

SAMPLE OWNER'S REPRESENTATIVE SERVICES AGREEMENT

This OWNER'S REPRESENTATIVE SERVICES AGREEMENT ("Agreement") is made and entered into as of Date (the "Effective Date"), by and between the CITY OF KIMBALL, a municipal corporation ("CITY"), and OWNER'S REPRESENTATIVE Name, type of entity ("REPRESENTATIVE").

RECITALS:

- A. CITY wishes to retain the services of an experienced and qualified OWNER'S REPRESENTATIVE to *[insert brief description of services]*.
- B. OWNER'S REPRESENTATIVE represents that it is qualified to perform those services.

AGREEMENT:

1. SERVICES TO BE PERFORMED BY OWNER'S REPRESENTATIVE

- A. OWNER'S REPRESENTATIVE will provide the services listed in the Scope of Services attached as Exhibit A. OWNER'S REPRESENTATIVE warrants that all work and services set forth in the Scope of Services will be performed in a competent, professional and satisfactory manner.

2. TERM

Unless earlier terminated in accordance with Paragraph 4 below, this Agreement will continue in full force and effect from the Effective Date through *[enter date]*.

3. COMPENSATION

A. OWNER'S REPRESENTATIVE's Fee.

1. For services rendered pursuant to this Agreement, OWNER'S REPRESENTATIVE will be paid in accordance with the Compensation Schedule attached as Exhibit B, provided, however, that in no event will the total amount of money paid OWNER'S REPRESENTATIVE, for services initially contemplated by this Agreement, exceed the sum of \$insert dollar amount ("Agreement Sum"), unless otherwise first approved in writing by CITY.

B. Schedule of Payment.

1. Provided that OWNER'S REPRESENTATIVE is not in default under the terms of this Agreement, upon presentation of an invoice, OWNER'S REPRESENTATIVE will be paid the fees described in Paragraph 3.A. above, according to the Compensation Schedule. Payment will be due within 30 days after the date of the invoice.

4. TERMINATION OF AGREEMENT

A. Termination by CITY for Convenience.

1. CITY may, at any time, terminate the Agreement for CITY's convenience and without cause.
2. Upon receipt of written notice from CITY of such termination for CITY's convenience, OWNER'S REPRESENTATIVE will:
 - a. cease operations as directed by CITY in the notice;
 - b. take actions necessary, or that CITY may direct, for the protection and preservation of the work; and

- c. except for work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.
 3. In case of termination for CITY's convenience, OWNER'S REPRESENTATIVE will be entitled to receive payment for work executed, together with costs incurred by reason of the termination, along with reasonable overhead and profit on work not executed.
- B. Termination for Cause.
 1. If either party fails to perform any term, covenant or condition in this Agreement and that failure continues for 15 calendar days after the non-defaulting party gives the defaulting party written notice of the failure to perform, this Agreement may be terminated for cause; provided, however, that if during the notice period the defaulting party has promptly commenced and continues diligent efforts to remedy the default, the defaulting party will have such additional time as is reasonably necessary to remedy the default.
 2. In the event this Agreement is terminated for cause by the default of OWNER'S REPRESENTATIVE, CITY may, at the expense of OWNER'S REPRESENTATIVE and its surety, complete this Agreement or cause it to be completed. Any check or bond delivered to the CITY in connection with this Agreement, and the money payable thereon, will be forfeited to and remain the property of the CITY. All moneys due OWNER'S REPRESENTATIVE under the terms of this Agreement will be retained by CITY, but the retention will not release OWNER'S REPRESENTATIVE and its surety from liability for the default. Under these circumstances, however, OWNER'S REPRESENTATIVE and its surety will be credited with the amount of money retained, toward any amount by which the cost of completion exceeds the Agreement Sum and any amount authorized for extra services.
 3. Termination for cause will not affect or terminate any of the rights of CITY as against OWNER'S REPRESENTATIVE or its surety then existing, or that may thereafter accrue because of the default; this provision is in addition to all other rights and remedies available to the CITY under law.
- C. Termination for Breach of Law.
 1. In the event OWNER'S REPRESENTATIVE or any of its officers, directors, shareholders, employees, agents, subsidiaries or affiliates is convicted (i) of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of a contract or subcontract; (ii) under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a public consultant or OWNER'S REPRESENTATIVE; (iii) under state or federal antitrust statutes arising out of the submission of bids or proposals; or (iv) of violation of Paragraph 19 of this Agreement; or for any other cause CITY determines to be so serious and compelling as to affect OWNER'S REPRESENTATIVE's responsibility as a public consultant or OWNER'S REPRESENTATIVE, including but not limited to, debarment by another governmental agency, then CITY reserves the unilateral right to terminate this Agreement or to impose such other sanctions (which may include financial sanctions,

temporary suspensions or any other condition deemed appropriate short of termination) as it deems proper. CITY will not take action until OWNER'S REPRESENTATIVE has been given notice and an opportunity to present evidence in mitigation.

