DESIGN PROFESSIONAL AGREEMENT (CONSTRUCTION MANAGER AT RISK FORM) (OPERATING MANUAL FORM) (SINGLE PROJECT FORM) © JUNE 2006 EDITION

Date (type in) Issued:

Request for Qualifications Number ____________________

OWNER

ARIZONA BOARD OF REGENTS
for and on behalf of
ARIZONA STATE UNIVERSITY

DESIGN PROFESSIONAL

CMAR

________________________
________________________
________________________

________________________
________________________
________________________
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<td></td>
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APPENDIX A

to

Design Professional Agreement Between Owner and Design Professional

Specific Terms and Provisions of the Design Professional Agreement

1. Section 1:

SECTION 1. PROJECT

1.1 Project Title: ________________________________

1.2 Project Number: __________________________

1.3 Project Location: ____________________________

1.4 Project Scope: ______________________________

2. Section 8.5:

[NOTE TO USERS OF THIS DOCUMENT: Insert the applicable minimum coverage per occurrence from the middle column below in the first set of blanks and the minimum aggregate amount from the chart below in the second set of blanks.]

Professional liability or errors and omissions insurance with minimum limits of \( \$ \) each occurrence, claim, wrongful act or loss and an unimpaired aggregate limit of \( \$ \), with respect to the DP Contract Documents.

<table>
<thead>
<tr>
<th>Construction Budget</th>
<th>DP Professional Liability (E&amp;O) Minimum Coverage</th>
<th>Minimum Aggregate</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0 - $1,000,000</td>
<td>Value of project budget minimum $1,000,000</td>
<td>$2,000,000</td>
</tr>
<tr>
<td>$1,000,000 to $5,000,000</td>
<td>$1,000,000</td>
<td>$2,000,000</td>
</tr>
<tr>
<td>$5,000,000 to $10,000,000</td>
<td>$2,000,000</td>
<td>$3,000,000</td>
</tr>
<tr>
<td>$10,000,000 to $20,000,000</td>
<td>$3,000,000</td>
<td>$3,000,000</td>
</tr>
<tr>
<td>$20,000,000 to $30,000,000</td>
<td>$4,000,000</td>
<td>$4,000,000</td>
</tr>
<tr>
<td>$30,000,000 to $40,000,000</td>
<td>$5,000,000</td>
<td>$5,000,000</td>
</tr>
<tr>
<td>above $40,000,000</td>
<td>$6,000,000</td>
<td>$6,000,000</td>
</tr>
</tbody>
</table>

3. Section 13.1.2:
13.1.2 DP Basic Compensation shall be computed on the following basis ________________________________

______________________________________________________________

4. Section 13.1.3:

13.1.3 When DP Basic Compensation is based on a stipulated sum, the payments of DP Basic Compensation shall be allocated to each subphase as follows:

<table>
<thead>
<tr>
<th>Subphase</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Program Development Subphase</td>
<td>___%</td>
</tr>
<tr>
<td>Schematic Design Subphase</td>
<td>___%</td>
</tr>
<tr>
<td>Design Development Subphase</td>
<td>___%</td>
</tr>
<tr>
<td>Construction Documents Subphase</td>
<td>___%</td>
</tr>
<tr>
<td>Bidding and Bid Award Phase</td>
<td>___%</td>
</tr>
<tr>
<td>Construction Phase</td>
<td>___%</td>
</tr>
<tr>
<td>Closeout and Occupancy Phase</td>
<td>___%</td>
</tr>
</tbody>
</table>

5. Section 13.2.2:

13.2.2 DP will provide the following DP Additional Services:

For performing the above specified DP Additional Services (services beyond the services specified as DP Basic Services), the DP’s compensation shall be as follows:

6. Section 13.2.3:

13.2.3 For DP Additional Services in retaining consultants, including surveyors, engineers and others whose work does not fall within the DP Basic Services, as approved in writing by the Owner, the Owner will be charged the actual cost to the DP for such services multiplied by a factor of ______________________.

7. Section 14:

SECTION 14. PROJECT SPECIFIC PROVISIONS

7. Section 14:

SECTION 14. PROJECT SPECIFIC PROVISIONS

[NOTE TO USERS OF THIS DOCUMENT: Please complete the blanks in Section 13.1.2. If not applicable, please insert “NOT APPLICABLE”]

[NOTE TO USERS OF THIS DOCUMENT: Please complete the blanks in Section 13.1.3. If any particular blank is not applicable, please insert “NOT APPLICABLE” in that blank.]

[NOTE TO USERS OF THIS DOCUMENT: Please complete the blanks in Section 13.2.2. Please see Section 5 for a list of types of DP Additional Services to assist in drafting the insert in the first blank below. If not applicable, please insert “NOT APPLICABLE”]

[NOTE TO USERS OF THIS DOCUMENT: Please complete the blanks in Sections 13.2.3. If not applicable, please insert “NOT APPLICABLE”]

[NOTE TO USERS OF THIS DOCUMENT: Please complete the blank in Section 14. If not applicable, please insert “NOT APPLICABLE”. If there are Project specific provisions, they must be reviewed by Hank Traeger or another OGC attorney as to appropriateness of the proposed provisions.]
**DESIGN PROFESSIONAL:**

<table>
<thead>
<tr>
<th>By:</th>
<th>By:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name:</td>
<td>Name:</td>
</tr>
<tr>
<td>(Printed)</td>
<td>(Printed)</td>
</tr>
<tr>
<td>Title:</td>
<td>Title:</td>
</tr>
<tr>
<td>Date:</td>
<td>Date:</td>
</tr>
</tbody>
</table>

**OWNER:**

ARIZONA BOARD OF REGENTS

for on behalf of

ARIZONA STATE UNIVERSITY

<table>
<thead>
<tr>
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<th>By:</th>
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<tr>
<td>Title:</td>
<td>Title:</td>
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<tr>
<td>Date:</td>
<td>Date:</td>
</tr>
</tbody>
</table>

**OWNER PROJECT MANAGER**

Approval by Owner’s Facilities Capital Program Management Group project manager:

(Signature)
AGREEMENT BETWEEN OWNER
AND
DESIGN PROFESSIONAL
(Construction Manager at Risk Form)
(Operating Manual Form)

NOTE: The information or contract provisions that go in the numbered blank spaces in this contract are in the respective numbered paragraph in Appendix A attached hereto.

