



# Terms and Conditions for Agreement between Owner and Designer

## Article 1 DESIGNER'S SERVICES

### 1.1 Basic Services

#### 1.1.1 General

- .1 Designer's services shall commence upon receipt of the fully executed copy of the Agreement and a notice to proceed, and shall pursue the services with diligence commensurate with the exercise of due skill and care. Designer will provide accessible communications at its office during normal working hours, which must include an office phone with answering device/service and email. Designer agrees to the phase durations set forth in Section 1.5 of the Agreement. Phase durations shall be extended by the length of delays caused by fire, acts of God, unavoidable casualty, strikes, war, civil disturbance, or unreasonable delays by Owner, building officials, or others not controlled by Designer. Designer shall inform Owner in writing of any situation potentially causing a delay within ten (10) days of its occurrence. The durations in Section 1.5 of the Agreement may not be altered without written approval from Owner.
- .2 Designer's Basic Services consist of the phases marked as included in Section 1.5 of the Agreement and described in this Article which must meet the requirements of Section 1.3 below. Consultants identified in the Agreement as providing "Basic Services" shall provide the services set forth in this Section 1.1 and all other usual and customary services for their disciplines as a part of Basic Services; services outside of those will be considered "Additional Services" in accordance with Section 1.2 below.
- .3 Designer shall secure written approval of Owner before proceeding with each phase of the Project and, upon written request by Owner, shall furnish to Owner evidence of payment to its consultants for their services in the preceding phase. Owner is not obligated to proceed with any phase beyond the last phase specifically approved in writing.
- .4 Notwithstanding any other provision in the Agreement to the contrary, in providing services under the Agreement, Designer shall perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in the same or similar locality. Designer shall perform its services and prepare its instruments of service in compliance with applicable laws and codes. Designer agrees that approval of the Construction Documents by any person, body or agency shall not relieve Designer of the responsibility for providing services in accordance with the applicable standard of care. Any conflicts shall be promptly reported in writing to Owner with proposed strategies for resolution.
- .5 Designer shall conform to and be bound by all documents included as a part of the Agreement as the same may be amended. Subsequent revisions and updates to these documents may result in a change in the Project justifying Additional Services.
- .6 Designer shall designate a Design Team ("Design Team"), consisting of registered individuals from all professional disciplines and other skilled individuals necessary to perform and manage the services under the Agreement. A list ("Project Directory") of the Design Team representatives for all Project phases shall be provided to Owner at the start of the Project. The lead representative for Designer and Design Team shall be the Principal identified in Section 1.3 of the Agreement. Once established, Design Team shall remain intact unless a change is approved in writing by Owner.
- .7 All Project meetings, site visits, progress meetings, and inspections shall be attended by representatives of Designer and appropriate members of the Design Team having authority and qualifications, including registration, if necessary, to make decisions appropriate to the phase of service. Failure to provide the required representatives by any party for a scheduled Project meeting, site visit, progress meeting, or

inspection of which the party had proper notice shall cause the cancellation and rescheduling at the expense of the responsible party.

- .8 The specific duties and responsibilities of Designer shall include those outlined in the following Phases. The required deliverables of each Phase may vary subject to the requirements of the Project to complete the Phase.

### **1.1.2 Program Verification Phase**

- .1 Designer shall review the program and other information furnished by Owner, and shall review laws, codes and regulations applicable to Designer's services. Designer shall meet with Owner to ascertain the general requirements for the Project. If required by the Project, Designer shall verify the functional and departmental objectives of the Project, to advise, with respect to time and budget, the following: selection of the site; the relationship of the Project to other structures and facilities; and scope and functional aspects of the program.
- .2 The Design Team shall visit the Project site and become familiar with the existing site conditions in order to correlate these findings with Owner's program.
- .3 Designer shall prepare an initial evaluation of all elements of Owner's program, budget, Project site, and the proposed procurement or delivery method and other initial information, each in terms of the other, to ascertain the requirements of the Project. Designer shall notify Owner of any inconsistencies discovered in the information.
- .4 Designer shall present its initial evaluation of the program to Owner and shall, if necessary, discuss with Owner approaches to design and construction of the Project. Designer and Owner shall agree on the budget and requirements of the Project.
- .5 Designer shall show the progress to date, confirm the remainder of the Phase durations, and obtain written approval of the Program Verification Phase and to proceed with the Schematic Design Phase.

