

**TOWN OF
APPLE VALLEY, CALIFORNIA**

AGENDA MATTER

Subject Item:

APPROVAL OF A PROFESSIONAL SERVICES AGREEMENT BETWEEN THE TOWN OF APPLE VALLEY AND POPULOUS, INC., FOR ARCHITECTURAL SERVICES RELATING TO A PROPOSED MINOR LEAGUE BASEBALL STADIUM

Summary Statement:

In February of this year, Mayor Pro-Tem Scott Nassif was approached by representatives and supporters of Brett Sports & Entertainment to determine whether or not the Town of Apple Valley had an interest in securing a California League (Single "A") baseball team, and building a baseball stadium for that purpose within the Town's corporate boundaries. Brett Sports & Entertainment ("Brett") is the owner of the High Desert Mavericks, the California League Single "A" franchise that has operated continuously in the City of Adelanto since 1990. After receiving a formal letter of interest from Brett, Town Manager Robinson reported to the Town Council the results of a meeting held with Brett representatives, Mayor Pro-Tem Nassif and Assistant Town Manager Henderson. As a result of this report, Mr. Robinson received approval from the Town Council to form a Baseball Stadium Task Force to study the feasibility of developing a minor league baseball stadium that would meet the standards and specifications of the National Association of Minor League Baseball and the California League.

The members of this task force were comprised of Populous, Inc., an architectural services company with the most extensive experience of any such firm in the country in designing minor league baseball stadiums and related facilities, Mayor Pro-Tem Nassif, Town Manager Robinson, Assistant Town Manager Pattison and Assistant Town Manager Henderson. During the feasibility analysis portion of this project, the task force received extensive reports from Populous, Inc., regarding minor league baseball stadiums recently constructed throughout the country, the costs related to such facilities, design parameters, methods of financing and, in some cases, related stadium development and lease agreements.

Recommended Action:

That the Town Council and Redevelopment Agency Board of Directors approve and adopt a Professional Services Agreement between the Town and Populous, Inc., for architectural services relating to stadium design in the amount of \$1.9 million; and, authorize the Mayor/Chairman to execute said agreement.

Proposed by: Assistant Town Manager, Econ. & Comm. Dev Item Number _____

T. M. Approval: _____ Budgeted Item Yes No N/A

Summary Statement

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Based upon the review and analysis of this information, three key items of interest became clear to the task force: (i) the cost of construction of minor league baseball stadiums had risen between 500% and 600% since the construction of Mavericks' stadium in 1989; (ii) in order for the Town to be able to take advantage of this opportunity, and to keep the ultimate lease payments and agreement provisions acceptable to Brett, the land for the stadium and related improvements would have to be donated free of charge to the Town; and, (iii) before the Town could engage Brett in serious negotiations, it would have to secure site control in order to assure Brett that, if agreement was reached, the Town could deliver on its legal obligations.

During the course of task force deliberations, various, potential stadium locations were analyzed by staff. Some of these potential locations were immediately discarded for one reason or another and some required further due diligence analysis. After this process was complete, the potential sites were rated by staff. Other than the sites' ability to accommodate a development of the type being considered, the key rating factor in establishing a preferred site alternative was the willingness and ability of the property owners to consider land donations to the Town for this purpose. Two land owners, owning property immediately adjacent to one another were able to meet this key requirement, HDC Group, LLC (represented by Tom Hrubik), and Bear Valley & Apple Valley 103, LLC (represented by Robert ("Bob") Shaw), respectively. After negotiations, it was determined that HDC Group, LLC, would donate 30-acres to the Town and Bear Valley & Apple Valley 103, LLC would donate 11.6-acres, for a total of 41.6-acres for the Apple Valley baseball stadium project.

The specific deal points related to the above referenced land donations are contained in the attached Site Dedication and Development Agreements, but it is important to summarize for the Council, and the general public, the key elements of the attached agreements. The Site Dedication and Development Agreements provide that the Town, at its sole cost, will (i) develop and approve a Specific Plan and Environmental Impact Report (EIR); install full-width road improvements on Geronimo Road, from Apple Valley Road to Deep Creek Road, including a traffic signal at the intersection of Apple Valley and Geronimo Roads; (ii) install full-width road improvements on Locust Road, from Geronimo Road to Bear Valley Road, including drainage systems and a traffic signal at Locust and Bear Valley Roads; and (iii) install road improvements on Bear Valley Road, from Locust Road to Cottontail Road (stadium property fronting Bear Valley Road).

In addition to the above items, the proposed 209-acre Specific Plan will contain land uses related to the baseball stadium and three additional athletic fields, commercial development and high quality, for-sale only, multifamily town homes and condominiums. The Specific Plan will further provide for the relocation of "The Mansion" project from its former, proposed location in the Deep Creek area, which was denied by court action, to an area generally located at the northwest corner of Bear Valley Road and the logical extension of Deep Creek Road, north of Bear Valley Road. Because the anticipated opening date of the stadium is April 2011, and because the stadium takes at least one-year to construct, the only way for the Town Council to accomplish its goal with respect to this project is embark upon the development of a Specific Plan in order to provide for the land uses and activities described above. In this regard, staff is recommending the approval of a professional services agreement between the Town and Terra Nova Partners for the development of the Specific Plan and Environmental Impact Report. The

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company Terra Nova Partners is familiar to those members of the community who have followed the development and approval of the North Apple Valley Specific Plan and the Town's first comprehensive General Plan Update since 1991, which occurred at the Town Council's last meeting. Terra Nova's intimate knowledge of the Town enables it to use much of the data it developed while preparing the General Plan for the proposed Specific Plan development process, saving the Town money and time in carrying out this signature project.

While the Specific Plan development process is taking place, Populous, Inc., the proposed architect of record will be taking all necessary steps to design a baseball stadium facility that meets the standards and specifications of the National Association of Minor League Baseball and the California League. As noted earlier, Populous has extensive, direct, on-point experience in developing baseball stadium facilities of the type contemplated by the Apple Valley stadium development program. The proposed agreement between Populous, Inc., and the Town outlines the full scope of architectural services required by this project, including design development, cost estimating, project management, bid preparation and issuance and related services.