AGREEMENT BETWEEN OWNER AND DESIGN PROFESSIONAL, entered into as of __________, 20 __________, by and between the Arizona Board of Regents, for and on behalf of Arizona State University ("Owner") and ________________________________ ("Design Professional" or "DP").

SECTION 1. PROJECT

(1)

SECTION 2. GENERAL

2.1 The Operating Manual for Construction Manager at Risk Project ("Operating Manual") is attached hereto as Exhibit A and is incorporated herein by reference.

2.2 This agreement is the DP Agreement as defined in the Operating Manual.

2.3 The DP Contract Documents are listed in the Operating Manual.

2.5 The DP Contract Documents are complementary and must be interpreted in harmony so as to avoid conflict. In the event of any inconsistency, conflict or ambiguity, the DP Contract Documents shall take precedence in the order in which they are listed in the definition of that term in the Operating Manual.

2.7 The DP Contract Documents form the entire agreement between Owner and DP relating to the Project, are hereby incorporated herein by reference and by incorporation herein are as fully binding on the parties as if repeated herein. The DP Contract Documents supersede all prior discussions and negotiations. The DP Contract Documents may be amended or modified only in writing executed by Owner and DP.

2.8 If not specifically defined, terms, words and phrases in the DP Contract Documents will have their ordinary and common meaning, with undefined words, phrases and abbreviations interpreted consistent with construction and design industry standards and technical and trade meanings.

2.8 All terms defined in the Operating Manual or in other DP Contract Documents will have the same meanings when used herein. The following terms shall have their respective designated meanings when used in the DP Contract Documents.

"DP Basic Services" means all obligations and activities of the DP in the DP Contract Documents and compliance with all terms and conditions in the DP Contract Documents applicable to the DP, but excluding the DP Additional Services.

"DP Additional Services" means that obligations and activities of the DP described in Section 5 below, as it may be amended and modified from time to time in writing executed by DP and Owner.

"DP Basic Compensation" means the compensation provided in this Agreement for the DP Basic Services. DP Basic Compensation includes the fees of all DP Consultants. DP Basic Compensation also includes the fees of each Special DP Consultant, unless and to the extent Owner has agreed separately in writing to pay part of all of the fees of such Special DP Consultant.
SECTION 3. AGREEMENT OF DESIGN PROFESSIONAL AND OWNER

3.1 DP agrees to perform all obligations and activities of the DP under the DP Contract Documents and to comply with all terms and conditions applicable to DP under the DP Contract Documents.

3.2 Owner agrees to perform all obligations and activities of Owner under the DP Contract Documents and to comply with all terms and conditions applicable to Owner under the DP Contract Documents.

3.3 Subject to any specific modifications, additions or deletions contained herein and/or attached hereto, the DP Basic Services:

(i) shall be rendered in phases consisting of the Design Phase (which includes of the Program Development subphase, the Schematic Design subphase, the Design Development subphase and the Construction Documents subphase) and Construction Phase, which includes, among other activities, close out and occupancy actions;

(ii) include the actions of the DP described in the DP Contract Documents;

(iii) shall support as necessary and be coordinated with the activities of the CMAR as described in the Operating Manual; and

(iv) include (but are not limited to) complete architectural, landscaping, civil, structural, mechanical and electrical engineering services for each subphase of the Design Phase. The phases and subphases are to be performed in the sequence set forth in Section 3.3(i) above, and under no circumstances shall the DP proceed with the next phase or subphase of the DP Basic Services without prior written authorization from the Owner.

SECTION 4. DESIGN PROFESSIONAL RESPONSIBILITY

The DP shall be responsible for and shall indemnify, hold harmless and, if elected by Owner, defend the Owner, the Arizona Board of Regents, and the State of Arizona from and against any and all claims, demands, losses, damages, liabilities, costs and expenses (including, without limitation, reasonable attorneys’ and paralegal fees and costs and expenses of administrative proceedings and litigation and appeals) arising or resulting from any errors or omissions in the documents prepared by DP or any DP Consultant for Owner (“Errors and Omissions Amounts”).

For all purposes of this Section 4, the other provisions in this Agreement and the other DP Contract Documents the phase, “documents prepared by DP or any DP Consultant for Owner”, shall include, without limitation, (i) all documents actually prepared by DP and submitted to Owner and (ii) all documents prepared by any DP Consultant or any other person at the request of DP and submitted to Owner in connection with the Project, regardless of the degree, if any, of DP’s actual involvement in the preparation of the documents. The phase, “documents prepared by DP or any DP Consultant for Owner” also includes, without limitation, the Construction Documents and the other Design Submission Documents.

