

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement is by and among **Sourcewell**, 202 12th Street Northeast, PO Box 219, Staples, MN 56479; **Cooperative Purchasing Connection**, 1001 E. Mount Faith, Fergus Falls, MN 56537; and **ORB Management**, 406 3rd Avenue East, Suite 1, Alexandria, MN 56308 (Contractor).

Contractor provides real estate and project advisory services to assist in the planning and implementation of real estate and facility transactions and projects, and other services related to improvements of real property.

Service Cooperatives are public service cooperatives and, along with their members, occasionally require the management and administration services of projects related to real property.

Contractor is qualified and willing to perform the services described in this Agreement.

ARTICLE 1: TERM

- A. Term. This Agreement will be effective as of the date of the last signature below and will remain in effect through October 31, 2022, unless earlier terminated pursuant to the terms of this Agreement.
- B. Survival. Notwithstanding any expiration or termination of this Agreement, all payment obligations incurred prior to expiration or termination will survive, as will Articles 6 and 7. All other rights will cease upon expiration or termination of this Agreement.

ARTICLE 2: CONTRACTOR'S DUTIES

Contractor will offer Owner's Representative services outlined in Exhibit A: Owner's Representative Agreement, which is attached and incorporated into this Agreement.

In addition to Owner's Representative services, referenced above, Contractor will also offer the following services pursuant to a separate agreement between Contractor and the Sourcewell or Cooperative Purchasing Connection Member:

1. Real Estate Development: fee development, public-private partnerships, site identification and due diligence, governmental approvals, economic incentives, financial pro forma analysis, zoning/entitlement, environmental review/coordination, master development planning.
2. Real Estate Brokerage: building sales/purchases, land sales/purchases, tenant representation, landlord representation, site selection/acquisition, GIS/Market analysis, property and facility management, lease administration, asset management, lease/own strategies, lease-up and marketing, broker pricing option (BPOs).

Sourcewell, Cooperative Purchasing Connection, and their members, at their discretion, may access the services of Contractor using the agreement attached and incorporated as Exhibit A. Any entity accessing Contractor's work through this Agreement is hereinafter referred to as "Using Entity." **No work under an**

agreement created using Exhibit A will begin until all required signatures have been obtained by a Using Entity, and Contractor has been notified by the Using to begin services.

ARTICLE 3: CONSIDERATION AND PAYMENT

- A. Consideration. All costs associated with Contractors work and the full amount that would be due to Contractor will be clearly outlined in Exhibit A.
- B. Payment. Contractor will present an itemized invoice for the services actually performed as outlined in Exhibit A. All services provided by the Contractor under this Agreement must be performed to the satisfaction of the Using Entity.
- C. Administrative Fee. Contractor will pay to the respective service cooperative an Administrative fee in the amount of 2% of the total dollar volume paid to Contractor by each Using Entity in the respective service area.

ARTICLE 4: AUTHORIZED REPRESENTATIVE

- A. Sourcewell's Authorized Representative is Jeremy Schwartz, Director of Operations and Procurement, 202 12th Street Northeast, PO Box 219, Staples, MN 56479, 218-894-5488, or his/her successor, and has the responsibility to monitor the Contractor's performance and the authority to accept the services provided under this Agreement.
- B. Cooperative Purchasing Connection Authorized Representative is Jane Eastes, Deputy Executive Director, 1001 East Mount Faith Avenue, Fergus Falls, MN 56537, 218-737-6531, or his/her successor, and has the responsibility to monitor the Contractor's performance and the authority to accept the services provided under this Agreement.
- C. Contractor's Authorized Representative is Tom Wacholz, President, 406 3rd Avenue East, Suite 1, Alexandria, MN 56308, 320-762-2077, or his/her successor.

ARTICLE 5: INSURANCE

Contractor must maintain the following insurance in force and effect throughout the term of this Agreement. A Using Entity may require different limits within Exhibit A, but the limits may be no less than the following:

- A. Commercial General Liability Insurance. Contractor will maintain insurance protecting it from claims for damages for bodily injury and property damage.

Insurance minimum limits are:

\$1,000,000 – per occurrence

\$2,000,000 – annual aggregate

\$2,000,000 – annual aggregate – Products/Completed Operations

- B. Commercial Automobile Liability Insurance.