### **1.1.3 Schematic Design Phase**

- .1 Upon written approval to proceed with the Schematic Design Phase by Owner, Designer shall develop and submit to Owner an analysis of the site describing applicable known or observable significant physical and geologic features and characteristics (i.e., climate, topography, soils, ecology, utilities, circulation, views, noise and existing structures and shall describe the implication of the above factors on design.
- .2 Designer shall develop and submit to Owner conceptual diagrams of alternative approaches for translating programmatic requirements into conceptual design solutions. The number of alternate approaches diagrammed shall be reasonable and appropriate for the Project. These diagrams shall include, but not be limited to, consideration of land use, functional relationships within the program, relationships to proposed future construction and surrounding area, relative volumes of circulation, land use, traffic, parking, transportation, utilities, and systems described in Section 1.1.3.6 below, and organization of major building functions.
- .3 Designer shall prepare and submit to Owner visual studies illustrating the scale and relationship of the Project components required in Owner's program. Sketches of design concepts showing elevations and exterior appearances, and any other sketches or visual studies necessary for evaluation of the alternative concepts shall be submitted to Owner. If necessary to communicate the design intent, massing studies in model and/or diagrammatic form shall be submitted to Owner.
- .4 Upon written approval by Owner of a design concept, Designer shall prepare and submit to Owner schematic documents of the approved concept required by this Section 1.1.3.
- .5 The schematic drawings required by this phase shall include, but not be limited to, the following information, when applicable: the basic design approach drawn at an agreed to scale, siting in relationship to the existing environment, relationship to proposed future construction, circulation, organization of building functions, functional-aesthetic aspects of the design concepts under study, graphic description of critical details, and visual and functional relationship and compatibility to the surrounding environment.

- .6 Designer shall prepare and submit to Owner Preliminary Project Descriptions (“PPD”) based on *Uniformat*. PPD on all Project components should be consistent with the level of detail of the schematic design. If applicable, Designer shall describe and give design criteria for the major elements of the following Project components with economic and energy use considerations of all systems required:

Foundations	Interior Construction	H.V.A.C. Systems	Demolition
Basement Construction	Stairs	Fire Protection	Site Work
	Interior Finishes	Electrical	Site Utilities
Superstructure	Conveying	Equipment and Furnishings	Site Construction
Exterior Enclosure	Plumbing	Special Construction	Other
Roofing	Communications		

- .7 Designer shall prepare and submit to Owner an estimate of cost of construction and a description of causes for deviations, if any, from the program and/or budget.
- .8 Designer shall show the progress to date, confirm the budget and the remainder of the Phase durations, and obtain written approval of Owner of the Schematic Design Phase and to proceed with the Design Development Phase.
- .9 If necessary given the scope of the Project, Designer shall make a presentation of the Project with drawings to the State Procurement Agency and/or the State Architect, as required.