The DP acknowledges that errors and omissions or either in the documents prepared by DP or any DP Consultant for the Owner can result in claims, demands, losses, damages, liabilities, costs and expenses for the Owner and the others named above. The Owner acknowledges that no set of design documents can be completely free from errors and omissions. Therefore, notwithstanding the assignment of responsibility to the DP and the DP’s agreement to indemnify and defend above, the Owner and the others named above agree to absorb and agree to not make claims against the Design Professional for Errors and Omissions Amounts selected by Owner up to an aggregate amount equal to two percent (2%) of the Actual Costs of Construction Work (“Owner’s Share of Errors and Omissions Amounts”). This is not a release of the obligations to indemnify and defend; it is only an agreement by Owner to not make claims for the Owner’s Share of Errors and Omissions Amounts. The Design Professional shall indemnify and defend as provided above for any and all Errors and Omissions Amounts in excess of the Owner’s Share of Errors and Omissions Amounts.

The DP acknowledges and agrees that the contractual obligations of the DP under this Section 4 (i) are in addition to the DP’s responsibility and liability under applicable law for errors and omissions in the documents prepared by DP or
by any DP Consultant for Owner, (ii) are not a substitute for or waiver of responsibility and liability under applicable law, and (iii) shall not affect or impair DP’s responsibility and liability under applicable law. In addition, the agreement by Owner and others in this Section 4 to absorb and to not make claims for the Owner’s Share of Errors and Omissions Amounts (I) shall apply only to DP’s contractual obligation under this Section 4 to be responsible for and to indemnify and to defend as to Errors and Omissions Amounts, and (II) shall not affect or impair the responsibility and liability of the DP under applicable law for errors or omissions in the documents prepared by DP or any DP Consultant for Owner. However, to be consistent with the limitation on DP’s contractual responsibility for Errors and Omissions Amounts above in this Section 4, the Owner agrees that the aggregate amount Owner will collect from DP and DP’s professional liability insurers will not exceed an amount equal to (i) Errors and Omissions Amounts, less (ii) Owner’s Share of Errors and Omissions Amounts. This is not a release of responsibility and liability; it is only an agreement by Owner to limit the amount collected by Owner.

Owner shall deliver to DP a statement of the amount that is two percent (2%) of the Actual Costs of Construction Work and a list of Errors and Omissions Amounts that Owner has absorbed or will absorb in whole or in part.

The DP acknowledges and agrees that review, comment on and approval by the Owner and involvement of the CMAR and the Owner during the Design Phase (including, without limitation, recommendations by the CMAR or Owner as to the design) or during the Construction Phase, in no way relieve the Design Professional of the responsibility described above. The DP and the Owner will cooperate in the resolution of all matters covered by this Section 4 so as to minimize any detrimental impact upon the Project. However, such cooperation shall not be deemed a waiver of any rights the Owner may have relating to the DP. Any claims or disputes between the DP and the Owner related to this Section 4 will be resolved as provided in Section 11 of this Agreement.

Acceptance by the Owner of the Design Submission Documents and any other documents provided to Owner by DP and the DP’s Estimates of Probable Construction Costs shall not relieve DP from any responsibility for errors or omissions nor from any duties to indemnify and hold the Owner and others harmless, nor from any other obligation of DP under the DP Contract Documents or from any liability under applicable law. In addition, involvement of the Owner and the CMAR in the design development and adoption by the DP of any recommendations by the Owner or CMAR into the DP’s design will not relieve the DP from any responsibility for professional errors and/or omissions nor from any duties to indemnify and hold the Owner harmless or from any other obligations of the DP under the DP Contract Documents or from any liability under applicable law.

Approval by the Owner wherever required in the DP Contract Documents shall not relieve the DP of responsibility (i) for errors and omissions, or (ii) for compliance with the DP Contract Documents.

The DP agrees that DP shall have the same legal responsibility to the Owner as the Owner has, or may have, to others arising out of, or resulting from, any acts or omissions of the DP. Without limiting the foregoing, the above obligation to indemnify and defend includes claims, demands, losses, damages, liabilities, costs and expenses (including, without limitation, reasonable attorneys’ and paralegal fees and costs and expenses of administrative proceedings and litigation and appeals) made against Owner or incurred by Owner in respect of Owner’s legal responsibility to others.

SECTION 5. ADDITIONAL SERVICES

5.1 The following additional services shall be provided only when authorized by the Owner in writing in advance of performance and shall be paid for by the Owner in addition to the DP’s Basic Compensation.

5.1.1 Providing financial feasibility or other special studies.

5.1.2 Providing services relative to future facilities, systems, and equipment, which are not intended to be constructed during the Construction Phase.

5.1.3 Providing interior design and all other similar services required for or in connection with the selection, procurement or installation of movable furniture, furnishings, and related equipment if not expressly contemplated by the DP Contract Documents.
5.1.4 Providing consultation concerning replacement of any work damaged by fire or natural causes or forces majeure during the Construction Phase.

5.1.5 Retaining services of a competent surveyor or engineer to provide any special inspections or tests, as required by code or prudent practice, during the Construction Phase.

5.1.6 Providing extraordinary services made necessary by the default of the CMAR.

5.1.7 Providing assistance required by the Owner in judicial, quasi-judicial, administrative, or legislative hearings or proceedings arising out of the design and/or construction agreement(s) when such proceedings do not relate in any way to the actions or omissions of the DP.

5.2 If the Owner and the DP agree on more extensive representation at the Site than is described in Section 3.4 of the Operating Manual, the DP shall provide one or more full-time Project Representatives. Such full-time Project Representatives shall be selected, employed and directed by the DP, and the DP shall be compensated for such services as mutually agreed in writing between the Owner and the DP.

5.3 Any full-time DP Project Representatives or replacements shall be subject to prior approval by the Owner. The Owner reserves the absolute right to reject or require replacement of any DP Project Representatives.