In the current economic climate, it is important to address how the Town would pay for the improvements it would commit itself to in the event the Council approves the actions recommended by staff. First, it is important to state up front that no Town General Fund revenues would be used to finance the Town obligations associated with this project. As the Council is aware, the General Fund is the life blood of any municipality in the state of California. As such, any transaction that would require a General Fund contribution from the Town would not be recommended by staff. In that regard, staff is pleased to note for the record that the Town obligations will be met by the issuance of lease revenue bonds (or similar financial facility), whereby the lease payments made by the High Desert Mavericks would pay for, and extinguish, the bond indebtedness associated with the successful sale of the lease revenue bonds and the cost of stadium construction. Further, the Town's redevelopment, traffic impact fee, sewer and drainage funds will pay for the public infrastructure improvements the Town will be installing. As the Assistant Town Manager for Finance & Administration has previously reported, monies in these funds are sufficient for the Town to meet its obligations in connection with the proposed baseball stadium project.

It is noted that the four proposed agreements are a package deal; that is to say this project cannot proceed as envisioned if the Council adopts one or two, but not all, of the proposed agreements. **It is also important to point out that the recommended motions are actions of both the Town and the Redevelopment Agency.** If the Council is desirous of proceeding as recommended, all four agreements must be approved and adopted. To assist the Council in this regard, staff is recommending that the Council receive one oral staff report on the four related items, but take separate actions on each of the proposed agreements. In this way, the public record will reflect four separate actions taken by the Council and Redevelopment Agency regardless of the actions taken. Based upon the foregoing, staff recommends adoption of the form motion.

August 18, 2009

Mr. Frank W. Robinson
Town Manager
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307

RE: Apple Valley Minor League Ballpark

Dear Mr. Robinson:

We have reviewed the comments to the proposed agreement provided by Best Best & Kreiger and have provided a revised contract for which we are prepared to sign, should our proposed comments be acceptable to the city.

Unfortunately, Mr. Joseph Spear, Populous Senior Principal and California Architectural licensee is unavailable to sign the agreement at this time. We will forward originals of the agreement, with Mr. Spear's signature, upon his return to the office this week.

We greatly appreciate the opportunity to work with the Town of Apple Valley in making this project a reality.

Respectfully submitted,



Martin DiNitto
Associate Principal
Populous

cc: Joseph Spear Populous
 Zachary Rudman Populous
 file

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POPULOUS.COM

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AGREEMENT
BETWEEN THE
THE TOWN OF APPLE VALLEY, CALIFORNIA (OWNER)
AND
POPULOUS (ARCHITECT)
FOR
ARCHITECTURAL AND ENGINEERING SERVICES

Based in part on AIA Copyright Document B141, 1987 Edition

AGREEMENT

AGREEMENT

made as of the Twentieth day of August in the year of Two Thousand and Seven.

Between the Owner:

The Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, California 92307

and the Architect:

Populous
300 Wyandotte, Suite 200
Kansas City, MO 64105

For the Following Project:

A new Class A minor league baseball stadium.

The Owner and the Architect agree as set forth below.

TERMS AND CONDITIONS OF AGREEMENT BETWEEN OWNER AND ARCHITECT

ARTICLE 1 ARCHITECT'S RESPONSIBILITIES

1.1 ARCHITECT'S SERVICES

1.1.1 The Architect's services consist of those services performed by the Architect, Architect's employees and Architect's consultants as enumerated in Articles 2 and 3 of this Agreement and any other services included in Article 12 or in the Exhibits if applicable.

1.1.2 The Architect's services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Work. Upon request of the Owner, the Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services which may be adjusted as the Project proceeds, and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project. Time limits established by this schedule once approved by the Owner shall not, except for reasonable cause, be exceeded by the Architect or Owner.

1.1.3 The services covered by this Agreement are subject to the time limitations contained in Subparagraph 11.5.1.

1.1.4 In providing the Architect's services, Architect will review applicable laws, statutes, ordinances, codes and other regulations affecting the Project, including without limitation, accessibility requirements and seismic requirements (collectively, "Laws"). The Architect shall use the best of Architect's ability to prepare all design documents in compliance with such Laws.

1.1.5 Architect shall coordinate its services with those services provided by the Owner and the Owner's consultants. The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information.

ARTICLE 2

SCOPE OF ARCHITECT'S BASIC SERVICES

2.1 DEFINITION

2.1.1 The Architect's Basic Services consist of those described in Paragraphs 2.2 through 2.6, and any other services identified in Article 12 as part of Basic Services, and include normal structural, mechanical and electrical engineering services, interior design and finishes selections, playing field design services, sound system design services, and food service design services. No services will be provided with regard to the detection, removal, disposal or storage of asbestos and or other hazardous materials.

2.2 SCHEMATIC DESIGN PHASE

2.2.1 The Architect shall meet with the Owner and the Tenant Team (Hardball Capital, LLC) to review the requirements of the Project and shall arrive at a mutual understanding of such requirements with the Owner.

2.2.2 The Architect shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other, subject to the limitations set forth in Subparagraph 5.2.1.

2.2.3 The Architect shall review with the Owner alternative approaches to design and construction of the Project.

2.2.4 Based on the mutually agreed-upon program, schedule and construction budget requirements, the Architect shall prepare, for approval by the Owner, Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of Project components.

2.2.5 The Architect shall assist the Owner in reviewing preliminary estimates of Construction Cost based on current area, volume or other unit costs.

2.3 DESIGN DEVELOPMENT PHASE

2.3.1 Based on the approved Schematic Design Documents and any adjustments authorized by the Owner in the program, schedule or construction budget, the Architect shall prepare, for approval by the Owner, Design Development Documents consisting of drawings and other documents to fix and describe the size and character of the Project as to architectural, structural, mechanical and electrical systems, material and such other elements as may be appropriate.

2.3.2 The Architect shall assist the Owner in reviewing updates to the estimates of Construction Cost, as prepared by others, based on current documents defining the scope and design of the project.

2.4 CONSTRUCTION DOCUMENTS PHASE

2.4.1 Based on the approved Design Development Documents and any further adjustments in the scope or quality of the Project or in the construction budget authorized by the Owner, the Architect shall prepare, for approval by the Owner, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project.

2.4.2 The Architect shall assist the Owner in the preparation of the necessary bidding information, bidding forms, the Conditions of the Contract, and the form of Agreement between the Owner and Contractor.

2.4.3 The Architect shall assist the Owner in reviewing updates to the estimates of Construction Cost, as prepared by others, based on current documents defining the scope and design of the project.