5. FORCE MAJEURE

If any party fails to perform its obligations because of strikes, lockouts, labor disputes, embargoes, acts of God, inability to obtain labor or materials or reasonable substitutes for labor or materials, governmental restrictions, governmental regulations, governmental control, judicial orders, enemy or hostile governmental action, civil commotion, fire or other casualty, or other causes beyond the reasonable control of the party obligated to perform, then that party's performance will be excused for a period equal to the period of that cause for failure to perform.

6. RETENTION OF FUNDS

OWNER'S REPRESENTATIVE authorizes CITY to deduct from any amount payable to OWNER'S REPRESENTATIVE (whether or not arising out of this Agreement) any amounts the payment of which may be in dispute or that are necessary to compensate CITY for any losses, costs, liabilities, or damages suffered by CITY, and all amounts for which CITY may be liable to third parties, by reason of OWNER'S REPRESENTATIVE's acts or omissions in performing or failing to perform OWNER'S REPRESENTATIVE's obligations under this Agreement. In the event that any claim is made by a third party, the amount or validity of which is disputed by OWNER'S REPRESENTATIVE, or any indebtedness exists that appears to be the basis for a claim of lien, CITY may withhold from any payment due, without liability for interest because of the withholding, an amount sufficient to cover the claim. The failure of CITY to exercise the right to deduct or to withhold will not, however, affect the obligations of OWNER'S REPRESENTATIVE to insure, indemnify, and protect CITY as elsewhere provided in this Agreement.

7. CITY REPRESENTATIVE

City Representative is designated as the "City Representative," authorized to act in its behalf with respect to the work and services specified in this Agreement and to make all decisions in connection with this Agreement. Whenever approval, directions, or other actions are required by CITY under this Agreement, those actions will be taken by the City Representative, unless otherwise stated. The City Manager has the right to designate another City Representative at any time, by providing notice to OWNER'S REPRESENTATIVE.

8. OWNER'S REPRESENTATIVE REPRESENTATIVE(S)

The following principal(s) of OWNER'S REPRESENTATIVE are designated as being the principal(s) and representative(s) of OWNER'S REPRESENTATIVE authorized to act in its behalf with respect to the work specified in this Agreement and make all decisions in connection with this Agreement:

Representative 1

Representative 2

9. INDEPENDENT OWNER'S REPRESENTATIVE

OWNER'S REPRESENTATIVE is, and at all times will remain as to CITY, a wholly independent OWNER'S REPRESENTATIVE. Neither CITY nor any of its agents will have control over the conduct of OWNER'S REPRESENTATIVE or any of OWNER'S REPRESENTATIVE's employees, except as otherwise set forth in this Agreement. OWNER'S REPRESENTATIVE's agents and employees are not and shall not be considered employees of CITY for any purpose. OWNER'S REPRESENTATIVE may not, at any time or in any manner, represent that it or any of its agents or employees are in any manner agents or employees of CITY. CITY has no duty, obligation, or responsibility to OWNER'S REPRESENTATIVE's agents or employees under the Affordable Care Act. OWNER'S REPRESENTATIVE is solely responsible for any tax penalties associated with the failure to offer affordable coverage to its agents and employees under the Affordable Care Act and any other liabilities, claims and obligations regarding compliance with the Affordable Care Act with respect to OWNER'S REPRESENTATIVE's agents and employees. CITY is not responsible and shall not be held liable for OWNER'S REPRESENTATIVE's failure to comply with OWNER'S REPRESENTATIVE's duties, obligations, and responsibilities under the Affordable Care Act. OWNER'S REPRESENTATIVE agrees to defend, indemnify and hold CITY harmless for any and all taxes and penalties that may be assessed against CITY as a result of OWNER'S REPRESENTATIVE's obligations under the Affordable Care Act relating to OWNER'S REPRESENTATIVE's agents and employees.

10. BUSINESS LICENSE

OWNER'S REPRESENTATIVE must obtain a City business license prior to the start of work under this Agreement, unless OWNER'S REPRESENTATIVE is qualified for an exemption.

11. OTHER LICENSES AND PERMITS

OWNER'S REPRESENTATIVE warrants that it has all professional, contracting and other permits and licenses required to undertake the work contemplated by this Agreement.