5.4 The DP shall not engage, contract with or use the services of any DP Consultant ("Special DP Consultant"), other than DP Consultants included in the original DP team identified to Owner in DP’s response to Owner’s request for qualifications or otherwise initially identified to Owner, without obtaining the prior written approval of the Owner. The DP shall submit to the Owner for its approval a proposal of the scope of services to be provided by each Special DP Consultant, with the latter’s acknowledgment thereof. No provision of the DP Contract Documents and no approval by the Owner of the scope of services to be provided by the Special DP Consultants shall be construed as an agreement between the Owner and any Special DP Consultant or in any way affect the responsibilities of the DP hereunder. Unless otherwise agreed to in writing by the Owner, the fees of any Special DP Consultants retained by the DP shall be deemed covered by the DP Basic Compensation to be paid by the Owner to the DP.

SECTION 6. REIMBURSABLE EXPENSES

All services, travel, and supplies necessary or useful to the DP in carrying out the DP Contract Documents are included in the DP Basic Compensation and shall not be separately reimbursable unless specifically identified and approved by the Owner in writing in advance of being incurred.

SECTION 7. DESIGN PROFESSIONAL’S ACCOUNTING RECORDS

7.1 The DP’s records pertaining to its services on the Project shall be kept on a generally recognized accounting basis and shall be available to the Owner or his authorized representative upon request for five (5) years from the date of Final Payment to the CMAR.

7.2 The DP shall retain and require all DP Consultants to retain, for inspection and audit by the Owner or the State of Arizona all books, accounts, reports, files, and other records relating to the bidding and performance of the CMAR Construction Contract Documents for a period of five (5) years after its final completion. Upon request by the Owner, the original or a legible copy of the originals of all such records shall be produced by the DP at the address designated by the Owner. The cost of any copying requested by Owner or made necessary to DP by Owner’s request for production of originals shall be paid by Owner.

SECTION 8. INSURANCE AND INDEMNITY

8.1 Without limiting any liability or any other obligations of the Design Professional either:

(i) the DP shall obtain and maintain and the DP shall cause each DP Consultant to obtain and maintain the insurance coverages listed below and the DP shall comply and cause each DP Consultant to comply with the requirements of this Section 8; or
(ii) the DP shall obtain and maintain the insurance coverages listed below covering the DP and each DP Consultant and the DP shall comply with the requirements of this Section 8.

Coverage will be provided with forms and insurers authorized to do business in the State of Arizona in forms acceptable to the Owner until all of the Design Professional's obligations under the DP Contract Documents are satisfied. All insurers must be authorized to do business in the State of Arizona by the Arizona Department of Insurance and possess a current AM Best, Inc. rating of at least A - VII.

8.2 Worker's Compensation Insurance. Worker's compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of the Design Professional, its employees, or both, engaged in the performance of services under the DP Contract Documents. In addition, employer's liability insurance with the minimum limit of $500,000 for each accident, $500,000 disease for each employee, and $1,000,000 disease policy limit. Evidence of qualified self-insurance status satisfactory to and approved by Owner may suffice for this section.

8.3 General Liability Insurance. Commercial general liability insurance with minimum limits of $1,000,000 per occurrence, and minimum unimpaired Products and Completed Operations aggregate and General Aggregate minimum limits of $2,000,000. Coverage shall be at least as broad as the Insurance Service Office, Inc. Form CG00010196 issued on an Occurrence basis. The policy shall include coverage for Bodily Injury, Broad Form Property Damage (including completed operations); Personal Injury; Blanket Contractual Liability; Products and Completed Operations, which coverage shall extend for one year past acceptance, cancellation or termination of the services or work defined in the DP Contract Documents; and Fire Legal Liability. Said policy shall contain a severability of interest provision, and shall not contain a sunset provision or commutation clause, or any provision which would serve to eliminate third-party action over claims. In the event the General Liability insurance policy is written on a "claims made" basis, coverage shall extend for two (2) years past completion and acceptance of the work or services as evidenced by annual certificates of insurance delivered to the Owner.

8.4 Automobile Liability Insurance. Commercial/business automobile liability insurance with minimum limits of $1,000,000 combined single limit per occurrence, with respect to claims arising from the ownership, maintenance or use of any auto assigned to or used in the performance of the DP Contract Documents.

8.5 Professional Errors & Omissions Insurance. Professional liability or errors and omissions insurance with minimum limits of ($2) each occurrence, claim, wrongful act or loss and an unimpaired aggregate limit of ($2) with respect to the DP Contract Documents. The Retroactive Coverage Date (if the policy is written on a "claims made" form) shall be the same as the effective date of the DP Contract Documents. The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the scope of work of the DP Contract Documents. In the event that the professional liability or errors or omissions insurance is written on a "claims made" basis, coverage shall be maintained for two (2) years past completion and acceptance of the work or services as evidence by annual certificates of insurance delivered to the Owner.

8.6 Policy Requirement. The policies required by Sections 8.3 (General Liability) and 8.4 (Automobile Liability) shall be endorsed to include "the State of Arizona, the Arizona Board of Regents (ABOR), Arizona State University, their agents, regents, officers, and employees as additional insureds as to the acts or omissions of the Design Professional and its officers, employees, and agents" and shall stipulate that the insurance afforded the Design Professional shall be primary insurance and that any self-insurance or other insurance carried by the State of Arizona, the Arizona Board of Regents (ABOR), Arizona State University, their agents, officers, or employees, if any, shall be excess and not contributory to the insurance provided by the Design Professional.