2.4.4 The Architect shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the project.

2.5 BIDDING OR NEGOTIATING PHASE

2.5.1 The Architect, following the Owner's approval of the Construction Documents and of the latest preliminary estimate of Construction Cost, shall assist the Owner in obtaining bids or negotiated proposals and assist in awarding and preparing contracts for construction.

2.5.2 The Architect's responsibilities during the bidding or negotiating phase shall be limited to: providing original documents to the Owner or Construction Manager for the purposes of copying and distributing; attending pre-bid meetings; answering bidder's questions; reviewing requests for substitution; and preparing documents for addendums issued by the Construction Manager; and providing a review of the successful bid. The Architect's responsibilities during the bidding and negotiating phase shall not include: preparing the bid advertisement or instructions to bidders and the front-end of the specifications; providing copies of the bid documents for distribution to bidders; maintaining a log of bidders; certification of the successful bid; or the preparation or administration of contracts for construction.

2.6 CONSTRUCTION PHASE - CONSTRUCTION OBSERVATION SERVICES

2.6.1 The Architect's responsibilities during Construction, shall be limited to providing Construction Observation Services, and shall not include preparing or administering the advertisement for bidders, except as otherwise provided in Paragraph 2.5.2, for the Construction Phase under this Agreement which commences with the award of the Contract for Construction and terminates at the earlier of the issuance to the Owner of the final Certificate for Payment or sixty (60) days after the date of Substantial Completion of the Work.

2.6.2 The Architect shall assist the Owner and the Construction Manager in the administration of the Contract for Construction, on an as-needed basis, as set forth below and pursuant to the terms of the General Conditions of the Contract for Construction for the project, which shall be subject to the Architect's review and comment and shall be mutually agreed upon by the Architect and the Owner prior to bidding of the Contract for Construction.

2.6.3 The duties, responsibilities and limitations of authority of the Architect shall not be restricted, modified or extended without written agreement of the Owner and Architect with consent of the Contractor, which consent shall not be unreasonably withheld.

2.6.4 The Architect shall be a representative of and shall advise and consult with the Owner: (1) during construction in accordance with Article 2.6.1 and, (2) as an Additional Service at the Owner's direction from time to time during the correction period described in the Contract for Construction. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement unless otherwise modified by written instrument.

2.6.5 The Architect shall visit the site at intervals appropriate to the stage of construction, or at least once a month during construction, or as otherwise agreed by the Owner and Architect in writing to become generally familiar with the progress and quality of the Work completed and to determine in general if the Work is being performed in a manner indicating that the Work when completed will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site observations or inspections to check the quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the Work. (More extensive site representation may be agreed to as an Additional Service, as described in Paragraph 3.2.)

2.6.6 The Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility under the Contract for Construction. The Architect shall not be responsible for the Contractor's schedules or failure to carry out the Work in accordance with the Contract Documents. The Architect shall not have control over or charge

of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

2.6.7 The Architect shall at all times have access to the Work wherever it is in preparation or progress.

2.6.8 Communications by and with the Architect's consultants shall be through the Architect. Copies of all significant communications between Owner and Contractor shall be provided to the Architect in a timely manner.

2.6.9 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect shall review and certify the amounts due the Contractor.

2.6.10 The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's observations at the site as provided in Subparagraph 2.6.5 and on the data comprising the Contractor's Application for Payment, that to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed in writing by the Architect. The issuance of a Certificate for Payment shall further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment shall not be a representation that the Architect has: (1) made exhaustive or continuous on-site observations or inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences or procedures; (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner, for the purpose of affirming whether the Owner received such material or other data; or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

2.6.11 The Architect shall have authority to reject Work which does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect will have authority, with Owner's prior written consent, to require additional inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons performing portions of the Work.

2.6.12 The Architect shall review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design intent expressed in the Contract Documents. The Architect's actions shall be taken with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. The review of Shop Drawings shall be limited to three submissions under the scope of Basic Services and will be conducted only after the General Contractor has coordinated said documents to indicate field conditions, proposed General Contractor's deviations from the Contract Documents, and other requirements which affect design intent; all submissions shall indicate that the required coordination has been performed. The Architect will be compensated by the Owner as Additional Services for review of Shop Drawings submitted by the General Contractor more than three times. Review of submittals is not conducted for the purpose of determining the accuracy and completeness of details such as dimensions and quantities or for substantiating instructions for installation or performance of equipment or systems designed by the Contractor, all of which remain the responsibility of the Contractor to the extent required by the Contract Documents, all of which the Architect shall be entitled to rely upon. The Architect's review shall not constitute approval of

safety precautions or, unless otherwise specifically stated by the Architect, of construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component. When the professional certification of performance characteristics of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon such certification to establish that the materials, systems or equipment to meet the performance criteria required by the Contract Documents.

2.6.13 The Architect shall prepare Change Orders and Construction Change Directives, with supporting documentation and data if deemed necessary by the Architect as provided in Subparagraphs 3.1.1 and 3.3.3, for the Owner's approval and execution in accordance with the Contract Documents, and may authorize minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time which are not inconsistent with the intent of the Contract Documents.

2.6.14 The Architect shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, shall receive and forward to the Owner for the Owner's review and records written warranties and related documents required by the Contract Documents and assembled by the Contractor, and shall issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

2.6.15 The Architect shall interpret and decide matters concerning performance of the Owner and Contractor under the requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests shall be made with reasonable promptness and within any time limits agreed upon.

2.6.16 Interpretations and decisions of the Architect shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions so rendered in good faith.

2.6.17 The Architect's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.

2.6.18 The Architect shall render written decisions within a reasonable time on all claims, disputes or other matters in question between the Owner and Contractor relating to the execution or progress of the Work as provided in the Contract Documents.

2.6.19 The Architect's decisions on claims, disputes or other matters, including those in question between the Owner and Contractor, except for those relating to aesthetic effects as provided in Subparagraph 2.6.17, shall be subject to mediation and/or arbitration as provided in this Agreement and in the Contract Documents.

ARTICLE 3

ADDITIONAL SERVICES

3.1 GENERAL

3.1.1 The services described in this Article 3 are not included in Basic Services unless so identified in Article 12, and they shall be paid for by the Owner as provided in this Agreement, in addition to the compensation for Basic Services. Performance of services not included in the

Basic Services must be approved in writing by the Owner prior to commencement of performance or Owner may deny payment therefor.