12. FAMILIARITY WITH WORK

By executing this Agreement, OWNER'S REPRESENTATIVE warrants that OWNER'S REPRESENTATIVE (a) has thoroughly investigated and considered the scope of services to be performed, (b) has carefully considered how the services should be performed, and (c) fully understands the facilities, difficulties and restrictions attending performance of the services required under this Agreement. If the services involve work upon any site, OWNER'S REPRESENTATIVE warrants that OWNER'S REPRESENTATIVE has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of the services set forth in this Agreement. Should OWNER'S REPRESENTATIVE discover any latent or unknown conditions that will materially affect the performance of the services set forth in this Agreement, OWNER'S REPRESENTATIVE must immediately inform CITY of that fact and may not proceed except at OWNER'S REPRESENTATIVE's risk until written instructions are received from CITY.

13. CARE OF WORK

OWNER'S REPRESENTATIVE must adopt reasonable methods during the term of the Agreement to furnish continuous protection to the work, and the equipment, materials, papers, documents, plans, studies and other components to prevent losses or damages, and will be responsible for all damages to persons or property, until acceptance of the work by CITY, except those losses or damages as may be caused by CITY's own negligence.

14. OWNER'S REPRESENTATIVE'S ACCOUNTING RECORDS; OTHER PROJECT RECORDS

Records of OWNER'S REPRESENTATIVE's time pertaining to the project, and records of accounts between CITY and OWNER'S REPRESENTATIVE, will be kept on a generally recognized accounting basis. OWNER'S REPRESENTATIVE will also maintain all other records, including without limitation, specifications, drawings, progress reports and the like, relating to the work and services identified in Exhibit A. All records will be available to CITY during normal working hours. OWNER'S REPRESENTATIVE will maintain these records for three years after final payment.

15. INDEMNIFICATION

OWNER'S REPRESENTATIVE will indemnify, defend, and hold harmless CITY, the Successor Agency to the Former Redevelopment Agency of the City of KIMBALL, the City Council, each member thereof, present and future, members of boards and commissions, their officers, agents, employees and volunteers (collectively "City Affiliates") from and against any and all liability, expenses, including defense costs and legal fees, and claims for damages whatsoever, including, but not limited to, those arising from breach of contract, bodily injury, death, personal injury, property damage, loss of use, or property loss however the same may be caused and regardless of the responsibility for negligence. The obligation to indemnify, defend and hold harmless includes, but is not limited to, any liability or expense, including defense costs and legal fees, arising from the negligent acts or omissions, or willful misconduct of OWNER'S REPRESENTATIVE, its officers, employees, agents, or vendors. OWNER'S REPRESENTATIVE's obligations to indemnify, defend and hold harmless will apply even in the event of concurrent negligence on the part of City Affiliates, except for liability resulting solely from the negligence or willful misconduct of City Affiliates. Payment by CITY is not a condition precedent to enforcement of this indemnity. In the event of any dispute between OWNER'S REPRESENTATIVE and CITY, as to whether liability arises from the sole negligence of City Affiliates, OWNER'S REPRESENTATIVE will be obligated to pay for the defense of City Affiliates until such time as a final judgment has been entered adjudicating City Affiliates as solely negligent. OWNER'S REPRESENTATIVE will not be entitled in the event of such a determination to any reimbursement of defense costs including but not limited to attorney's fees, expert fees and costs of litigation.

16. NON-LIABILITY OF CITY OFFICERS AND EMPLOYEES

No officer or employee of CITY will be personally liable to OWNER'S REPRESENTATIVE, in the event of any default or breach by the CITY or for any amount that may become due to OWNER'S REPRESENTATIVE.

17. INSURANCE

A. OWNER'S REPRESENTATIVE must maintain for the duration of the Agreement at their sole expense the following insurance, which will be full coverage, not subject to self-insurance provisions:

1. Automobile Liability, including owned, non-owned and hired vehicles, with at least the following limits of liability:

a. Primary Bodily Injury with limits of at least \$500,000 per person, \$1,000,000 per occurrence; and

- b. Primary Property Damage of at least \$250,000 per occurrence; or
- c. Combined single limits of \$1,000,000 per occurrence.

2. Commercial General Liability including coverage for premises, products and completed operations, independent OWNER'S REPRESENTATIVEs/vendors, personal injury and contractual obligations with combined single limits of coverage of at least \$2,000,000 per occurrence, \$4,000,000 aggregate.

