) the coordination between conceptual design, preliminary design and development of the Construction Documents (detailed design); (b) any separate long-lead procurements; (c) permitting issues; (d) any land and right-of-way acquisition; (e) bid packaging strategy and awards to subcontractors and suppliers; (f) major stages of construction; (g) start-up and commissioning; and (h) occupancy of the completed Work by the City. The Project Schedule will include, but not be limited to, 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.

The Project Schedule will be updated and maintained by the CM@Risk throughout the design phase such that it will not require major changes at the start of the construction phase to incorporate the CM@Risk's plan for the performance of the construction phase Work. The CM@Risk will provide updates and/or 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 CM@Risk will include with such updates and/or revisions 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.

Project Phasing: If phased construction is deemed appropriate and the City and Engineer approve, the CM@Risk will review the design and make recommendations regarding the phased issuance of Construction Documents to facilitate phased construction of the Work with the objective of reducing the Project schedule and/or Cost of the Work. The CM@Risk will take into consideration factors such 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 other factors pertinent to saving time and decreasing costs.

IV- DESIGN DOCUMENT REVIEWS

The CM@Risk 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 Model, GMP Proposals and/or the Project Schedule.

The CM@Risk will identify, in conjunction with the Project Team, those additional surface and subsurface investigations that are required to provide the necessary information for the CM@Risk to construct the Project. After completion of design phase services, the CM@Risk may provide additional investigations to improve the adequacy and completeness of the site condition information and the data made available with the Construction Documents. The CM@Risk will be responsible for the time and cost required to obtain such additional investigations, except if otherwise provided by specific Additional Services.

The CM@Risk will meet with the Project Team as required to review designs during their development. The CM@Risk will thoroughly familiarize itself with the evolving documents through conceptual design, preliminary design and development of the Construction Documents (detailed design). The CM@Risk 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 CM@Risk will advise the Project Team on proposed site improvements, excavation and foundation considerations, as well as any concerns with respect to coordination of the Drawings and Specifications. The CM@Risk will recommend cost effective alternatives.

As necessary to satisfy the needs of the Project Team, the CM@Risk will routinely conduct constructability and biddability reviews of the Drawings and Specifications. The reviews will attempt to identify all discrepancies and inconsistencies in the Construction Documents, especially those related to clarity, consistency and coordination of Work of subcontractors and suppliers.

Constructability Reviews: The CM@Risk 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/pre-assembly 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, laydown and storage of materials, staging of site facilities, construction parking and other similar pertinent issues.

Biddability Reviews: The CM@Risk will check cross-reference 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 of interpretation discrepancies; (b) named materials and equipment are commercially available and are performing well in similar installations; (c) the design provides as-built data; (d) specifications include alternatives in the event a requirement cannot be met in the field; and (e) the Project is likely to be subject to differing site conditions considering the data on subsurface conditions, physical conditions of existing surface and subsurface facilities and physical conditions of underground utilities made available by the design or resulting from conditions inherent to work similar to the Work.

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 CM@Risk will meet with the City and Engineer to discuss findings and review reports. The CM@Risk's reviews will be from a contractor's perspective, and though it will serve to reduce the number of Requests For Information (RFI's) and changes during the construction phase, responsibility for the Drawings and Specifications will remain with the Engineer and not the CM@Risk.

Notification of Variance or Deficiency : It is the CM@Risk's responsibility to assist the Engineer in ascertaining that the Construction Documents are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. If the CM@Risk recognizes that portions of the Construction Documents are at variance with applicable laws, statutes, ordinances, building codes, rules or regulations, it will promptly notify the Engineer and City in writing describing the apparent variance or deficiency.

Alternate Systems Evaluations: The Project Team will routinely identify and evaluate, using value engineering principles, any alternate systems, approaches and/or design changes that have the potential to reduce Project costs while still delivering a quality and functional product. If the Project Team agrees, the CM@Risk in cooperation with the Engineer will perform a cost/benefit analysis of the alternatives and submit the analysis in writing to the Project Team. The project Team will decide which alternatives will be incorporated into the Project. The Engineer will have full responsibility for the incorporation of the alternatives into the Drawings and Specifications. The CM@Risk will include the cost of the alternatives in the Cost Model and any GMP Proposals.

