

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

CONSTRUCTION MANAGER AT RISK

SUPPLEMENTAL CONTRACT PROVISIONS

SECTION I – 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

1. **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.
2. **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.
3. **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.
4. **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.
5. **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.

6. **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.

7. **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.

8. **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.

9. **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 II - 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 III - 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 IV - 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 V – 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 VI - 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 VII - 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 VIII - 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 IX - 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 X - 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 XI - 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 XII - 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 XIII - 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 XIV - 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 XV - 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 XVI - 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 XVII - 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 XVI. 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 XVIII - 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	/(CONTRACTOR) address
To Engineer:	/(DESIGN ENGIENER) address

Copy to:	/(CITY PROJECT MANAGER) address
Copy to:	/(CITY PROJECT MANAGER) address

SECTION XIX - 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 XX- 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 XXI - 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 XXII - 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 XXIII - 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 XXIV - 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 XXV - SURVIVAL

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

SECTION XXVI - 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 XXVII - 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 XXVIII - 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 XXIX - 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 XXX - 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 XXXI - 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 XXXII - 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.