**1.1.4 Design Development Phase**

- .1 Upon written approval to proceed with the Design Development Phase by Owner, Designer shall develop and submit to Owner a fully developed design concept. If needed to develop and communicate the design concept, Designer shall furnish to Owner exterior perspective drawings and/or study models. If directed by Owner, Designer shall make a presentation of the design concept (an Early Design Phase or EDP presentation) to the State Building Commission. The presentation shall provide sufficient information to describe the Project and to identify proposed building systems and estimated costs that are anticipated for the Project.
- .2 Designer shall prepare and submit to Owner floor plans showing spaces by name, number, estimated net area of each space, structural module, mechanical, electrical and communication spaces, equipment, chases, and circulation area. Designer shall also prepare and submit site plans (which show utilities), plumbing, electrical, mechanical, and structural plans and preliminary furnishings and equipment layouts to show accommodation of program requirements, engineered systems, and contractor supplied equipment. Drawings shall show overall building dimensions. Designer shall also prepare outline specifications organized in accordance with the Project components listed in Section 1.1.3.6 above. The drawings and outline specifications shall be at a level of detail for all components sufficient for the development of an estimate of cost of construction.
- .3 Designer shall prepare and submit to Owner: elevations, building sections, and design details showing use of materials and fenestration, developed to the extent that Designer can proceed with the Construction Document Phase when the Design Development Phase is approved.
- .4 Designer shall prepare and submit to Owner an estimate of cost of construction showing allocation of costs for all Project components and a description of causes for deviations, if any, from the estimate of cost of construction provided at the Schematic Design Phase. The basis for the estimate of cost shall be a preliminary quantity take-off, which shall be required of all Project components, described in Section 1.1.3.6 above. The estimate of cost of construction shall show escalation projected from date of the estimate to projected bid date.
- .5 Designer shall show the progress to date, confirm the budget and the remainder of the Phase durations and obtain written approval of Owner of the Design Development Phase and to proceed with the Construction Document Phase.

**1.1.5 Construction Document Phase**

- .1 Upon written approval to proceed with the Construction Document Phase by Owner, Designer shall prepare and submit to Owner documents, including working drawings and Project Manual setting forth information necessary for bidding and proper execution of the Work. The Project Manual shall include: bidding requirements; contract requirements; conditions of the contract; and any and all other information required for receiving bids on the Project and administration of the Construction Phase.
- .2 Upon completion of the Construction Document Phase, Designer shall provide Owner with a written confirmation of the estimate of cost of construction. If Designer cannot confirm the validity of the estimate of cost of construction from the Design Development Phase, then Designer shall provide an updated estimate of cost of construction identifying the Project elements that have changed.
- .3 Upon receipt of the review comments in writing from Owner, Designer shall revise the Construction Documents to conform with the review comments, obtain required approvals from regulatory authorities, and furnish final copies to Owner prior to release of the Construction Documents for bidding.
- .4 Designer shall show the progress to date, confirm the budget and the remainder of the Phase durations and obtain written approval of Owner of the Construction Document Phase and to proceed with the Bidding or Negotiation Phase.

#### **1.1.6 Bidding or Negotiation Phase**

- .1 Upon written approval to proceed with the Bidding or Negotiation Phase by Owner, Designer shall assist Owner in obtaining bids or proposals, and in awarding and preparing construction contracts.
- .2 The date for receipt of bids shall be established by Owner.
- .3 In the event that the lowest responsive and responsible bid received exceeds the MACC, Designer shall revise the Construction Documents, if requested by Owner, in order to bring the construction cost within the bid target at no additional expense to Owner. Owner in this event agrees to cooperate with Designer and permit reasonable and necessary reductions in the scope of the Project. Alternatively, Owner may increase the MACC and proceed with the award of the construction contract, with no change in the Basic Services Fee.
- .4 Should the lowest responsive and responsible bid received be more than twenty percent (20%) less than Designer's most current estimate of cost of construction accepted by Owner, Owner may require: (1) redesign and rebid of the Construction Documents to include any scope previously removed, with no additional expense to Owner; (2) additional bid packages to add back the scope removed, with no additional expense to Owner; or (3) the execution of a Supplement to the Agreement reducing the MACC to actual bid amount plus appropriate contingency and the Basic Services Fee based on the revised MACC. The reduction of the Basic Services Fee shall only apply for the Construction Document Phase through the Close-Out Phase.

#### **1.1.7 Construction Phase**

- .1 Designer shall provide administration of the Construction Contract as described in the Contract Documents and will be an Owner's representative during construction. Designer will have authority to act on behalf of Owner only to the extent provided herein and in the Construction Contract.
- .2 The Construction Phase begins with the execution of the Construction Contract. The Construction Phase is comprised of the professional services required to perform Designer's services related to the two components of construction: "Office" and "Field".
- .3 The professional services performed in the "Office Components" include the administration of the Construction Contract; the review of Contractor's payment applications, certifications of the amounts due the Contractor; the review, approval, or the taking of other appropriate action upon the Contractor's submittals, preparation of responses to contractor requests for information, revisions, corrections or clarifications in the Contract Documents by the appropriate Modification, review of proposed change orders, together with all necessary and proper correspondence and clerical work in connection therewith. Designer, by the requirements of Section 1.1.7.6 below, shall prepare and maintain documentation of the above, Substantial and Final Completion inspections, and the acceptance of the completed Project, together with all requirements of the Contract Documents for

“close-out” and Record Documents (as defined in the Designers’ Manual). Contractor submittals shall be reviewed by Design Team members in the appropriate disciplines.