V- COST MODEL, COST ESTIMATES AND SCHEDULE OF VALUES

- A. As soon as practical during the conceptual design phase, the CM@Risk will review all available information regarding the design and scope of the Project and other factors deemed pertinent by the CM@Risk. Based upon that review the CM@Risk will develop a Cost Model for review and approval by the City. Once approved by the City, the Cost Model will be continually updated and kept current as the design progresses to the design phase until a final GMP for the entire Project is established. The Cost Model will be the best representation of what the complete functional Project's construction costs will be. The CM@Risk will communicate in writing to the Project Team any assumptions made in preparing the Cost Model. The Cost Model will support the CM@Risk's construction cost estimates and may be broken down initially as dictated by the available information, but eventually must be broken down by Construction Standard Institute (CSI) Specification Divisions 1-16 and/or other breakdowns, as required by the City. The Cost Model will also include allowances as agreed to by the Project Team, including but not limited to: (a) construction cost contingency based on an agreed upon percentage of a total estimated construction cost; (b) allowances for potential additional quantities and/or additional Work that the City may require; and (c) any costs as required by the City.
- B. After receipt of the Engineer's most current documents from certain specified design phase milestones, the CM@Risk will provide a detailed written report to the Project Team regarding the impact of and changes to the Cost Model based on the CM@Risk's review of the design documents made available at the specified

design phase milestone. The Engineer and the CM@Risk will reconcile any disagreements on the Cost Model to arrive at an agreed upon estimate for the construction costs based on the scope of the Project through that specified design phase milestone. The design phase milestones applicable to this paragraph are: detailed design completion at 60%, 90% and 100%. If no consensus is reached, the City will make the final determination. If the Project Team requires additional updates of the Cost Model beyond that specified in this paragraph, the CM@Risk will provide the requested information in a timely manner.

- C. If at any point the Cost Model submitted to the City exceeds previously accepted estimates agreed to by the Project Team or other key aspects of the Cost Model or the City's Project Budget, the CM@Risk will make appropriate recommendations to the City and Engineer on means/methods, materials and/or other design elements that it believes will reduce the estimated construction costs (without altering the City's basic program) such that it is equal to or less than the established Project Team's target and/or the Project Budget.
- D. Near completion of the 90% detailed design review and included with the associated report, the CM@Risk will submit to the City for review and approval, a Schedule of Values which complies with the following requirements. The Schedule of Values will be based on the 16 CSI Divisions, and highlight significant variances from any previously submitted Schedule of Values. The Schedule of Values will be directly related to the breakdowns reflected in the Project Schedule and the CM@Risk's Cost Model. In addition, the Schedule of Values will: (a) detail unit prices and quantity take-offs; (b) segregate Work covered by any changes to construction phase Work already in progress; (c) reconcile used and remaining Contractor's contingency allowance; (d) detail all other allowances and unit price Work shown and specified in the detailed design documents; and (e) segregate unit costs, material and equipment costs, labor costs, General Conditions costs, hourly labor rates, payment for design services, and total cost. Labor costs in the Schedule of Values will include employee benefits, payroll taxes and other payroll burdens. The total cost for any portion of the Work to be performed by subcontractors will include subcontractor overhead and profit.

As required under paragraph V B, the CM@Risk will submit to the City a final Schedule of Values based on the one hundred percent (100%) detailed design set of Drawings and Specifications for the entire Project or any portion thereof, which final Schedule of Values will also be included in any proposed GMP(s).

Upon request by the City, the CM@Risk will submit to the City a cash flow projection for the Project based on the current updated/revised Project Schedule and the anticipated level of payments for the CM@Risk during the design and construction phases. In addition, if requested by the City and based on information provided by the City, the CM@Risk will prepare a cash flow

projection for the entire Project based on historical records for similar types of projects to assist the City in the financing process.

VI- GUARANTEED MAXIMUM PRICE (GMP) PROPOSALS

The proposed GMP for the entire Work (or portions thereof) will be presented in a format acceptable to the City and consistent with the City's request for GMP Proposal. 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 CM@Risk will be based on and consistent with the current updated/revised Cost Model 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.

GMP Proposals for the entire Project will be the sum of the maximum Cost of the Work and include the CM@Risk's Construction Fee, General Conditions Fee and Contractor's Contingency. The CM@Risk guarantees to complete the Project at or less than the final approved GMP Proposal, defined as the contract Amount for the construction phase contract, and agrees that it will be solely responsible for any difference between the actual Cost of the Work and the Contract Amount.