3.2 PROJECT REPRESENTATION BEYOND BASIC SERVICES

3.2.1 If the Owner and Architect agree that more extensive representation at the site than is described in Subparagraph 2.6.5 is required, the Architect shall provide one or more Project Representatives to assist in carrying out such additional on-site responsibilities.

3.2.2 Project Representatives shall be selected, employed and directed by the Architect, and the Architect shall be compensated therefore as agreed by the Owner and Architect. The duties, responsibilities and limitations of authority of Project Representatives shall be as described in the edition of AIA Document B352 current as of the date of this Agreement, unless otherwise agreed.

3.2.3 Through the observations by such Project Representatives, the Architect shall endeavor to provide further protection for the Owner against defects and deficiencies in the Work, but the furnishing of such project representation shall not modify the rights, responsibilities or obligations of the Architect as described elsewhere in this Agreement.

3.3 ADDITIONAL SERVICES

3.3.1 Making revisions in Drawings, Specifications or other documents when such revisions are:

- .1 inconsistent with approvals or instructions previously given by the Owner, including revisions made necessary by adjustments in the Owner's program or Project budget;
- .2 required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents; or
- .3 due to changes required as a result of the Owner's failure to render decisions in a timely manner.

3.3.2 Providing services required because of significant changes in the Project including, but not limited to, size, quality, complexity, the Owner's schedule, or the method of bidding or negotiating and contracting for construction, except for services required under Subparagraph 5.2.5

3.3.3 Preparing Drawings, Specifications and other documentation and supporting data, evaluating Contractor's proposals, and providing other services in connection with Change Orders and Construction Change Directives.

3.3.4 Providing services in connection with evaluating substitutions proposed by the Contractor and making subsequent revisions to the Contract Documents resulting therefrom.

3.3.5 Providing consultation concerning replacement of Work damaged by fire or other cause during construction, and furnishing services required in connection with the replacement of such Work.

3.3.6 Providing services made necessary by the default of the Contractor, by major defects or deficiencies in the Work of the Contractor, or by failure of performance of either the Owner or Contractor under the Contract for Construction.

3.3.7 Providing services in evaluating an extensive number of claims submitted by the Contractor or others in connection with the work.

- 3.3.8 Providing services in connection with a public hearing, arbitration proceeding or legal proceeding except where the Architect is party thereto.
- 3.3.9 Preparing documents for alternate, separate or sequential bids or providing services in connection with bidding, negotiation or construction prior to the completion of the Construction Documents Phase.
- 3.3.10 Providing analyses of the Owner's needs and programming the requirements of the Project.
- 3.3.11 Providing financial feasibility or other special studies.
- 3.3.12 Providing planning surveys, site evaluations or comparative studies of prospective sites.
- 3.3.13 Providing special surveys, environmental studies and submissions required for approvals of governmental authorities or others having jurisdiction over the Project.
- 3.3.14 Providing services relative to future facilities, systems and equipment.
- 3.3.15 Providing services to investigate existing conditions or facilities or to make measured drawings thereof.
- 3.3.16 Providing services to verify the accuracy of drawings or other information furnished by the Owner.
- 3.3.17 Providing coordination of construction performed by separate contractors or by the Owner's own forces and coordination of services required in connection with construction performed and equipment supplied by the Owner.
- 3.3.18 Providing services in connection with the work of a construction manager or separate consultants retained by the Owner.
- 3.3.19 Providing detailed estimates of Construction Cost.
- 3.3.20 Providing detailed quantity surveys or inventories of material, equipment and labor.
- 3.3.21 Providing analyses of owning and operating costs.
- 3.3.22 Providing interior design and other similar services required for or in connection with the selection, procurement or installation of furniture, furnishings and related equipment, except as otherwise provided in Paragraph 2.1.1.
- 3.3.23 Providing services for planning tenant or rental spaces, except as otherwise provided in Paragraph 2.1.1.
- 3.3.24 Making investigations, inventories of materials or equipment, or valuations and detailed appraisals of existing facilities.
- 3.3.25 Preparing a set of electronic record drawings showing significant changes in the Work made during construction based on marked-up prints, drawings and other data furnished by the Contractor to the Architect.
- 3.3.26 Providing assistance in the utilization of equipment or systems such as testing, adjusting and balancing, initial start-up, preparation of operation maintenance manuals, training personnel for operation and maintenance, and consultation during operation.

3.3.27 Providing services after issuance to the Owner of the final Certificate for Payment, or in the absence of a final Certificate for Payment, more than 60 days after the date of Substantial Completion of the Work.

3.3.28 Providing services of consultants for other than architectural, structural, mechanical and electrical engineering portions of the Project provided as a part of Basic Services.

3.3.29 Providing any other services not otherwise included in this Agreement or not customarily furnished in accordance with general accepted architectural practice.

ARTICLE 4

THE OWNER'S RESPONSIBILITIES

4.1 The Owner, in conjunction with the tenant and with Architect's input, shall provide full information regarding requirements for the Project, including a program which shall set forth the Owner's objectives, schedule, constraints and criteria, including space requirements and relationships, flexibility, expandability, special equipment, systems and site requirements.

4.2 The Owner shall establish and update an overall budget for the Project including the Construction Cost, the Owner's other costs and reasonable contingencies related to all of these costs.

4.2.1 Specific examples of contingencies to be included in the Owner's overall budget include but are not limited to:

- .1 variations in design;
- .2 unknowns and variables in market and bidding conditions; and,
- .3 unknowns and variables in the construction process including, but not limited to:
 - .1 unforeseen underground and otherwise concealed conditions;
 - .2 changes in laws, codes, or regulations;
 - .3 changes in the Owner's program or functional needs;
 - .4 changes in available materials or systems;
 - .5 incidental changes normally associated with the Work; and,
 - .6 fast track construction (further described herein).

4.3 If requested by the Architect, the Owner shall furnish evidence that financial arrangements have been made to fulfill the Owner's obligations under this Agreement.

4.4 The Owner shall designate a representative authorized to act on the Owner's behalf with respect to the Project. The Owner or such authorized representative shall render decisions in a timely manner pertaining to documents submitted by the Architect in order to avoid unreasonable delay in the orderly and sequential progress of the Architect's services.

4.5 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations as may be reasonably determined upon review of available public and property records for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

4.6 The Owner shall furnish the services of geotechnical engineers when such services are reasonably necessary and requested by the Architect. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions including water conditions with reports and appropriate professional recommendations.