8.7 Proof of Insurance. An original certificate of insurance evidencing the coverages required herein and acceptable to the Owner shall be filed with the Owner as evidence that policies providing the required coverages' conditions of limit are in full force and effect prior to the Design Professional performing any work on the Project. All of the above conditions shall be clearly shown on each certificate. Such certificates shall identify the DP Contract Documents or be an annual or periodic certificate stating that it covers any and all projects or work performed by the Design Professional during said period and shall contain provisions that coverage afforded under the policies will not be canceled, terminated, or materially altered until at least thirty (30) days prior written notice has been given to the Owner. The certificates for insurance for the coverages required by Sections 8.3 and 8.4 shall contain a waiver of subrogation as required in Section 8.10 and statement that the following are additional insureds under the policy to the
extent of the acts and omissions of the 
DP and its officers, employees and agents: the State of Arizona, the Arizona Board of Regents, Arizona State University and their officers, employees and agents. Certificates of insurance should be addressed as follows:

Purchasing and Business Services
Construction/Facilities Team
Arizona State University
Facilities Mgt Bldg, 2nd Floor Room A224
651 East University Drive - PO Box 874005
Tempe, Arizona 85287-4005

Owner reserves the right to request and to receive, within ten (10) working days, certified copies of any or all of the policies and/or endorsements required in the DP Contract Documents. Owner shall not be obligated to review same or to advise DP of any deficiencies in such policies and endorsements, and such receipt shall not relieve DP from, or be deemed waiver of, Owner’s right to insist on strict fulfillment of DP’s obligations under the DP Contract Documents.

8.8 Failure to Provide or Maintain Insurance. Failure on the part of the Design Professional to procure or maintain the required insurance shall constitute a material breach of the Contract Documents upon which the Owner may immediately terminate the DP Contract Documents, or at its discretion procure new or renew such insurance and pay all premiums in connection therewith, and all monies so paid by the Owner shall be repaid by the Design Professional to the Owner upon demand, or the Owner may offset the cost of such premiums together with interest at the appropriate rate against any money due the Design Professional from the Owner. Costs for coverages maintained by the Design Professional in excess of those required shall not be charged to the Owner without prior written approval of the Owner.

8.9 Authorization to Obtain Information. The Owner may, and the Design Professional hereby authorizes the Owner to, request and receive directly from insurance companies utilized by the Design Professional in meeting the insurance requirements any and all information reasonably considered necessary in the sole discretion of the Owner.

8.10 Waiver. Insurers providing required insurance coverages hereby waive all rights of subrogation and all other rights to recover against the State of Arizona, the Arizona Board of Regents, Arizona State University and their agents. regents. officers and employees. Each required insurance policy and each certificate of insurance shall contain a waiver of subrogation by each insurer providing required insurance coverages. This Section 8.10 does not apply to the insurer providing professional liability or errors and omission insurance.

8.11 Claim Reporting. Any failure to comply with the claim reporting provisions of the policies or any breach of a policy warranty shall not affect coverage afforded under the policy to protect the Owner.

8.12 Self-insurance. The policies specified herein may provide coverage, which contain deductibles or self-insured retention. Such deductibles and/or self-insured retentions shall not be applicable with respect to the coverage provided to Owner under such policies. The DP shall be solely responsible for deductible and/or self-insured retention, and Owner, at its option, may required the DP to secure the payment of such deductible or self-insured retention by a surety bond or an irrevocable and unconditional letter of credit.

8.13 General Indemnity by Design Professional. The Design Professional shall indemnify, defend and hold harmless the Owner, the State of Arizona, the Arizona Board of Regents, Arizona State University and their officers, regents, directors, employees and agents from and against any and all claims, lawsuits, liabilities, losses, damages, costs and expenses (including, without limitation, attorney’s fees and litigation costs and expenses) to the extent arising from any negligent acts or omissions (including, without limitation, willful misconduct) of the DP, the DP Consultants and their respective officers, employees, agents, subcontractors or independent contractors in the course of the Project. This indemnity does not cover errors or omissions in any of the documents prepared by the DP for the Owner. Those errors and omissions are covered by Section 4 herein. This indemnity shall not be construed to include claims, lawsuits, liabilities, losses, damages, costs and expenses to the extent arising or alleged to have arisen from the negligent acts or omissions (including, without limitation, willful misconduct) of Owner, the State of Arizona, the Arizona Board of Regents, Arizona State University or any of their officers, regents, directors, employees and agents.

Please see Section 4.1 of the Operating Manual for definitions of Environmental Law, OSHA, Hazardous Substance, Hazardous Waste and CMAR Release. The indemnity in this Section 8.13 shall include, without limitation, any claims,
lawsuits, liabilities, losses, damages, costs and expenses (including, without limitation, attorney’s fees and litigation costs and expenses) to the extent arising from: (i) any violation of Environmental Law or OSHA by DP or any DP Consultant relating to the Project; (ii) any claim by any officer, employee, agent, independent contractor or authorized representative of DP or any DP Consultant of personal injury, death or property damage arising from any failure by DP or any DP Consultant to comply with Environmental Law or OSHA or from any failure by DP or any DP Consultant to comply with Section 4.3 of the Operating Manual; or (iii) any release of any Hazardous Substance on Owner’s property to the extent caused by DP or any DP Consultant.

8.14 Intellectual Property Indemnity by Design Professional. The Design Professional shall indemnify, defend and hold harmless the Owner, the State of Arizona, the Arizona Board of Regents, Arizona State University and their officers, regents, directors, employees and agents from and against any and all claims, lawsuits, losses, damages, costs and expenses (including, without limitation, attorney’s fees and litigation costs and expenses) to the extent arising from any claim that the documents or any part of the documents prepared by the DP or any DP Consultant for the Owner or that the Project or any part of the Project constructed in accordance with the documents prepared by the DP or any DP Consultant for the Owner infringe on any proprietary rights or United States patent or copyright now or hereafter issued or existing.