3. Workers' Compensation coverage as required by the Labor Code of the State of Nebraska and, if workers' compensation is required, employer's liability insurance with minimum limits of \$1,000,000 per occurrence or occupational illness. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the CITY for all work performed by the OWNER'S REPRESENTATIVE, its employees, and agents.

B. The insurance provided by OWNER'S REPRESENTATIVE will be primary and non-contributory.

C. CITY, the Successor Agency to the Former Redevelopment Agency of the City of KIMBALL, the City Council and each member thereof, members of boards and commissions, every officer, agent, official, employee and volunteer must be named as additional insureds under the automobile and general liability policies.

D. OWNER'S REPRESENTATIVE must provide certificates of insurance including all required amendatory endorsements (or copies of the applicable policy language effecting coverage required by this clause) indicating appropriate coverage, to the City Clerk of the City of KIMBALL before the commencement of work.

E. Each insurance policy required by this Paragraph must contain a provision that no termination, cancellation or change of coverage can be made without notice to the CITY.

F. If the OWNER'S REPRESENTATIVE maintains broader coverage and/or higher limits than the minimums shown above, the CITY requires and shall be entitled to the broader coverage and/or the higher limits maintained by the OWNER'S REPRESENTATIVE. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the CITY.

G. The procuring of insurance shall not be construed as a limitation on liability nor as full performance of the indemnification provisions of the OWNER'S REPRESENTATIVE.

H. OWNER'S REPRESENTATIVE hereby grants to CITY a waiver of any right to subrogation which any insurer of said OWNER'S REPRESENTATIVE may acquire against the CITY by virtue of the payment of any loss under such insurance. OWNER'S REPRESENTATIVE agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the CITY has received a waiver of subrogation endorsement from the insurer.

18. SUFFICIENCY OF INSURERS

Insurance required by this Agreement will be satisfactory only if issued by companies admitted to do business in Nebraska, rated "A" or better in the most recent edition of Best's Key Rating Guide, and only if they are of a financial category Class VII or better, unless these requirements are waived by the Risk Manager of CITY ("Risk Manager") due to unique circumstances. In the event the Risk Manager

determines that the work or services to be performed under this Agreement creates an increased or decreased risk of loss to CITY, the OWNER'S REPRESENTATIVE agrees that the minimum limits of any insurance policies or performance bonds required by this Agreement may be changed accordingly upon receipt of written notice from the Risk Manager; provided that OWNER'S REPRESENTATIVE will have the right to appeal a determination of increased coverage by the Risk Manager to the City Council of CITY within 10 days of receipt of notice from the Risk Manager.

19. CONFLICT OF INTEREST

A. No officer or employee of the CITY may have any financial interest, direct or indirect, in this Agreement, nor may any officer or employee participate in any decision relating to the Agreement that effects the officer or employee's financial interest or the financial interest of any corporation, partnership or association in which the officer or employee is, directly or indirectly interested, in violation of any law, rule or regulation.

B. No person may offer, give, or agree to give any officer or employee or former officer or employee, nor may any officer or employee solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation or any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any way pertaining to any program requirement, contract or subcontract, or to any solicitation or proposal.

20. NOTICE

A. All notices, requests, demands, or other communications under this Agreement will be in writing. Notice will be sufficiently given for all purposes as follows:

1. Personal delivery. When personally delivered to the recipient, notice is effective on delivery.
2. First Class mail. When mailed first class to the last address of the recipient known to the party giving notice, notice is effective three mail delivery days after deposit in a United States Postal Service office or mailbox.
3. Certified mail. When mailed certified mail, return receipt requested, notice is effective on receipt, if delivery is confirmed by a return receipt.
4. Overnight delivery. When delivered by an overnight delivery service, charges prepaid or charged to the sender's account, notice is effective on delivery, if delivery is confirmed by the delivery service.
5. Facsimile transmission. When sent by fax to the last fax number of the recipient known to the party giving notice, notice is effective on receipt. Any notice given by fax will be deemed received on the next business day if it is received after 5:00 p.m. (recipient's time) or on a non-business day.
6. Addresses for purpose of giving notice are as follows:

OWNER'S REPRESENTATIVE:

CITY:

B. Any correctly addressed notice that is refused, unclaimed, or undeliverable because of an act or omission of the party to be notified, will be deemed effective as of the first date the notice was refused, unclaimed or deemed undeliverable by the postal authorities, messenger or overnight delivery service.

C. Either party may change its address or fax number by giving the other party notice of the change in any manner permitted by this Agreement.