4.6.1 The Owner shall furnish the services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Architect.

4.7 The Owner shall furnish structural, mechanical, chemical, air and water pollution tests for hazardous materials, and other laboratory and environmental tests, inspections and reports as required by law or the Contract Documents.

4.8 The Owner shall furnish all legal, accounting and insurance counseling services as may be necessary at any time for the Project, including auditing services the Owner may require to verify the Contractor's Application for Payment or to ascertain how or for what purposes the Contractor has used the money paid by or on behalf of the Owner.

4.9 The services, information, surveys and reports required by Paragraphs 4.5 – 4.8 shall be furnished at the Owner's expense, and the Architect shall be entitled to rely upon the accuracy and completeness thereof.

4.10 Prompt written notice shall be given by the Owner to the Architect if the Owner becomes aware of any fault or defect in the Project or nonconformance with the Contract Documents.

4.11 The proposed language of certificates or certifications requested of the Architect or Architect's consultants shall be submitted to the Architect for review and approval at least 14 days prior to execution. The Owner shall not request certifications that would require knowledge or services beyond the scope of this Agreement.

4.12 Notwithstanding any term or condition whatsoever of this Agreement to the contrary, it is understood and agreed that Architect has no expertise with regard to asbestos and shall have no responsibility whatsoever for or control over the detection, removal or disposal of asbestos. Architect shall have no responsibility or control over the selection or retention of any expert, consultant, contractor or sub-contractor engaged in the detection, removal or disposal of asbestos, nor shall Architect be responsible in any manner to anyone for the acts or omissions of any person or entity arising from the detection, removal or disposal of asbestos. Owner shall, at Owner's expense, defend, indemnify and hold Architect harmless from and against any and all injuries, losses, liabilities, damages, or claims therefore asserted against Architect arising out of, connected with, or relating directly or indirectly to the detection, removal or disposal of asbestos from the Project site. Such indemnity shall include without limitation, costs, expenses and attorney's fees which Architect may at any time sustain or incur by reason of any of the foregoing.

4.12.1 Owner shall retain, at Owner's expense, the services of a certified asbestos and or hazardous waste consultant ("Owner's Consultant") to survey and identify the existence and location of asbestos and or hazardous waste on the Project site. Owner's consultant shall therefore develop specifications for the removal of all asbestos and or hazardous waste, prepare asbestos and or hazardous waste removal drawings and directly oversee implementation of said removal.

4.12.2 Owner shall furnish Architect with a written notice which identifies the items to be removed and where such items are located. Upon receipt of such notice, the Architect shall commence preparation of the Basic Services described in Section Article 2 of this agreement, provided, however, that no personnel acting for or on behalf of the Architect shall undertake or be required to physically inspect the Project site until Owner shall have provided Architect with a certification, acceptable in form and substance to Architect, signed by Owner's consultant stating that all asbestos has been removed from the Project site

and that the Project site does not contain asbestos fiber concentrations in excess of those allowed by local, state and federal laws and regulations, in force as of the date of such certification.

4.12.3 Except as otherwise provided in the second sentence of 4.12.2 hereof, Architect's receipt of such certification shall be a condition precedent to Architect's commencing performance of the services and to any undertaking of the responsibilities set forth in this Agreement, and the time for the commencement of any duty to be performed by Architect under this Agreement or otherwise shall not commence until Architect has received and approved said certification. Owner and Owner's consultant shall have complete responsibility for and control over the detection, removal or disposal of asbestos from the Project site including, but not limited to, assuring compliance with all applicable local, state and federal governmental laws and regulations.

4.13 The Architect hereby states, and the Owner acknowledges, that the Architect has no professional liability or other insurance, and is unable to obtain such insurance reasonably for claims resulting from the actual, alleged, or threatened discharge, dispersal, release, or escape of any solid, liquid, gaseous or thermal irritant or containment, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste materials to be recycled, reconditioned or reclaimed (collectively, "pollutants"), other than claims arising from the design and construction of potable water systems, storm water systems and construction of potable water systems, storm water systems and sewerage systems (collectively, "covered claims").

4.13.1 Accordingly, the Owner hereby agrees to bring no claim (other than a covered claim) for negligence, breach of contract, indemnity, or otherwise against the Architect, or the Architect's principals, employees, agents or consultants relating to pollutants associated in any way with the Project. The Owner shall defend, indemnify, and hold the Architect and the Architect's principals, employees, agents and consultants harmless from any and all injuries, losses, liabilities, damages or claims (other than covered claims) of any nature whatsoever relating to pollutants associated in any way with the Project including, without limitation, the costs, expenses and attorney's fees which the Architect, the Architect's principals, employees, agents or consultants may at any time sustain or incur by reason of any of the foregoing. The foregoing indemnification provision includes, without limitation, claims arising from the actual, alleged or threatened discharge, dispersal, release or escape of pollutants in or into the atmosphere, or on, onto, upon, in, or into the surface or subsurface (a) soil, (b) water or water courses, (c) objects, or (d) any tangible or intangible matter, whether sudden or not, except covered claims.

ARTICLE 5

CONSTRUCTION COST

5.1 DEFINITION

5.1.1 The Construction Cost shall be the total cost or estimated cost to the Owner of all elements of the Project designed or specified by the Architect.

5.1.2 The Construction Cost shall include the cost at current market rates of labor and materials furnished by the Owner and equipment designed, specified, selected or specially provided for by the Architect, plus a reasonable allowance for the Contractor's overhead and profit.

5.1.3 Construction Cost does not include the compensation of the Architect and Architect's consultants, the cost of the land, rights-of-way, financing or other costs which are the responsibility of the Owner as provided in Article 4.

5.2 RESPONSIBILITY FOR CONSTRUCTION COST

5.2.1 Evaluations of the Owner's project budget, preliminary estimates of Construction Cost, and detailed estimates of Construction Cost, if any, prepared by the Architect, represent the Architect's best judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment, over the

Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's project budget or from any estimate of Construction Cost or evaluation prepared or agreed to by the Architect.

5.2.2 No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a project budget unless such fixed limit has been agreed upon in writing and signed by the parties hereto. If such a fixed limit has been established, the Architect shall be permitted to include contingencies for design, bidding and price escalation, to determine what materials, equipment, component systems and types of construction are to be included in the Contract Documents, to make reasonable adjustments in the scope of the Project and to include in the Contract Documents alternate bids to adjust the Construction Cost to the fixed limit. Fixed limits, if any, shall be increased in the amount of an increase in the Contract Sum occurring after execution of the Contract for Construction.