- .4 The issuance of a Certificate for Payment for the Contractor will constitute a representation by Designer to Owner, based on Designer’s evaluation of the Work and the data comprising the Contractor’s Application for Payment, that, to the best of Designer’s knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents.
- .5 The professional services performed in the “Field Component” include site visits, progress meetings, and inspections by Designer with the appropriate members of the Design Team to (1) become generally familiar with the progress and quality of the portion of the Work completed, (2) endeavor to guard Owner against defects and deficiencies in the Work, and (3) determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents.
- .6 Site visits, progress meetings, and inspections shall be made by appropriate representatives of the Design Team having authority and qualifications to make decisions appropriate to the status of construction. Designer with appropriate members of the Design Team shall make site visits as needed during the critical phases of construction (at a minimum of twice a month), as well as inspections for Substantial and Final Completion, and an inspection before the end of the one-year correction period. Designer shall observe and report on the Contractor’s compliance with the construction schedule and acknowledge the Contractor’s development of the Record Documents. For all site visits, progress meetings, and inspections, a written Project report shall be promptly submitted to Owner and the Contractor.
- .7 As further defined in the Construction Contract, Designer may disapprove or reject work as failing to conform to the Contract Documents, and Designer shall not have control over, charge of, or the responsibility for the construction means, methods, techniques, sequence of procedures, supervision, or for the safety precautions and programs in connection with the Work.
- .8 As further defined in the Construction Contract, Designer shall (i) be, in the first instance, the interpreter of the requirements of the Contract Documents and the impartial judge of the performance thereunder by both Owner and Contractor; (ii) make decisions on all claims of Owner or Contractor relating to the execution and progress of the Work and on all other matters or questions related thereto; and (iii) make recommendations in matters relating to artistic effect that are consistent with the intent of the Contract Documents, with Owner’s decision being final.
- .9 Upon request by the Contractor and submission of a list of incomplete items of work by the Contractor, Designer, with the appropriate members of the Design Team and with a representative of Owner present, shall make a Substantial Completion inspection and augment the Contractor’s list of items necessary to complete the Project in accordance with the Contract Documents. Prior to certifying Substantial Completion, Designer shall verify that all items required by the Project Manual for Substantial Completion are complete. When the Work is determined to be substantially complete, Designer will prepare and issue a Certificate of Substantial Completion.

#### **1.1.8 Close-Out Phase**

- .1 Upon Substantial Completion of the Work, the Close-Out Phase shall begin. When the Work is complete and a request is made by the Contractor, Designer, with the appropriate members of the Design Team and with a representative of Owner present, shall conduct a Final Completion inspection to verify, to the best of Designer’s knowledge, information and belief, to Owner that the Project is in compliance with the Contract Documents. When the Work is determined to be complete, Designer shall issue a Final Certificate for Payment.
- .2 Designer shall prepare and submit Record Documents to Owner as required by the Designers’ Manual. All approved Additional Services and reimbursable expenses shall be completed and billed. Designer shall prepare and submit to Owner a final request for payment to complete the Close-Out Phase.
- .3 During the one year correction period after the date of Substantial Completion of the Work, Designer shall work with a representative of Owner in securing remedy of any of the Work that is found to be not

in accordance with the requirements of the Contract Documents, and shall make a one year inspection of the Project and report observed non-conforming work to the Contractor for correction with a copy of the report to Owner. Designer will monitor the Contractor's work to completion.