Contractor will maintain insurance protecting it from claims for damages for bodily injury as well as for property damage.

Insurance minimum limits are as follows:

\$1,000,000 – per occurrence Combined Single limit for Bodily Injury and Property Damage

In addition, the following coverages should be included: owned, hired, and non-owned Automobile

- C. Workers' Compensation. The Contractor certifies that it is in compliance with Minnesota Statutes Section 176.181 pertaining to workers' compensation insurance coverage. The Contractor's employees and agents will not be considered Service Cooperatives' or Using Entity's employees. Any claims that may arise under the Minnesota Workers' Compensation Act on behalf of these employees or agents and any claims made by any third party as a consequence of any act or omission on the part of these employees or agents are in no way Service Cooperatives' or Using Entity's obligation or responsibility.
- D. Additional Conditions.
- Contractor's policy(ies) must be primary insurance to any other valid and collectible insurance available to a Using Entity with respect to any claim arising out of Contractor's performance under this Agreement;
 - Contractor agrees to name the Service Cooperatives and applicable Using Entity, including officers, agents, and employees, as an additional insured under the Contractor's commercial general liability insurance policy with respect to liability arising out of activities, "operations," or "work" performed by or on behalf of Contractor, and products and completed operations of Contractor. The policy provision(s) or endorsement(s) must further provide that coverage is primary and not excess over or contributory with any other valid, applicable, and collectible insurance or self-insurance in force for the additional insureds;
 - Contractor waives and must require (by endorsement or otherwise) all its insurers to waive subrogation rights against the Service Cooperatives and Using Entity and other additional insureds for losses paid under the insurance policies required by this Contract or other insurance applicable to the Contractor or its subcontractors. The waiver must apply to all deductibles and/or self-insured retentions applicable to the required or any other insurance maintained by the Contractor or its subcontractors;
 - If Contractor receives a cancellation notice from an insurance carrier affording coverage herein, Contractor will notify the Service Cooperatives and applicable Using Entity within five business days with a copy of the cancellation notice, unless Contractor's policy(ies) contain a provision that coverage afforded under the policy(ies) will not be cancelled without at least 30 days' advance written notice to the Service Cooperatives and applicable Using Entity; and
 - Contractor is responsible for payment of Agreement related insurance premiums and deductibles.

- Service Cooperatives and Using Entity may individually terminate participation in this Agreement if Contractor is not in compliance with the insurance requirements of this Agreement or Exhibit A, as applicable.

ARTICLE 6: DATA AND INTELLECTUAL PROPERTY

- A. Government Data. The Parties acknowledge that they are subject to the Minnesota Government Data Practices Act (Minnesota Statutes Chapter 13) as to data created and maintained under this Agreement.
- B. Intellectual property rights. The Service Cooperatives and applicable Using Entity owns all rights, title, and interest in all of the intellectual property rights, including copyrights, patents, trade secrets, trademarks, and service marks in the works and documents created and paid for under this Agreement.

ARTICLE 7: GENERAL TERMS

- A. Governing Law, Jurisdiction and Attorney's Fees. This Agreement will be interpreted and construed in accordance with the laws of the State of Minnesota. Any dispute arising out of this Agreement will be adjudicated in Todd County, Minnesota. In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and reasonable attorney's fees from the other party.
- B. Assignment. Neither party may assign or otherwise transfer its rights and obligations under this Agreement without prior written consent of the other party. Any prohibited assignment will be invalid.
- C. Independent Contractor. Each party is an independent entity under the terms of this Agreement. Neither party will have the right, power, or authority to act or create any obligation on behalf of the other party. Except as otherwise provided, all operational expenses incurred by either party will be borne by the party incurring the expense.
- D. Hold Harmless. The Contractor will indemnify and hold Service Cooperatives and any Using Entity harmless from all claims and demands that may result from its acts or omissions in performance of this Agreement. Service Cooperatives' responsibilities will be governed by the State of Minnesota's Tort Liability act (Minnesota Statutes Chapter 466) and other applicable law.
- E. Amendments. Any amendment to this Agreement must be in writing and will not be effective until it has been executed and approved by the parties.
- F. Severability. In the event that any term of this Agreement is in conflict with or is otherwise unenforceable under any rule, law, or statutory provision, such terms will be deemed stricken from this Agreement, but such invalidity or unenforceability will not invalidate any other terms of the Agreement unless the invalidity or unenforceability of such provisions substantially harms, compromises an integral part of, or are otherwise inseparable from the remainder of this Agreement.