The CM@Risk, in preparing any GMP Proposal, will obtain from the Engineer three sets of signed, sealed and dated Construction Documents (including all addenda). The CM@Risk will prepare its GMP Proposal requirements based on the most current completed Construction Documents at that time. The CM@Risk will send one set of those documents to the City's Project Manager, keep one set and return the third set to the Engineer.

An updated/revised Project Schedule will be included with any GMP Proposal that reflects the scope of Work shown in the current set of design documents upon which the GMP Proposal is based. Any such Project Schedule updates/revisions will continue to comply with the requirements of section III.

In the event the CM@Risk elects to maintain a Construction 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.

The CM@Risk's Construction Fee is set at 6% of the combined total of the Cost of the Work, General Conditions (General Expense Costs) and Contractor's Contingency.

VII- REVIEW AND APPROVAL OF GMP PROPOSAL(S)

The CM@Risk will meet with the City and Engineer to review any GMP Proposal and the written statement of its basis. In the event the City or Engineer discovers inconsistencies or inaccuracies in the information presented, the CM@Risk will make adjustments as necessary to the GMP Proposal, its basis, or both.

Upon receipt of any GMP proposal from the CM@Risk, the City may submit the same documents that were used by the CM@Risk in developing the GMP to an independent third party or to the Engineer for review and verification. The third party or Engineer will develop an independent estimate of the Cost of the Work and review the Project Schedule for the associated scope of the GMP Proposal.

If the CM@Risk GMP Proposal is greater than the independent third party or Engineer's estimate, the City may require the CM@Risk to reconfirm the GMP Proposal. The CM@Risk will accept the independent third party's or Engineer's estimate for the Cost of Work as part of the GMP or present a report to the City within seven days of a written request by the City identifying, explaining and substantiating the differences. The CM@Risk may be requested to submit a revised GMP Proposal for consideration by the City. At that time the City may do one of the following.

- (A) Accept the CM@Risk GMP Proposal, if within the City's budget.
- (B) Accept the CM@Risk GMP Proposal that exceeds the City's budget and agree to increase the Project Budget to fund the differences.
- (C) Reject the CM@Risk's GMP Proposal because it exceeds the City's budget or the independent third party's estimate or Engineer's estimate. The City may terminate this Design Phase Contract or elect not to enter into a contract with the CM@Risk for the construction phase of this project.
- (D) Take other actions deemed appropriate by the City.

If during the review and negotiation of GMP Proposals, design changes are required and agreed upon, the City will authorize and cause the Engineer to revise the Construction Documents to the extent necessary to reflect the agreed upon assumptions and clarifications contained in the final approved GMP Proposal. Such revised Construction Documents will be furnished to the CM@Risk. The CM@Risk will promptly notify the Engineer and City if any such revised Construction Documents are inconsistent with the agreed upon assumptions and clarifications.

VIII- SUBCONTRACTOR AND SUPPLIER SELECTIONS

The CM@Risk will develop subcontractor interest, submit the names of a minimum of three qualified subcontractors for each trade in the Project for approval by the City and solicit bids for the various Work categories. If there are not three qualified subcontractors available for a specific trade or there are extenuating circumstances warranting such, the CM@Risk may request approval by the City to submit less than three names. Without prior written approval by the City, no change in the City-approved subcontractors will be allowed.

If the City objects to any nominated subcontractor or supplier or to any Self-Performed Work for good reason, the CM@Risk will nominate a substitute subcontractor or supplier.

All subcontractors doing work in excess of \$30,000.00 will maintain, during the course of the construction contract, health insurance for all employees working on this project and will offer health insurance coverage to eligible dependents of such employees as required by the City of Tempe Guidelines for Implementation of Health Insurance, and Resolution No. 2000.73.

The CM@Risk will distribute Drawings and Specifications, and when appropriate, conduct a prebid conference with prospective subcontractors.

If the CM@Risk desires to self-perform certain portions of the Work, it will request to be one of the approved bidders for those specific bid packages. If the CM@Risk is approved as a subcontractor and submits the lowest responsive bid, then the CM@Risk may self-perform those portions(s) of the Work. If events warrant and the City concurs, the CM@Risk may self-perform Work in order to insure compliance with the Project Schedule and/or GMP(s).

The City, at the required time, will close the bidding and collect all bids received within the prescribed deadline for receipt of bids. The bids will be read aloud in a public opening at a location agreed upon by the City. The CM@Risk will submit a completed bid tabulation form to the City within a reasonable time after the closing of the bid opening proceedings.