SECTION 9. OWNERSHIP OF DOCUMENTS

9.1 The plans, drawings, specifications, notes, reports, renderings, final models, design concepts and images, and all other documents and items to be prepared and furnished by the DP or any DP Consultant pursuant to the DP Contract Documents shall be the property of the Owner, including, without limitation, the right to use same or any part of them on Owner’s other projects without additional cost to the Owner. The DP shall maintain file copies of those documents, drawings and/or other products required by law or the standards of professional practice.

9.2 In the case of future reuse of the Construction Documents by the Owner, the DP’s name and seal shall be removed, and the DP shall not be liable to the Owner or third parties in their reuse. The Owner agrees to add the DP as an additional insured under the Owner’s self-insurance program for this sole purpose.

9.3 By execution of the DP Contract Documents, the DP assigns all copyright ownership and other intellectual property interest in the Schematic Design Documents, the Design Development Documents, the Construction Documents and all other documents prepared by the DP or any DP Consultant for the Owner under the DP Contract Documents and in the completed Project to the Owner and further agrees to execute, and to cause any DP Consultant to execute, any separate assignment agreement necessary to implement such assignment.

9.4 Owner grants to DP grants to Owner a royalty-free, non-exclusive, unlimited and worldwide license to use standards, conventions, and details of the design in the Construction Documents, provided that use of the standards, conventions, and details in any other single project shall not in the aggregate result in the use of the entire design in the Construction Documents or a major part of the design in the Construction Documents.

SECTION 10. NO ASSIGNMENTS

The DP shall not assign, sublet or delegate his obligations under the DP Contract Documents without the prior written consent of the Owner.

SECTION 11. DISPUTES AND REMEDIES

11.1 Except as otherwise provided in Section 11.3, the DP hereby agrees that all disputes and disagreements and claims and controversies relating to the Project involving Owner or DP and all claims made by the Owner against the DP and by the DP against the Owner in respect of the DP Contract Documents, including, without limitation, controversies based on breach of contract, mistake, misrepresentation, contract modification or rescission or any other claim which arises under or by virtue of the DP Contract Documents shall be resolved in the following manner. Initially, appropriate representatives of the Owner and the DP shall meet and attempt to resolve the matter. If either party believes that the matter will not be able to be resolved by the Owner and DP representatives, the party may request an attempt to resolve the matter through any partnering procedures to which DP, Owner and CMAR have agreed for the
12.1 Documents. Upon written notice of suspension or termination the Owner may suspend or terminate the Project, and in the event that the Project is suspended for more than one calendar year through no fault of the Owner, the Owner shall continue to make payments to the DP in accordance with the DP Contract Documents to the extent the payments are not the subject of the dispute, disagreement, claim or controversy.

11.2 Unless otherwise agreed in writing, the DP shall carry on the services under the DP Contract Documents and maintain its progress during resolution of any disputes or disagreements and during any claims and controversy proceedings, and the Owner shall continue to make payments to the DP in accordance with the DP Contract Documents to the extent the payments are not the subject of the dispute, disagreement, claim or controversy.

11.3 Any dispute, disagreement, claim or controversy involving the DP or any of DP Consultant and also involving the CMAR or any Subcontractor of the CMAR shall be handled as provided for such matters in the CMAR Design Phase Contract Documents or the CMAR Construction Contract Documents, as applicable, even if the matter involves the Design Professional or any DP Consultant. As to such matters the DP agrees to be subject to the procedures in the CMAR Design Phase Contract Documents or the CMAR Construction Contract Documents, as applicable.

11.4 DP and Owner agree that all other parties involved in any claim, controversy, dispute or disagreement relating to the Project may be made parties to any process, proceeding or litigation, and to this end, both DP and Owner will include appropriate provisions in all contracts they execute with other parties in connection with this Project, and DP will require all DP Consultants to include appropriate provisions in all contracts they execute with other parties in connection with this Project, requiring attendance and participation in any such process, proceeding or litigation. DP and Owner expressly agree that any dispute resolution proceeding initiated pursuant to the DP Contract Documents may be joined or consolidated with any dispute resolution proceeding involving any other person or entity (i) necessary to resolve the claim, dispute or controversy, or (ii) substantially involved in or affected by such claim, dispute or controversy. Both DP and Owner will include appropriate provisions in all contracts they execute with other parties in connection with the Project, and DP will require all DP Consultants to include appropriate provisions in all contracts they execute with other parties in connection with the Project, to require such joinder or consolidation.

11.5 Any dispute, disagreement or ambiguity concerning the duties or obligations of the DP as described in the DP Contract Documents and the duties or obligations of any other person or legal entity providing services or materials or construction on this Project shall be resolved as provided in this Section 11.

SECTION 12. TERMINATION OR SUSPENSION

12.1 The Owner may suspend or terminate the Project at any time for the convenience of the Owner. If Owner terminates the Project, Owner will have the right to suspend or terminate this Agreement and the other DP Contract Documents. Upon written notice of suspension or termination the DP shall immediately cease all work and not incur any further costs or expenses except as expressly permitted by the Owner in writing. If the Project is suspended for more than one calendar year through no fault of the DP, the DP shall be paid for work actually performed and the DP Contract Documents shall terminate. Otherwise, the DP shall recommence work upon written notice from the Owner and the DP Contract Documents shall remain in full force and effect.

12.2 Owner may terminate this Agreement and the other DP Contract Documents without penalty or further obligation pursuant to Arizona Revised Statutes Section 38-511 if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of the Owner is or becomes, at any time while the DP Contract Documents or any extension of the DP Contract Documents is in effect, a consultant to the DP with respect to the subject matter of the DP Contract Documents or an employee of DP.