- G. Waiver. Failure by either party to take action or assert any right under this Agreement will not be deemed a waiver of such right in the event of the continuation or repetition of the circumstances giving rise to such right.
- H. Publicity and endorsement.
1. Publicity. Any publicity regarding the subject matter of this Agreement must be reviewed Service Cooperatives and must not be released without prior written approval from Service Cooperatives' Authorized Representative. However, Contractor has the right during the term of this Agreement to use each Service Cooperative's trademarks in advertising and promotions related to this Agreement. Such use must be pre-approved by each Service Cooperative prior to use, and such approval will not be unreasonably withheld.
 2. Endorsement. The Contractor must not claim that Service Cooperatives endorses its products or services
- I. Agreement Complete. This Agreement contains all negotiations and agreements among the parties. No other understanding regarding this Agreement, whether written or oral, may be used to bind either party.

ARTICLE 8: TERMINATION

A party may terminate its participation in this Agreement by providing 30 calendar days' written notice to the other parties. Termination by one service cooperative does not require the termination of the remaining service cooperatives. Unless otherwise agreed by the parties, termination under this section will not relieve a Using Entity's obligation to pay for satisfactorily completed services.

Upon any expiration or termination of this Agreement, each party will return promptly or, at the other party's request, destroy all documents and other tangible objects containing or representing information that is classified by the Minnesota Government Data Practices Act as non-public, private, or other non-disclosable data.

IN WITNESS WHEREOF, the parties have executed this Agreement.

Sourcwell

DocuSigned by:

Jeremy Schwartz

BY: 60FD2A139D06489...

Authorized Signature

Name – Printed

Title: _____

Date: 10/22/2019 | 7:01 PM CDT

Cooperative Purchasing Connection

DocuSigned by:

Jane Eastes

BY: 6D9BB132BB3040A...

Authorized Signature


Name – Printed

Title: _____

Date: 10/22/2019 | 8:00 AM PDT

ORB Management

DocuSigned by:

By: 

F6068996B67B4C9...
Authorized Signature

Name – Printed

Title: _____

Date: 10/22/2019 | 11:07 AM CDT

Exhibit A

(name of client organization)

OWNER'S REPRESENTATIVE AGREEMENT

THIS CONSULTING AGREEMENT (the "Agreement") is made as of _____ (the "Effective Date") between _____ a _____ (identify state) corporation, with its principal place of business located at _____ (the "Owner" and a "Party") and ORB Management Corporation, a Minnesota corporation with its principal place of business located at 406 3rd Avenue East, Suite 1, Alexandria, MN 56308 (the "Consultant" and a "Party").

RECITALS

- A. Owner is a member of Sourcewell or Cooperative Purchasing Connection.
- B. Consultant has entered into a Professional Services Agreement with Sourcewell and Cooperative Purchasing Connection as Consultant to provide consulting services to Sourcewell and Cooperative Purchasing Connection Members.
- C. The Owner has real property, consisting of land and buildings, located at _____ ("Property");
- D. The Owner desires to plan, design and construct improvements to the Property consisting of _____ (the "Project");
- E. The Owner desires to retain the Consultant as its owner's representative to assist in the management and administration of the Project on behalf of the Owner, as an independent contractor to the Owner; and
- F. The Owner and the Consultant wish to enter into this Agreement detailing their respective roles and responsibilities regarding the Project.

NOW, THEREFORE, in consideration of the mutual undertakings, covenants, and agreements hereinafter set forth, the Parties hereby agree as follows:

- I. **CONSULTANT.** As of the Effective Date, the Consultant will provide the services detailed in this Section I of the Agreement. The Consultant shall perform its services consistent with the skill and care ordinarily provided by consulting owner's representatives practicing in the same or similar locality under the same or similar circumstances. Consultant's services will be subject at all times to the Owner's ultimate and final direction and control. Specifically, the Consultant will:

Assist the Owner in the performance of its obligations during the planning, design, bidding, construction and occupancy process. Consultant has no authority to approve expenditures or enter into contracts. Specific services include:

- A. **Planning Phase.** Consultant will use its best efforts to assist the Owner with management and coordination of the following Planning Phase activities for the Project:

1. Advice, input and leadership on planning activities to facilitate decision-making and ensure accountability to the overall Project goals.
 2. Organize, attend and conduct planning meetings, related to the Project and prepare and distribute meeting minutes to the Owner.
 3. Develop, implement and administer a Master Program Schedule for managing all Project tasks.
 4. Develop, implement and administrate a centralized cost management system for the Project.
 5. Assist the Owner in developing and implementing a payment process for the Project.
 6. Develop a Request for Proposal (RFP) and solicit proposals from invited design firms, participate in the evaluation and interview process and provide input in the selection of a firm to perform design functions as the Architect/Engineer of Record ("A/E") for the Project pursuant to a contract with the Owner.
 7. Participate in negotiations, review the A/E's proposed contract form and make recommendations to the Owner regarding the scope of services between the Owner and the selected A/E.
 8. Financial Feasibility
 - i. Financing strategies and analysis as they relate to the Project.
 - ii. Prepare information to identify total project costs: construction, FF&E and soft costs.
 - iii. Advise/Assist with preliminary estimated financial project disbursement plan.
 - iv. Assist, if necessary, with collecting existing Property information and performing other due diligence efforts required by the Project.
 9. Develop a Request for Proposal (RFP) and solicit proposals from invited financial institutions, participate in the evaluation and interview process and provide input on the selection of a firm to provide financing for the Project pursuant to a contract with the Owner.
- B. **Design Phase.** Consultant will use its best efforts to assist the Owner with management and coordination of the following Design Phase activities for the Project:
1. Act as liaison between the Owner, A/E, and other design consultants.
 2. Review design documents during development for constructability, conformance to budget limitations, and value. Provide recommendations

to the Owner and A/E at the completion of design development and construction documents phases.

3. Assist in ensuring the A/E is executing and documenting the detailed Project plan. Monitor the design process to help ensure the A/E is incorporating the program requirements into the design and disseminating information to their consultants for incorporation into the design.
4. Participate in pricing review meetings to ensure scope/budget alignment. Make value engineering recommendations to enhance the design effort at the completion of Schematic Design and Design Development phases, evaluating alternative materials and systems.
5. Facilitate discussions with the Project Team to determine desired construction delivery method.
6. Review and provide input on final construction bid documents as prepared by the A/E. Assist the A/E with issuance of a construction bid package, summary of work, phasing plan, general conditions, etc.
7. Solicit proposals from invited (general contractors or construction managers), participate in the evaluation and interview process and provide input in the selection of a firm to perform construction functions as the (General Contractor or Construction Manager) of Record ("Contractor") for the Project.
8. Assist A/E with coordination of and attend the Pre-Bid meeting for all interested Contractors; assist in review and evaluation of all bids; participate in negotiations.
9. Assist A/E with coordinate of and participate in the Pre-Construction Meeting with the A/E and Contractor.
10. Assist the A/E with addressing Contractor questions and monitor that the A/E is maintaining a bid clarification log and an RFI (Request For Information) log.
11. Provide input on the construction contract and administer the contract on the Owner's behalf.
12. Confirm that plan reviews are completed by state/local code officials through the A/E.
13. Verify the A/E and Contractor have obtained required permits, approvals and other authorizations necessary for the development, construction and operation of the project.
14. Provide input in the A/E's and Contractor's site logistics and phasing plan to allow for implementation of pre-construction and proposed construction activities, and the coordination with the Owner's ongoing activities.