If after receipt of bids or after award of subcontractors or suppliers, the City objects to any nominated subcontractor or supplier or to any self-performed Work for good cause, the CM@Risk will nominate a substitute subcontractor or supplier, preferably if such option is still available, from those who submitted bids for the Work identified. Once such substitute subcontractors and suppliers are consented to by the City, the CM@Risk's proposed GMP for the Work or portion thereof will be correspondingly adjusted to reflect any higher or lower costs from any such substitution.

The CM@Risk, upon opening of bids for subcontractors will evaluate them including, but not limited to, the evaluation of lower tier subcontractors, subcontractor qualification submittals and prospective suppliers selected by each apparent low bidder. The CM@Risk will resolve any bid withdrawal, protest or disqualification in connection with the award at no increase in the Cost of the Work.

Within fifteen Days after subcontractor bid opening, the CM@Risk will deliver to the City a written Notice of Intent to Award, itemizing the subcontractors and suppliers selected by the CM@Risk. The Notice of Intent to Award will detail: (a) for each subcontractor agreement, the amount of the bid and the corresponding subcontractor or supplier; (b) the sum of bids received for all intended subcontractor agreements; and (c) trade work that the CM@Risk intends to self-perform, if any.

Promptly after receipt of the Notice of Intent to Award, the City will conduct a pre-award conference with the CM@Risk and other Project Team members. At the pre-award conference, the CM@Risk will: (a) review the nominated state of subcontractors and suppliers and discuss the City's objections to any nominated subcontractor or supplier; (b) discuss City concerns relating to any proposed self-performed Work; (c) review the CM@Risk's proposed Contract Price for the Work during the construction phase; (d) discuss the conditions, if any, under which the City will agree to leave any portion of the remaining Contingency Allowance within the Contract Price for the construction phase Work; (e) resolve possible scheduling issues with the Date of Commencement of the Contract time for the construction phase Work; (f) schedule the design conference; and (g) discuss other matters as needed.

Exhibit "A"

GUARANTEED MAXIMUM PRICE PROPOSAL

City of Tempe University Drive/ASU Transit Center

City of Tempe
 Project No. 0102061
 Reconstruction Services Pricing
Banicki Construction, Inc.
 3/31/2008

Work Item	Description	Total Hours	Project Director	Project Manager	Assistant P.M.	Project Super	Project Engineer	Estimator	Clerical	Total Cost
ITEM 1 PLAN REVIEW										
100% Plan Review		52	4	10	10	10	4	4	0	\$5,472
90% Plan Review		64	4	12	12	12	4	8	0	\$6,610
65% Plan Review		9	1	2	2	2	0	0	0	\$969
Total Hours Item 1		125	9	24	24	24	9	12	0	\$13,070
ITEM 2- PREPARE GMP										
Prepare Bid Packages		52	0	8	8	0	8	8	12	\$4,992
Estimating Time		90	2	10	10	0	12	40	6	\$8,181
Prebid Meeting, Contractor Site Visit, Bid Opening		26	0	6	6	4	4	0	0	\$2,495
Review and Recommend Bids		21	1	6	6	0	2	0	0	\$2,028
Prepare GMP and Schedules		52	2	16	16	6	4	0	2	\$5,995
Total Hours Item 2		251	5	46	46	10	30	49	20	\$23,070
ITEM 3 - MEETINGS										
Design Review Meeting/Misc. Project Meeting		84	14	14	14	14	14	0	0	\$10,010
Site Visits		46	2	8	8	8	8	4	0	\$5,150
GMP Review Meeting		26	4	4	4	4	4	4	0	\$3,940
Subcontractor Prebid Meetings & Site Visit		22	2	4	4	4	4	0	0	\$2,510
Total Hours Item 3		180	22	30	30	30	30	8	0	\$21,010
ITEM 4 - POTHOLE/SITE INVESTIGATION										
Pothole-all Inclusive @ \$295/hole	EA	20								\$5,900
*only actual potholes performed shall be billed	EA	20								\$5,900
Total Item 4										\$63,050
Subtotal Pre-Construction Activities		576	39	109	Assistant P.M.	64	Project Engineer	68	20	\$83,050
Hourly Rates			Project Director	Project Manager	\$130.00	Project Super	Project Engineer	Estimator	Clerical	
Total Labor Costs			\$175.00	\$145.00	\$130.00	\$130.00	\$115.00	\$120.00	\$60.00	
ITEM 5 Other Direct Costs & Reimbursable Expenses										\$88,090
Miscellaneous (Outside Reprographics, Deliver Drawings to Subs, Vendors, Etc.)										\$4,500
ITEM 6 Allowances										\$2,500
Electrical Consultation ALLOWANCE										\$2,500
Survey and Ground Penetrating Radar ALLOWANCE										\$2,500
TOTAL PROJECT PRECONSTRUCTION COSTS										\$72,550