5.2.3 If the Bidding or Negotiation Phase has not commenced within 90 days after the Architect submits the Construction Documents to the Owner, any project budget or fixed limit of Construction Cost shall be adjusted to reflect changes in the general level of prices in the construction industry between the date of submission of the Construction Documents to the Owner and the date on which proposals are sought.

5.2.4 If a fixed limit of Construction Cost (adjusted as provided in Subparagraph 5.2.3) is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall:

- .1 give written approval of an increase in such fixed limit;
- .2 authorize rebidding or renegotiating of the Project within a reasonable time;
- .3 if the Project is abandoned, terminate in accordance with Paragraph 8.3, or
- .4 cooperate in revising the Project scope and quality as required to reduce the Construction Cost.

5.2.5 If a Contractor or Construction Manager is providing construction cost estimates or cost control services for the Owner, the Architect shall be entitled to rely on the information provided. If a fixed limit of Construction Cost is exceeded because of Architect's failure to comply with the information furnished by the Contractor or Construction Manager providing cost control services, the Architect shall modify the Construction Documents with the approval of the Owner at the Architect's expense as necessary to comply with the fixed limit of construction cost. The modification of Contract Documents shall be the limit of the Architect's responsibility arising out of the establishment of a fixed limit. However, if the Architect has complied with information furnished by the Contractor or Construction Manager providing cost control services and the fixed limit of Construction Cost is exceeded, then Architect shall be entitled to compensation in accordance with this Agreement for all services performed whether or not the Construction Phase is commenced.

ARTICLE 6

USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS AND TRANSFER OF ELECTRONIC DATA

6.1 The Drawings, Specifications and other documents prepared by the Architect for this Project are instruments of the Architect's service for use solely with respect to this Project. Upon full payment for Architect's Services, Owner shall be deemed the owner of these documents and shall retain all common law, statutory and other reserved rights, including the copyright. The Architect shall be permitted to retain copies, including reproducible copies, of the Architect's Drawings, Specifications and other documents. The Architect's Drawings, Specifications or other documents shall not be used by the Owner or others on other projects or for completion of this Project by others, unless the Architect is adjudged to be in default under this Agreement. In the event of any reuse whatsoever of said documents by or through the Owner, the Owner hereby agrees to indemnify, defend and hold harmless the Architect from any and all claims, causes, damages, losses, liability and expenses, including but not limited to attorney's fees arising out of said use.

6.2 [Reserved.]

6.3 As a part of Basic Services, Architect will provide Owner Electronic Data in accordance with this Article 6.3. Electronic Data is defined as computer-aided design (CAD) files. Unless otherwise provided as a condition of this Agreement, Electronic Data remains the property of the Architect.

6.3.1 The Architect shall make Electronic Data available at specific Project milestones which are at the end of Schematic Design Phase, the end of Design Development Phase, the end of the Construction Document Phase and at the time construction bid packages are issued. It is anticipated the Architect will provide the Owner this information via an electronic transfer at the above milestone dates. The Architect does not anticipate distributing the Electronic Data to third parties. However, the Owner may distribute the information in accordance with this Agreement. If Electronic Data is needed in addition to the specific Project milestones listed above, the Architect shall be compensated as an Additional Service.

6.3.2 The Electronic Data will be provided in an original format produced by Architect. The specific Electronic Data and format to be transferred is at the sole discretion of Architect. The means by which the Electronic Data is transferred may include but are not limited to, electronic mail, File Transfer Protocol (FTP) sites, project websites, and disk copies transmitted between the parties in this Agreement.

6.3.3 Owner acknowledges that Electronic Data transferred in any manner or translated from the system and format used by Architect to an alternate system or format is subject to errors that may affect the accuracy and reliability of the data and that the data may be altered, whether inadvertently or otherwise. Accordingly, Architect makes no warranty, express or implied, as to the accuracy of the information transferred. The Electronic Data are not the Construction Documents and differences may exist between these electronic files and corresponding hard-copy Construction Documents. Architect reserves the right to retain hard copy originals in addition to electronic copies of the Electronic Data transferred, which originals shall be referred to and shall govern.

6.3.4 As consideration to Architect for the transfer of the Electronic Data, Owner agrees that Architect shall not be liable for and hereby waive all claims and agree to indemnify and hold Architect harmless from all liabilities, losses, damages or expenses (including attorneys' fees) arising out of, or connected with: (1) the Owner's transfer of Electronic Data by any means; or (2) the use, modification or misuse by parties other than Architect of the Electronic Data; or (3) the limited life expectancy and decline of accuracy or readability of the Electronic Data due to storage; (4) any use of the Electronic Data by any third parties receiving the data; or (5) the incompatibility of software or hardware used by Architect and the other parties to this Agreement.

6.3.5 The Electronic Data provided by Architect under the terms of this Agreement are the proprietary information of Architect. All Electronic Data shall be treated as confidential and is not to be disclosed to or shared with others without Architect's express, written consent, subject to any contrary requirements of law.

6.3.6 Owner agrees to include language similar to paragraphs 6.3.1 through 6.3.5 in the General Conditions to the Contract for Construction and require Contractors, Construction Managers, Subcontractors and Vendors to agree to these terms and conditions for the transfer of Architect's Electronic Data for the project.

ARTICLE 7

DISPUTE RESOLUTION/ARBITRATION

7.1 Any controversy, claim or dispute arising out of or relating to the interpretation, construction, or performance of this Agreement, or breach thereof, shall be referred to voluntary, nonbinding mediation to be conducted by a mutually acceptable mediator prior to resorting to litigation or arbitration.

7.1.1 Provided they do not exceed a total of \$150,000 during the term of the Agreement, all claims, disputes or other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, which are not resolved as the result of the non-binding mediation process, shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.

7.2 Demand for arbitration shall be filled in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.3 No arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent of Architect and Owner containing a specific reference to this Agreement signed by the Owner, Architect, and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

7.4 The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof.

7.5 This agreement to arbitrate and any agreement to arbitrate with an additional person or entity duly consented to by the parties to this Agreement shall be specifically enforceable under the prevailing arbitration law.

ARTICLE 8

TERMINATION, SUSPENSION OR ABANDONMENT

8.1 This Agreement may be terminated by either party upon not less than seven (7) days written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

8.2 If the Project is suspended by the Owner for more than ninety (90) consecutive days, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect's compensation shall be equitably adjusted to provide for expenses incurred in the interruption and resumption of the Architect's services.