15. Make recommendations to Owner regarding inspection and testing consultant services for Owner-provided services for field quality assurance as required by the Contract Documents. Note: it is the Contractor's responsibility to comply with all inspection and testing as required by the Contract Documents and local governing agencies.
- C. **Construction Phase.** Consultant will use its best efforts to assist the Owner with management and coordination of the following Construction Phase activities for the Project:
1. Act as liaison between the Owner, A/E, and Contractor in regards to construction of the Project.
 2. Confirm A/E and Contractor are maintaining Project document files to include copies of: plans, specifications, any Addendums issued, information requests, proposal requests, change directives and change orders, and submittals.
 3. Attend Contractor's construction progress meetings as needed to represent the Owner. Review Contractor's distribution of meeting minutes and track the progress of all action items outlined.
 4. Coordinate, attend and conduct Owner update meetings as needed or as requested to summarize: key construction activities progress, conformance to the Contractor's construction activities schedule, cost/budget status, percentage of completion, amounts of change orders, current or potential problems, recommendations for Owner actions and other issues.
 5. Confirm periodic observations are being performed by the A/E and other necessary consultants on the work of the Contractor. (Note: Contractor (and not Consultant) shall be responsible that all work conforms to the Contract Documents. Consultant is not a guarantor of Contractor's work).
 6. Consult with the A/E regarding Contractor requests for clarification of the meaning and intent of the drawings and specifications. Assist in the resolution of any questions which may arise. Confer with the Owner on any disputes requiring resolution through the terms of the construction documents. (Note: Consultant's participation on behalf of the Owner on any disputes requiring resolution through arbitration or other legal processes will be an additional service payable by Owner to Consultant on an hourly rate basis.)
 7. Confirm the A/E has established and implemented procedures for receiving, tracking and expediting the processing and approval of shop drawings, submittals and samples. Monitor shop drawing log and response times.
 8. Review the initial submittal of the Contractor's detailed construction schedule and provide recommendations to the Owner and project team. Monitor schedule progress, review Contractor's construction schedule updates, document any discrepancies, and make recommendations.

9. Confirm that the Contractor is complying with all inspection and testing as required by the Contract Documents and local governing agencies. Review testing and inspection reports.
10. Require that Contractor maintains current records of all contracts; shop drawings; samples; purchases; materials; equipment; applicable handbooks and safety manuals; federal, commercial and technical standards and specifications; maintenance and operating manuals and revisions which arise out of the construction documents or the work.
11. Assist in arranging for storage of any Owner purchased items.
12. Review proposal requests for possible changes to the Work on behalf of the Owner, make recommendations, and assist Owner in addressing any disputes regarding proposed change orders.
13. Assess and make recommendations on need for implementation of the In-State OSHA consultation program. Note: it is the Contractor's responsibility to comply with all safety codes and regulations.
14. Assist, as needed, the Owner's internal team responsible for the coordination and procurement of other Project work to be performed by the Owner and/or various vendors outside of the Construction Contract (i.e. communications, security, access control, signage, etc.).
15. Assist Owner with monitoring the payment process and coordinating the acquisition of mechanics lien releases.

D. Closeout/Warranty/Start-Up Phase. Consultant will use its best efforts to assist the Owner with management and coordination of the following activities related to closeout, start-up and warranty for the Project:

1. Attend Project reviews on behalf of the Owner for Substantial Completion, Final Occupancy/Commissioning/Start-Up, and Warranty.
2. Upon the determination by the Contractor of "substantial completion" of the Project or designated portions thereof, direct the A/E to prepare a list of incomplete, unsatisfactory or non-conforming items "punch list items" required for completion/remedy prior to certification of substantial completion.
3. After the A/E certifies the date of "substantial completion", facilitate and monitor the Contractor's completion of and the A/E's review and approval of all punch list items.
4. Confirm the transfer of building operations to the Owner by the Contractor. Verify and document that the Contractor has conducted equipment start-up and the orientation and training of Owner's operations personnel for building systems and equipment installed as part of the Project.
5. Assist the project team with coordination of Owner transition activities.

6. Confirm A/E has collected and reviewed the Final Project Closeout on the Owner's behalf: Coordinate and document receipt of warranties, operation and maintenance manuals/stocks, secured all owner's manuals and other associated operational guidebooks and the A/E's record drawings all related to the Project.
7. Confirm A/E has coordinated the determination of completion and provided written notice to Owner, Owner's Representative and Contractor that the work is ready for final inspection.
8. Assist the A/E, Contractor and other related vendors/contractors to expeditiously obtain temporary certificates of occupancy and permanent certificates of occupancy for the improvements, filing all notices of completion, coordinating final payment and requesting final conditional lien releases and any other activities which may be required to occupy the project.
9. Coordinate 10-month final warranty inspection.
10. Review Consent of Surety to Final Payment (AIA G707) form, if required.