12.3 If funds are not appropriated by the Legislature of the State of Arizona to pay for the Project or if appropriated funds become unavailable, the Owner may delay design and/or construction for a period up to six months, after which date if no appropriated funds are made available by the Legislature, this Agreement and the other DP Contract Documents shall terminate at the option of the Owner.
12.4 The Owner may, by written notice to the DP, terminate this Agreement and the other DP Contract Documents if it is found by the Owner that improper gratuities, in the form of entertainment, gifts or otherwise, were offered or given by the DP or any agent or representative of the DP to any officer or employee of the Owner or State of Arizona.

12.5 In the event of termination which is not the fault of the DP, the Owner shall pay to the DP only the compensation properly due for services properly performed and accepted by the Owner on the Project prior to the termination date and any reimbursable expenses incurred as provided hereunder. Any post-termination wrap-up costs must be approved by the Owner in writing in advance of their accrual or expenditure or DP specifically waives all rights to claim such costs.

12.6 This Agreement and the other DP Contract Documents may be terminated by either party for default upon the defaulting party’s failure to cure a material breach within seven (7) days after written notice by the non-defaulting party specifying the nature of the default.

12.7 Each payment obligation of the Owner created hereby is conditioned upon the availability of funds which are appropriated or allocated for the payment of such an obligation. If funds are not allocated and available for the continuance of the DP's services, the DP Contract Documents may be terminated by the Owner at the end of the period for which funds are available. The Owner shall notify the DP at the earliest possible time if the DP's services will or may be affected by a shortage of funds. No penalty shall accrue to the Owner in the event this provision is exercised, and the Owner shall not be obligated or liable for any further payments or for any damages, including lost profit, as a result of termination under this Section 12.7.

12.8 As of the termination date, all Drawings, Specifications, and other design, bidding or contract administration documents shall be surrendered forthwith by the DP to the Owner.

SECTION 13. COMPENSATION FOR THE DESIGN PROFESSIONAL’S SERVICES

13.1 Payment of DP Basic Compensation Services and of any Reimbursable Expenses

13.1.1 Payments for DP Reimbursable Expenses to the extent covered under Section 6 and DP Basic Compensation shall be made monthly, within thirty (30) days after the Owner receives the DP's properly itemized statement for Basic Services and any authorized Reimbursable Expenses in such form and accompanied by such supporting documentation as Owner may direct. If the Owner determines that any amounts requested by the DP are not due or are not sufficiently documented, the Owner will furnish the DP with notice of the reasons for withholding payment along with the Owner's payment on account of the balance of the statement.

13.1.2 (3)

13.1.3 (4)

13.1.4 When any portions of the Project are deleted or otherwise not constructed, compensation for such portions of the Project shall be payable to the extent services are performed on such portions, in accordance with the schedule set forth in Section 13.1.3 based on (i) the lowest bona fide bid or negotiated proposal, or (ii) if no such bid or proposal is received, the most recent Owner approved DP Estimate of Probable Construction Costs for such portions of the Project.

13.1.5 Additive and deductive alternates that are not awarded, which involve changes in design (as opposed to substitutions or additions which, in the judgment of the Owner, do not involve design changes), will be paid for as a component of DP Basic Compensation during the Construction Phase. Notwithstanding the foregoing, unless otherwise agreed to in writing by the Owner, the DP shall not be entitled to any additional compensation or reimbursement in connection with the Project for any alternates developed because the GMP proposed by the CMAR or, if Owner elects to proceed on a design-bid-build method, all responsible and responsive bids exceed the amount within the current Owner's Project Budget available for payment of costs of Construction Work.

13.1.6 If and to the extent that the time initially established for the Construction Phase of the Project is exceeded or extended through no fault of the DP as determined by the Owner, DP Basic Compensation for DP Basic
13.1.7 DP shall pay to each DP Consultant within thirty (30) days of receipt of DP’s monthly payment from Owner, that amount properly due and payable to said DP Consultant for services performed within the payment period. DP shall, by an appropriate agreement with each DP Consultant, require each DP Consultant to make payments to its sub-consultants in a similar manner. Upon request of the Owner, DP shall furnish documentary evidence of compliance with these payment provisions.

13.2 Payment for DP Additional Services

13.2.1 Payments for DP Additional Services shall be made monthly, within thirty (30) days after the Owner receives the DP’s properly itemized statement for DP Additional Services in such form and accompanied by such supporting documentation as Owner may direct. If the Owner determines that any amounts requested by the DP are not due or are not sufficiently documented, the Owner will furnish the DP with notice of the reasons for withholding payment along with the Owner’s payment on account of the balance of the statement.

13.2.2  
13.2.3  

SECTION 14. PROJECT SPECIFIC PROVISIONS

SECTION 15. MISCELLANEOUS

15.1 No deductions shall be made from the DP’s compensation on account of liquidated damages or other amounts withheld from payments to the CMAR.

15.2 Payments that have not been made to the DP within thirty (30) days of the due date shall thereafter bear interest at the contract rate prevailing in the State of Arizona, as established at Arizona Revised Statutes Section. § 44-1201, as amended or superseded.

15.3 A listing of the key employees assigned directly to this Project on a day-to-day basis as well as alternates (replacements) has been furnished to and approved by the Owner prior to award of the services contract to DP. Any substitutions of assigned personnel shall have prior, written approval by the Owner and shall be proposed from the list of acceptable alternates. No changes of personnel will be allowed so long as approved personnel remain employees of the DP and capable of performing the required services.

15.4 The DP shall make a good-faith effort to assure that not less than 15% of the services performed under the DP Contract Documents are performed by a small business as defined in Arizona Revised Statutes Section 41-1001(19). The DP shall report to the Owner the value of the services performed under this provision during each phase of the project. Documentation evidencing DP’s compliance with this provision shall be furnished in a format acceptable to Owner as a condition precedent to payment for services rendered on subsequent phases of the project or for final payment, as applicable.