8.3 Notwithstanding anything to the contrary in this Agreement, Owner shall have the right to suspend or terminate all or any portion of this Agreement without cause upon no less than five (5) days written notice to Consultant of the effective date of termination.

8.4 Failure by the Owner to make payments, within thirty (30) days of the date posted, to the Architect in accordance with this Agreement, except pending resolution of a bona fide dispute regarding such invoice, shall be considered substantial nonperformance and cause for either termination or suspension.

8.5 If the Owner fails to make payment when due the Architect for services and expenses, the Architect may, upon seven (7) days' written notice to the Owner, suspend performance of services under this Agreement. Unless payment in full is received by the Architect within seven (7) days of the date of the notice, the suspension shall take effect without further notice. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services.

8.6 In the event of termination not the fault of the Architect, the Architect shall be compensated for services performed satisfactorily prior to termination, together with Reimbursable Expenses then due.

8.7 [Reserved.]

8.8 The Owner shall reimburse the Architect for all costs incurred in collection of unpaid accounts, including, without limitation, all reasonable attorney and legal expenses.

ARTICLE 9

MISCELLANEOUS PROVISIONS

9.1 Unless otherwise provided, this Agreement shall be governed by the laws of the State of California.

9.2 Terms in this Agreement shall have the same meaning as those in the General Conditions of the Contract for Construction agreed-upon pursuant to Paragraph 2.6.2 above.

9.3 Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion, or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion.

9.4 The Owner and Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither Owner nor Architect shall assign this Agreement without the written consent of the other.

9.5 This Agreement represents the entire and integrated agreement between the Owner and Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect.

9.6 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

9.7 The Architect shall have the right to include representations of the design of the Project, including photographs of the exterior and interior, among the Architect's promotional and professional materials. The Architect's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be

confidential or proprietary. The Owner shall provide professional credit for the Architect on the construction sign and in the promotional materials for the Project.

9.8 In the event any of the provisions of this Agreement shall be held to be invalid and unenforceable, the remaining provisions shall be valid and binding upon the parties. One or more waivers by either party of any provision, terms, condition or covenant shall not be construed by the other party as a waiver of a subsequent breach of the same by the other party.

9.9 Subject to Paragraph 8.1, neither party to this Agreement shall hold the other party responsible for damages or delays in performance caused any acts of God, unavoidable casualty, unusually severe weather conditions not reasonably anticipatable for the locale, national emergency, strikes, lockouts or other items beyond such party's control. Extension of time is Architect's sole remedy for any excusable delays that actually delay the performance of Services.

9.10 Architect agrees to comply with customary and reasonable requirements of financing entities for the Project which may be imposed as a condition to payments due under this Agreement. Architect hereby consents to the Owner's assignment of this Agreement to the Owner's lender, and Architect will execute all documents reasonably required to effectuate such consent.

9.11 Architect hereby agrees to indemnify and hold Owner and its directors, officers, members and employees (collectively "Indemnitees") harmless from all losses, claims, costs, demands, liabilities, injuries, damages and expenses, including litigation costs and attorneys' fees, that the Indemnitees may incur by reason of any injury to or damage sustained by any person or property (including, but not limited to, any alleged violation or unlawful use of any third party's trade secrets, trademark, copyright, patent, other proprietary information or rights; and injury to or damage sustained by any employee of Architect or any one or more of the Indemnitees) to the extent arising out of Architect's negligent errors, omission, acts, or willful misconduct, to the fullest extent permitted by law. This indemnity obligation imposes no personal liability on any officer, director, shareholder or employee of Architect.

9.12 Architect shall provide at its expense, and with admitted insurers or such other insurers as are reasonably acceptable to Owner: (i) Professional liability insurance covering Architect's errors and omissions arising out of or in connection with Architect's design of the Project in an amount not less than One Million Dollars (\$1,000,000) per claim and in the annual aggregate; (ii) Commercial general liability insurance written on an occurrence basis, with limits of liability not less than One Million Dollars (\$1,000,000) per occurrence and in the annual aggregate, containing all standard comprehensive general liability broad form terms and conditions, including coverage for liability of bodily injury, property damage, personal injury, advertising injury, products, contractual liability and completed operations, which insurance shall, be endorsed to name Owner, and each and every director, officer, employee and agent of Owner at additional insured, and endorsed to state such insurance shall apply primary to and non-contributing with any other insurance coverage available to the Owner, and each and every director, officer, employee and agent of Owner notwithstanding any "other insurance" provisions of such policy to the contrary

ARTICLE 10

PAYMENTS TO THE ARCHITECT

10.1 DIRECT PERSONNEL EXPENSE

10.1.1 Direct Personnel Expense is defined as the direct salaries of the Architect's personnel engaged on the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

10.2 REIMBURSABLE EXPENSES

10.2.1 Reimbursable Expenses are in addition to compensation for Basic and Additional Services and include expenses incurred by the Architect and Architect's employees and consultants in the interest of the Project as identified in the following Clauses.

10.2.1.1 If authorized in writing in advance by the Owner and consistent with any applicable policies of Owner, expense of transportation in connection with the Project; expenses in connection with authorized out-of-town travel; long-distance communications; courier services; express mail; and fees paid for securing approval of authorities having jurisdiction over the Project.

10.2.1.2 Expense of reproduction, postage and handling of Drawings, Specifications and other documents.

10.2.1.3 If authorized in advance by the Owner, expense of overtime work requiring higher than regular rates.

10.2.1.4 Expense of renderings, models and mock-ups requested by the Owner.

10.2.1.5 Expense of any additional insurance coverage or limits, including professional liability insurance, requested by the Owner in excess of that normally carried by the Architect and the Architect's consultants.

10.2.1.6 Expense of data processing, photography and photo prints used for the Project or on behalf of the Owner.

10.2.1.7 All payments to be made by the Owner under this Agreement shall be increased by the addition of applicable Sales and Use Taxes, if any.

10.2.1.8 The Owner shall reimburse the Architect for all costs incurred in collection of unpaid accounts, including, without limitation, all reasonable attorney and legal expenses.