**CITY OF TEMPE
TEMPE, ARIZONA
DEPARTMENT OF PUBLIC WORKS**

**AFFIDAVIT OF GENERAL CONTRACTOR / PRIME CONSULTANT
REGARDING
HEALTH INSURANCE**

_____,
Arizona

Date _____

**University Drive / ASU Transit Station
Project No. 6002961**

I hereby certify that _____ (name of company) currently has, and all of its major subcontractors/subconsultants, defined as doing work in excess of \$30,000.00, will have, during the course of this contract, health insurance for all employees working on this project and will offer health insurance coverage to eligible dependents of such employees, as defined in the accompanying Guidelines. The company's health insurance is as follows:

Name of Insurance Company: _____

Type of Insurance (PPO, HMO, POS, INDEMNITY): _____

Policy No.: _____

Policy Effective Date (MM/DD/YY): _____

Policy Expiration Date (MM/DD/YY): _____

Signed and dated at _____, this _____ day of _____, 2008.

General Contractor/Prime Consultant

By: _____

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2008.

Notary Public

My commission expires:

City of Tempe Guidelines for Implementation of Health Insurance

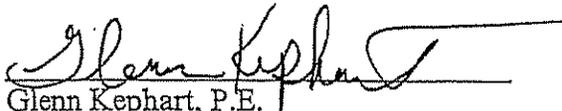
These Guidelines are provided for purposes of implementing Resolution No. 2000.73, which requires all employees of prime consultants, general contractors and major subconsultants and subcontractors to have health insurance and to offer health insurance to their eligible dependants, as determined at the start of each project. Questions regarding these guidelines should be directed to the City of Tempe Engineering Division at (480) 350-8200.

1. All Prime Consultants who enter into a Public Works contract or General Contractors who bid on Public Works projects that are advertised for bid and enter into a contract in excess of \$30,000 with the City of Tempe after January 1, 2001, are required to sign an affidavit in the form attached hereto. The prime consultant or general contractor shall require that all major subconsultants or subcontractors, defined as entities doing work in excess of \$30,000, comply with the health insurance requirements. In signing the affidavit, prime consultants and general contractors may refer to and rely upon these Guidelines for interpretation.
2. Health insurance is required for permanent employees who work for the consultant/contractor more than one hundred and twenty (120) days in any calendar year. A "work day" consists of any time within a twenty-four hour period, regardless of number of hours, that the individual is paid. This requirement excludes students working part-time who are enrolled in a recognized educational institution. Many companies have a grace period or a qualifying period prior to commencement of insurance coverage, which is acceptable so long as the employee coverage begins by the 120th day of contract signing. Temporary employees will be covered to the same extent as the City of Tempe covers temporary employees as determined at the start of each project.
3. If a contractor is a "Union" shop and withholds union dues from employees for health insurance coverage that is also offered to their eligible dependents and meets all City requirements, the Contractor may so note on the required affidavit.
4. The health insurance requirements herein apply to all employees that are directly involved with the City of Tempe project including support and administrative personnel.
5. Health insurance coverage must be maintained during the entire time of the contract, including any warranty periods, with the City.
6. All complaints concerning violations of the health insurance requirements shall be filed by an employee, in writing, with the Public Works Department, within thirty (30) days from discovery of the violation. An administrative hearing will be held before the Public Works Manager, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal from the decision

of the Public Works Manager may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Public Works Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.

7. In the event of a finding by the City of a violation of the insurance provisions, the company in violation of the provision shall be barred from bidding on, or entering into, any public works contract with the City for a minimum period of three (3) years.
8. All consultants and contractors subject to the health insurance requirements shall post, in English and Spanish, notice of the health insurance requirements at their office and at the job site. Signs for posting will be provided by the City.

These "Guidelines for Implementation of Health Insurance", issued and dated this 21st day of August, 2002, hereby amend all guidelines previously issued.



Glenn Kephart, P.E.
Public Works Manager