E. Services Not Provided by the Consultant. Notwithstanding anything in this Agreement to the contrary, the Owner acknowledges that the Consultant:

1. Is not the A/E, Contractor, Design-Builder or Construction Manager for the Project.
2. Will not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences, or procedures, or for the safety precautions and programs in connection with the work on the Project, which all shall be solely the rights and responsibilities of the Contractor (and their respective subcontractors, sub-subcontractors and suppliers) hired by the Owner or other project team member.
3. Will not have control over or charge of and will not be responsible for acts or omissions of the A/E, Contractor, subcontractors, or their agents or employees, or any other persons or entities responsible for performing portions of the work on the Project.
4. Will not be responsible for Contractor's failure to perform the work in accordance with the plans and specifications.
5. Is not a guarantor of the work or services provided by the A/E, Contractor, subcontractors, or their agents or employees, or any other persons or entities responsible for performing portions of the work on the Project.
6. Does not represent itself as a provider of any legal, financial, insurance or accounting services and shall not provide such services to the Owner.

7. Will not be signatory to any contracts, change orders, payment applications or other legal agreements with the A/E, Contractor or other service providers to the Owner.
- F. **Insurance.** The Consultant shall provide an original certificate of insurance and identify the Owner as an additional insured with minimum limits of professional liability, automobile liability and general liability of \$1,000,000 each; and worker's compensation of \$500,000 or more.

II. **THE OWNER.**

A. **Generally.** The Owner shall:

1. Identify a representative authorized to act for and bind the Owner with respect to the Project. The Owner shall render decisions pertaining to the Project in a timely manner in order to avoid delay in the performance of the Consultant's services and the Project.
2. Assist and cooperate with the Consultant during the term of this Agreement, including providing all pertinent information required by the Consultant to perform its services under this Agreement.
3. Retain and rely upon professionals other than the Consultant for legal, insurance, financial, accounting, survey, design, engineering, and construction services related to the Project, as necessary and appropriate. Owner shall retain legal counsel for purposes of reviewing all bid forms, contracts, and other Project agreements and documents.
4. Directly enter in to contracts with the A/E, and other design consultants, necessary for Project design.
5. Directly enter into contracts with the Contractor, testing companies and other service providers necessary for Project construction – that are consistent with this Agreement. Owner shall coordinate such contracts with Consultant and provide copies of the contracts to Consultant.
6. Maintain builder's risk and property insurance for the Project as of the Effective Date through the date of Project completion.
7. Obtain financing and all required financing approvals prior to the start of construction.
8. Except in cases of emergency, the Owner shall endeavor to communicate with the Contractor and other Project participants through the Consultant about matters arising out of or relating to the construction of the Project. The Owner shall promptly notify the Consultant of any direct communications that may affect the Consultant's services.

B. **Payment.**

1. The Owner shall pay the Consultant, in current funds, fees described below ("Fees") plus 1.15 times Reimbursable Expenses (defined below) for performance of this Agreement as follows:

i. A fixed fee of _____ Dollars (\$XX,XXX).

... or ...

ii. A fee of _____ % of the Total Project Cost. Total Project Cost is all costs incurred by Owner to complete the Project, excluding land costs and Consultant's fees and reimbursable expenses.

... and/or...

iii. An hourly rate fee, up to a maximum total amount of _____, based on Consultant's Standard Hourly Rates described on Schedule 1 attached and incorporated herein, subject to annual adjustment.

- iv. Additional services may be requested by Owner or Consultant should there be a change in the scope of the Project and/or this Agreement, including but not limited to, changes in the Project budget; changes in the Consultant's overall scope of services; assisting with resolution of legal disputes with the A/E, Contractor or other vendors on the Project; assisting with the coordination of repair, replacement or correction of work on the Project as a result of errors, omissions or negligence of the A/E, Contractor or other Project vendors; etc. Additional services will be provided with the Owner's prior written authorization on an hourly rate basis in accordance with Consultant's current rates as shown on Schedule 1.
- v. Reimbursable Expenses shall include the items described no Schedule 2 attached and incorporated herein, subject to annual adjustment.
2. The Owner will pay the Fees and Reimbursable Expenses based on monthly invoices provided by the Consultant to the Owner. Payment then will be made within 15 days of the invoice being filed with the Owner. All amounts not paid within this time period shall bear interest of 1.5% per month.
3. If the Owner fails to make payments to the Consultant in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Consultant's option, cause for suspension of performance of services under this Agreement. If the Consultant elects to suspend services, the Consultant shall give seven day's written notice to the Owner before suspending services. In the event of a suspension of services, the Consultant shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, Consultant shall be paid (i) all sums due prior to suspension; (ii) any expenses incurred in the interruption and resumption of the Consultant's services; and (iii) a retainer in a mutually agreeable amount or the establishment of an escrow for the remaining

amount of the fees to be paid to Consultant. The time schedules shall be equitably adjusted.