10.3 PAYMENTS ON ACCOUNT OF BASIC SERVICES

10.3.1 An initial payment as set forth in Paragraph 11.1 is the minimum payment under this Agreement.

10.3.2 Subsequent payments for Basic Services shall be made in accordance with this Agreement. Payments are due to the Architect within thirty (30) days from the date of invoice. Invoices are presented monthly and Owner will review the invoices promptly and notify Architect of any inaccuracies. After ten (10) working days from the receipt of the invoices, said invoices will be deemed accurate unless Owner has notified Architect to the contrary.

10.3.3 If and to the extent that the time initially established in Subparagraph 11.5.1 of this Agreement is exceeded or extended through no fault of the Architect, compensation for any services rendered during the additional period of time shall be computed in the manner set forth in Subparagraph 11.3.3.

10.4 PAYMENTS ON ACCOUNT OF ADDITIONAL SERVICES

10.4.1 Payments on account of the Architect's Additional Services and for Reimbursable Expenses shall be made monthly upon presentation of the Architect's statement of services rendered or expenses incurred.

10.5 PAYMENTS WITHHELD

10.5.1 No deductions shall be made from the Architect's compensation on account of claims of penalty, liquidated damages, or negligent errors or omissions in performance of professional services by the

Architect, except pursuant to a judicial award or an award rendered in a proceeding in accordance with the Construction Industry Rules of the American Arbitration Association.

10.6 ARCHITECT'S ACCOUNTING RECORDS

10.6.1 Records of Reimbursable Expenses and expenses pertaining to Additional Services and services performed on the basis of a multiple of Direct Personnel Expense shall be available to the Owner or Owner's authorized representative at mutually convenient times and within a reasonable time after Owner's request.

ARTICLE 11

BASIS OF COMPENSATION

The Owner shall compensate the Architect as follows:

11.1 AN INITIAL PAYMENT of Fifty-Thousand Dollars \$(50,000) shall be made upon execution of this Agreement and credited to the Owner's account at final payment.

11.2 BASIC COMPENSATION

11.2.1 FOR BASIC SERVICES, as described in Article 2, and any other services included in Article 12 are a part of Basic Services, and basic compensation shall be a not to exceed value of One Million Nine Hundred Thousand Dollars (\$1,900,000.00).

11.2.2 Where compensation is based on a stipulated sum or percentage of Construction Cost, progress payments for Basic Services in each phase shall total the following percentages of the total Basic Compensation payable:

Schematic Design Phase:	Percent (20 %)
Design Development Phase:	Percent (15 %)
Construction Documents Phase:	Percent (40 %)
Bidding or Negotiation Phase:	Percent (5 %)
Construction Phase:	Percent (20 %)

Total Basic Compensation One Hundred Percent (100%)

11.3.1 COMPENSATION FOR ADDITIONAL SERVICES

11.3.1 FOR PROJECT REPRESENTATION BEYOND BASIC SERVICES, as described in Paragraph 3.2, compensation shall be computed as follows: Not applicable.

11.3.2 FOR ADDITIONAL SERVICES OF THE ARCHITECT, as described in Articles 3 and 12, other than (1) Additional Project Representation, as described in Paragraph 3.2, and (2) services included in Article 12 as part of Basic Services, but excluding services of consultants, compensation shall be computed as follows:

HOURLY BILLING RATES

Populous shall provide services for this phase of the work at an hourly rate per the following rate schedule:

Title	Hourly Rate
Sr. Project Manager	\$181.50
Sr. Project Architect	\$145.75
Project Architect Tech	\$88.00
Sr. Project Designer	\$148.50
Project Designer	\$123.75
Cadd Tech	\$82.50
Sr. Planner	\$250.25
Planner	\$140.25
Interior Designer	\$143.00
Graphics	\$143.00
Spec. Writer	\$88.00

11.4 REIMBURSABLE EXPENSES

11.4.1 FOR REIMBURSABLE EXPENSES, as described in Paragraph 10.2, and any other items included in Article 12 as Reimbursable Expenses, no mark-up shall be permitted, including any mark-up added by any subcontractor or subconsultant, and only actual expenses shall be reimbursable.

11.5 ADDITIONAL PROVISIONS

11.5.1 IF THE BASIC SERVICES covered by this Agreement have not been completed within Twenty-two (22) months of the date hereof, through no fault of the Architect, extension of the Architect's services beyond that time shall be compensated as provided in Subparagraph 11.3, following written notice to Owner of extension of services.

11.5.2 Payments due the Architect and unpaid under this Agreement shall bear interest from the date payment is due at the rate of two percent (2%) over the prevailing Bank of America prime interest rate or an interest charge in accordance with the statutes of the state where the project is located, whichever is greater, shall accrue on any unpaid balance not received thirty (30) days following receipt of an invoice, except for disputed invoices.

11.5.3 The rates and multiples set forth for Additional Services shall be annually adjusted in accordance with normal salary review practices of the Architect.

ARTICLE 12

OTHER CONDITIONS OF SERVICES

12.1 The Owner, in accordance with Paragraph 4.4, hereby designates **Greg Leatherman** as the Owner's representative.

12.3 AMERICAN WITH DISABILITIES ACT

12.3.1 With respect to the Americans with Disabilities Act (“ADA”), the ADA is not a detailed building code and that its requirements are general in nature and open to differing interpretations. Architect will use its reasonable professional efforts to interpret applicable ADA requirements and to advise Owner in this regard. However, Architect does not warrant or represent that services provided under this Agreement will result in full project compliance with the ADA or all interpretations of ADA requirements by regulatory bodies or court decisions. In addition, if the Owner requires that the construction of the project deviate from the Architect's reasonable judgment and understanding of the provisions of the ADA, Owner shall hold Architect harmless from any claim based upon such deviation. For clarity, this does not relieve the Architect of its duty to adhere to applicable state and local building codes.

ARTICLE 13

LIMITATION OF LIABILITY

13.1 The Owner and the Architect acknowledge that a reasonable number of change orders may occur during Construction Phase resulting from errors and omissions in the documents prepared by the Architect and the Architect's consultants.

13.2 The Architect shall provide at no additional cost to the Owner professional services to design, document, and process corrective measures for negligent errors or omissions caused by the Architect and the Architect's consultants.

EXHIBITS

- Exhibit No. 1 Outline Scope of Services, dated August 13, 2009
- Exhibit No. 2 Anticipated Project Schedule, dated August 13, 2009

This Agreement entered into of the day and year first written above.

OWNER
THE TOWN OF APPLE VALLEY, CALIFORNIA

ARCHITECT
POPULOUS.

(Signature)

(Signature)

(Printed name and title)

(Printed name and title)