15.5 Neither DP nor Owner may without the written consent of the other, assign, transfer, or sublet any portion or part of the DP’s services under the DP Contract Documents or the obligations required by either DP or Owner under the DP Contract Documents.

15.6 The provisions of the DP Contract Documents shall be binding upon the parties, their employees, agents, heirs, successors and assigns.

15.7 Interpretation of the DP Contract Documents and any and all claims, controversies, disagreements and disputes. 

Arizona State University
Rev. 06/23/2006
arising under or in connection with the Project, the DP services, the DP Contract Documents shall be governed by the law of the State of Arizona, without giving effect to conflicts of law principles. No suit or action shall be commenced by any claimant other than in the Arizona Superior Court in Maricopa County, Arizona, and only after all contractual and administrative claims, controversies, dispute and disagreement resolution procedures have been fulfilled. By submitting a proposal or its qualifications and also by executing the DP Contract Documents, DP agrees to be bound by Section 3-809(C) of the Arizona Board of Regents Policy containing procedures claims controversies, disagreements and disputes and waives any objections to those procedures.

15.8 If any provision or any part of a provision of the DP Contract Documents shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to applicable laws by any authority having jurisdiction, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the DP Construction Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

15.9 The failure of either DP or Owner to insist, in any one or more instances, on the performance or timely performance of any of the obligations required by the DP Contract Documents, shall not be construed as a waiver or relinquishment of such obligation or right with respect to any other performance or obligation.

15.10 The headings used in the DP Contract Documents are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

15.11 Whenever the DP Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given (i) if delivered or sent by registered or certified mail, postage prepaid to the address indicated at the end of this Agreement, three (3) days after mailing; or (iii) if transmitted by facsimile, at the time stated in a machine generated confirmation that notice was received at the number of the intended recipient.

15.12 If funding for this Project is dependent on the sale of revenue bonds or other debt instruments and if bonds or other instruments are not sold or proceeds are not available for this Project, the Owner may terminate the DP Contract Documents. If such a termination occurs, the Owner shall reimburse DP for services rendered and non-cancelable commitments made prior to the termination on the same basis as if Owner had terminated for convenience under Section 12.1.

15.13 In connection with the performance of DP services under the DP Contract Documents, the DP agrees to observe Arizona Executive Order 99-4 and all applicable Arizona and Federal Laws (including, without limitation, the Americans With Disabilities Act). DP further agrees not to discriminate against any employee or applicant for employment because of race, color, religion, sex, age, national origin or handicap, except to the extent such discrimination is not prohibited by pertinent State or Federal law or Executive order. In addition, the DP agrees to actively recruit in accordance with any affirmative action programs applicable to the DP. The aforesaid provisions shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. DP shall post in conspicuous places, available for employees and applicants for employment, notices to be provided by the Owner, setting forth the provisions of this nondiscrimination clause and shall insert this provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

15.14 Any failure of the Owner to make a decision within the time limit set forth shall not be construed as acquiescence in all or any part of any DP claim for relief.

15.15 The DP shall comply with the Owner's current policy regarding sexual harassment. The Owner prohibits sexual harassment by any person on Owner's premises or at any Owner-affiliated functions.

15.16 The DP Contract Documents represent the complete and integrated agreement between the Owner and the DP and supersede all prior negotiations, representations or agreements, either written or oral. The DP Contract Documents may be amended only by written instrument signed by both the Owner and the DP.

15.17 To the extent required by Section 35-214, Arizona Revised Statutes, DP agrees to retain all records relating to the DP Contract Documents. DP agrees to make those records available at all reasonable times for inspection and audit by Owner or the Auditor General of the State of Arizona during the term of the DP Contract.
Documents and for a period of five (5) years after the completion of the DP Contract Documents. The records shall be provided at Arizona State University, Tempe, Arizona, or another location designated by Owner upon reasonable notice to DP.

15.18 Each party acknowledges that it has had an opportunity to review the DP Contract Documents with counsel and this document shall not be construed against any party that is determined to have been the drafter of the document.

15.19 None of the DP Contract Documents, the CMAR Design Phase Services Contract Documents and the CMAR Construction Contract Documents shall be construed or interpreted to create any contractual relationship between the CMAR or any Subcontractor, on the one hand, and the DP or any DP Consultant, on the other hand.

15.20 Nothing in the DP Contract Documents shall be construed or interpreted to give any third party any claim or right of action against the Owner, the DP or CMAR which does not otherwise exist without regard to the DP Contract Documents.

**DESIGN PROFESSIONAL:**

**OWNER:**

ARIZONA BOARD OF REGENTS
for on behalf of
ARIZONA STATE UNIVERSITY

By: ________________________________
Name: ________________________________ (Printed)
Title: ________________________________
Date: ________________________________

Address for notices to DP:

______________________________
______________________________
______________________________

FAX: ________________________________

With a required copy to:

Paul J. Ward, Esq.
General Counsel
Office of General Counsel
P.O. Box 872003
Tempe, AZ 85287-2003

FAX: (480) 965-0984

APPLIES TO EACH PROJECT

EXHIBIT A

Operating Manual for Construction Manager at Risk Projects
THIS EXHIBIT B APPLIES TO FOLLOWING PROJECT ONLY:
PROJECT NUMBER: __________________
PROJECT NAME: __________________

EXHIBIT B

Required DP Consultant Field Administration and Observation Under Section 3.4.5 of the Operating Manual

Note: to be determined with the firm ranked number one during fee negotiations and or added to the agreement with a change order.