IV. Waiver of Subrogation Rights.

- A. Neither the Consultant nor the Owner shall be liable to the other for losses arising out of damage to or destruction of the Project, Property, or other real or personal property of the Owner or the Consultant, when such loss is caused by any of the perils which are or could be included within or insured against by property liability insurance with extended coverage and builder's risk insurance. All such claims for any and all loss, however caused, hereby are waived. Such absence of liability shall exist whether or not the damage or destruction is caused by the negligence of either the Consultant or the Owner or by any of their respective agents, servants or employees.
 - B. Fees payable under this Agreement have been fixed in contemplation that each Party shall fully provide its own insurance protection at its own expense, and that each Party shall look to his respective insurance carriers for reimbursement of any such loss, and further, that the insurance carriers involved shall not be entitled to subrogation under any circumstances against any Party to this Agreement. Both Parties shall give notice to their respective insurance carriers of this provision. The Owner shall require by appropriate agreements, similar waivers of the A/E, Owner's Contractor, and the subcontractors, sub-subcontractors, agents, and employees of any of them, each in favor of Owner and Consultant.
 - C. As between the Parties hereto, the Owner shall bear all of the risk of loss of the Project and/or Property. The Owner at its expense shall provide the property liability and builder's risk insurance. The Consultant shall provide general liability and name Owner as an additional insured and professional liability in the amounts described in paragraph I.F. of this Agreement. The Owner and Consultant shall cause the Contractor to fully provide general liability and auto insurance in amounts described in the final bid documents, and workman's compensation in the statutory amount, and both the Owner and the Consultant shall be named as additional insureds on such general liability policies. The Consultant will collect and forward to Owner a proof of insurance certificate from the Contractor for the Project.
- V. **Assignment.** Neither Party may assign any rights or delegate any duties hereunder without the express prior written consent of the other Party, which shall not be unreasonably withheld by either Party.
- VI. **General.** The Laws of the State of Minnesota shall govern the legal relations between the parties and all questions and interpretations concerning the validity and construction of this Agreement and the performance hereunder. If any provision of this Agreement is held invalid, illegal, or unenforceable, the remaining provisions will not be affected and shall remain in full force and effect. The captions contained in this Agreement are inserted for convenience only, are not intended to be part of the Agreement, and shall not affect or be utilized in the construction or interpretation of the Agreement. This Agreement is the result of a negotiation by the parties and shall not be interpreted against the party originally drafting this Agreement. Any notice or demand required to be given or made by a party hereto under the terms of this Agreement or pursuant to any statute shall be in writing and shall be effective upon delivery by overnight carrier

or by registered or certified mail to the other party at the address indicated on the first page of this Agreement. This Agreement may be modified or amended only by a written agreement executed by all parties hereto.

- VII. **Resolution of Disputes.** In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or the breach thereof (a "Dispute"), the Parties shall use their best efforts to settle the Dispute by negotiation. If they do not resolve the Dispute within a period of ten (10) days, then upon written notice by either Party to the other (the "Mediation Notice"), the Parties agree to submit the Dispute to mediation before resorting to litigation. The Parties shall attempt to agree upon a mediator. Should they fail to do so within ten (10) days of the Mediation Notice, either party may request that the American Arbitration Association ("AAA") appoint the mediator. If the matter is not resolved by mediation, the Dispute shall be resolved by litigation in the state or federal courts for Douglas County, Minnesota, and the Parties agree to the jurisdiction and venue of such courts to the fullest extent permitted by law. Notwithstanding the foregoing, Consultant shall be entitled to take whatever steps as may be required under applicable law to perfect any mechanics' lien or bond rights.
- VIII. **Notices.** Any notice or demand required to be given or made by a party hereto under the terms of this Agreement or pursuant to any statute or ordinance shall be in writing and shall be sent registered or certified mail to the respective address indicated below:

To the Owner:

To the Consultant:

Tom Wacholz, President
ORB Management Corporation
406 3rd Avenue East, Suite 1
Alexandria, MN 56308

IX. Indemnification and Mutual Waiver of Consequential Damages.

- A. To the fullest extent permitted by law, the Owner hereby indemnifies and holds the Consultant, its agents, employees and independent contractors, harmless from any and all costs, expenses, attorney fees, suits, liabilities, damages, and claims of every type, from or connected with the performance or exercise of any of the duties, obligations, powers, or authorities herein or hereafter granted to the Consultant.
- B. To the fullest extent permitted by law, the Consultant hereby indemnifies and holds the Owner, its agents, employees and independent contractors, harmless from any and all costs, expenses, attorney fees, suits, liabilities, damages, and claims of every type, from or connected with the performance or exercise of any of the duties, obligations, powers, or authorities herein or hereafter granted to the Owner.
- C. Either party shall not hold the other party liable for any error in judgment or any mistake of fact or law, or for anything that such party may do or refrain from doing, except in cases of willful misconduct or gross negligence. The Consultant and the Owner waive all claims against each other for consequential damages arising out of or relating to this Agreement and/or Consultant's services, including all damages incurred:

1. By the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
 2. By the Consultant for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the performance under this Agreement.
- X. **Suspension/Termination.** Either Party may suspend or terminate this Agreement upon sixty (60) days written notice to the other party. Upon suspension or termination, the Owner shall compensate the Consultant for all work performed up to the date of suspension/termination, including all time spent and all Reimbursable Expenses. Upon receipt of such payment, the Consultant shall provide to the Owner all work product completed prior to the date of suspension/termination.
- XI. **Non-Solicitation.** During the period of performance of this Agreement and for a period of one (1) year thereafter, the parties shall not, directly or indirectly, solicit or encourage any employee of the other to leave or solicit or engage the services of any employee of the other. During the period of performance of this Agreement and for a period of one (1) year thereafter, the parties shall not hire any employee who has left the employ of the other party during the term of this Agreement or such one-year period.
- XII. **Independent Contractor.** The relationship between the Owner and the Consultant shall be solely that of client and independent contractor. No agent, employee, partner, or servant of the Consultant shall be or shall be deemed to be an agent, employee, partner, or servant of the Owner. This Agreement shall not be deemed or construed as a partnership or a joint venture. Neither the Owner nor the Consultant shall have authority to bind the other to any obligations and shall not be liable for any obligations of the other, except to the extent specifically stated in this Agreement.
- XIII. **Intellectual Property Rights.** All copyrights, trademarks, patents, or any similar registered or other allowable intellectual property rights arising before, during, or after the period of this Agreement created by the Consultant shall be and at all times shall remain the sole property of the Consultant and ownership of and rights in such property shall not be affected in any way by the consulting services provided by the Consultant, or by the Consultant's association with the Owner.
- XIV. **Entire Agreement.** This Agreement contains the entire understanding between and among the parties and supersedes any prior understandings and agreements among them respecting the subject matter of this Agreement. Nothing expressed or implied in this Agreement shall be construed to convey any legal or equitable rights, benefits, remedies, or claims upon any person other than the parties to this Agreement. This Agreement is intended for the sole and exclusive benefit of the Owner and the Consultant.
- XV. **Counterparts.** This Agreement may be executed in counterparts and the signature pages transmitted by facsimile or PDF. This Agreement shall be effective when there are attached together execution pages containing the signatures of each of the parties hereto, each of which counterpart shall be deemed to be an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have set their hands and affixed their respective seals the day and year first above written.

Client Organization

ORB Management Corporation

By: _____
Print Name, Title

By: _____
Print Name, Title

By: _____
Signature

By: _____
Signature

SCHEDULE 1

2019 HOURLY RATE SCHEDULE

<u>Position</u>	<u>Hourly Rate (\$/hr.)</u>
Project Principal	200.00
Project Executive	190.00
Project Manager	150.00
Director of Pre-Construction	150.00
Project Cost Manager	80.00

SCHEDULE 2

Reimbursable Expenses include, but are not limited to, plan duplication, delivery fees, travel (i.e. mode of transportation costs, per diem, lodging), and insurance.)