21. PROHIBITION AGAINST ASSIGNMENT AND SUBCONTRACTING

This Agreement and all exhibits are binding on the heirs, successors, and assigns of the parties. The Agreement may not be assigned or subcontracted by either CITY or OWNER'S REPRESENTATIVE without the prior written consent of the other.

22. INTEGRATION; AMENDMENT

This Agreement represents the entire understanding of CITY and OWNER'S REPRESENTATIVE as to those matters contained in it. No prior oral or written understanding will be of any force or effect with respect to the terms of this Agreement. The Agreement may not be modified or altered except in writing signed by both parties.

23. INTERPRETATION

The terms of this Agreement should be construed in accordance with the meaning of the language used and should not be construed for or against either party by reason of the authorship of this Agreement or by any other rule of construction that might otherwise apply. To the extent that the terms of the Scope of Services or the Proposal are inconsistent with the terms of this Agreement, the terms of this Agreement shall control.

24. SEVERABILITY

If any part of this Agreement is found to be in conflict with applicable laws, that part will be inoperative, null and void insofar as it is in conflict with any applicable laws, but the remainder of the Agreement will remain in full force and effect.

25. TIME OF ESSENCE

Time is of the essence in the performance of this Agreement.

26. GOVERNING LAW; JURISDICTION

This Agreement will be administered and interpreted under the laws of the State of Nebraska. Jurisdiction of any litigation arising from the Agreement will be in Kimball County, Nebraska.

27. COMPLIANCE WITH STATUTES AND REGULATIONS

OWNER'S REPRESENTATIVE will be knowledgeable of and will comply with all applicable federal, state, county and city statutes, rules, regulations, ordinances and orders.

28. WAIVER OF BREACH

No delay or omission in the exercise of any right or remedy by a non-defaulting party on any default will impair the right or remedy or be construed as a waiver. A party's consent or approval of any act by the other party requiring the first party's consent or approval will not be deemed to waive or render unnecessary the other party's consent to or approval of any subsequent act. Any waiver by either party of any default must be in writing and will not be a waiver of any other default concerning the same or any other provision of this Agreement.

29. ATTORNEY'S FEES

Except as provided for in Paragraph 15, in any dispute, litigation, arbitration, or other proceeding by which one party either seeks to enforce its rights under this Agreement (whether in contract, tort or both) or seeks a declaration of any rights or obligations under this Agreement, the prevailing party will be awarded reasonable attorney's fees, together with any costs and expenses, to resolve the dispute and to enforce any judgment.

30. EXHIBITS

All exhibits identified in this Agreement are incorporated into the Agreement by this reference.

31. OWNER'S REPRESENTATIVE'S AUTHORITY TO EXECUTE

The persons executing this Agreement on behalf of OWNER'S REPRESENTATIVE warrant that (i) OWNER'S REPRESENTATIVE is duly organized and existing; (ii) they are duly authorized to execute this Agreement on behalf of OWNER'S REPRESENTATIVE; (iii) by so executing this Agreement, OWNER'S REPRESENTATIVE is formally bound to the provisions of this Agreement; and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which OWNER'S REPRESENTATIVE is bound.

32. PUBLIC RECORDS ACT

Any documents submitted by the OWNER'S REPRESENTATIVE; all information obtained in connection with the CITY's right to audit and inspect the OWNER'S REPRESENTATIVE's documents, books, and accounting records pursuant to paragraph 14 OWNER'S REPRESENTATIVE's Accounting Records; Other Project Records; become the exclusive property of the City. All such documents become a matter of public record and shall be regarded as public records. Exceptions will be those elements in the Nebraska Public Records Act and which are marked "trade secret", "confidential", or "proprietary". The CITY shall not in any way be liable or responsible for the disclosure of any such records including, without limitation, those so marked, if disclosure is required by law, or by an order issued by a court of competent jurisdiction. In the event the CITY is required to defend an action on a Public Records Act request for any of the aforementioned documents, information, books, records, and/or contents of a proposal marked "trade secret", "confidential", or "proprietary", the OWNER'S REPRESENTATIVE agrees to defend and indemnify the CITY from all costs and expenses, including reasonable attorney's fees, in action or liability arising under the Public Records Act.

CITY OF KIMBALL,

a municipal corporation

Owner's Representative [Firm Name],

Type of Entity

By: _____

Signer

Title

APPROVED AS TO FORM:

City Attorney

By: _____

Attachments:

Exhibit A Scope of Services

Exhibit B Compensation Schedule

EXHIBIT A
SCOPE OF SERVICES
[To be attached]

EXHIBIT B
COMPENSATION SCHEDULE
[To be attached]