#### **1.1.9 Surveys, Reports, Tests and other Project Information:**

- .1 Owner shall furnish Designer with all available information related to the Project.
- .2 Designer may be responsible for obtaining a survey of the building site from qualified consultants, which shall include applicable grades and lines of streets, alleys, pavements, adjoining property, rights of way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site, locations, dimensions, and data pertaining to existing buildings, utilities, other improvements, locations of trees, and information concerning available service and utility lines, both public and private.
- .3 Designer may be responsible for obtaining reports on subsurface conditions including test borings or pits, environmental, mechanical, laboratory, or other tests for determining subsurface soil bearing capacities, and other soil or subsoil conditions required for the design of the Project from qualified consultants.
- .4 Designer may be responsible for obtaining structural, mechanical, environmental and other laboratory tests, field tests, inspections, and reports from qualified consultants known to and acceptable to Designer as required to produce the Contract Documents.
- .5 If not provided by Owner, the obtaining of surveys, tests, reports, engineering data, and any other information obtained by Designer and described in this Section 1.1.9 is the responsibility of Designer. Owner shall reimburse Designer at a multiple, as set forth in Section 2.5 of the Agreement, of the direct cost of this information from competent laboratories, engineers, and licensed surveyors selected and recommended by, and responsible to Designer, provided the cost is approved by Owner, in writing, before it is ordered.

#### **1.1.10 Designer-Provided Documents**

- .1 As a part of Basic Services, but subject to reimbursement in accordance with Section 2.4 below, Designer shall provide:
  - Documents as required by regulatory authorities;
  - Partial submittals as required by the Project;
  - The number of hard copy, complete sets, requested by Owner, of documents demonstrating suitable progress in a design Phase, when requesting incremental payments as permitted in Article 2;
  - The number of hard copy, complete sets, requested by Owner, of documents for each Phase submittal, demonstrating the deliverable product required for the Phase;
  - As many hard copy, complete sets of Construction Documents as are necessary for bidding purposes according to the policy of Owner; and

Documents that cannot be approved will not be considered as a set of Documents and shall not qualify as a reimbursable expense. There will be no reimbursement for electronic copies of documents.

#### **1.2 Additional Services**

**1.2.1** The services described below in this Section 1.2 are Additional Services and are not included in Basic Services. Requests by Designer to Owner for services not listed in these Terms and Conditions will be evaluated by Owner who will consult with the Office of the State Architect in making such an evaluation.

**1.2.2** Making material revisions in documents when such revisions are:

- .1 Inconsistent with written approvals or documented instructions previously given by Owner, for the previously approved phase or concept and which are made necessary by significant adjustments in

Owner's program, Phase durations or Project budget; or significant changes in the Project including, but not limited to size, quality, or complexity and which are not caused by Designer error or omission.

- .2** Required by the enactment or revision of codes, laws or regulations subsequent to the preparation of documents for a given phase.
- 1.2.3** Providing services concerning replacement of work damaged by fire or other cause during construction.
- 1.2.4** Providing services made necessary by default of the Contractor, or made necessary by major defects in the work of the Contractor, which defects require significant investigation or redesign.
- 1.2.5** Providing services in connection with a government public hearing, or legal proceeding except where Designer is party thereto, beyond that typically required. These services may include, but are not limited to, local government hearings or meetings.
- 1.2.6** Providing analysis of Owner's existing facilities, needs and programming requirements of the Project beyond that required in Section 1.1.2 above.
- 1.2.7** Assisting Owner in preparation of application to the U.S. Government and other granting agencies for construction, interest subsidy, and other forms of grants.
- 1.2.8** Providing planning surveys, site evaluations or comparative studies of prospective sites beyond that required in Section 1.1.3.1 above, such as, offsite detention and water quality analysis design, existing conditions surveys not related to the Project, site benchmarking, site feasibility studies and analysis, site planning surveys, hazardous materials surveys, and seismic studies or analysis beyond that needed for code compliance.
- 1.2.9** Providing site or environmental surveys, reports, applications or studies required for approvals of governmental authorities, or others having jurisdiction over the Project, which are not considered a part of Basic Services.
- 1.2.10** Providing measured drawings or evaluations of existing facilities and conditions where reasonable documentation does not exist, including load studies and capacity analysis.
- 1.2.11** Providing special services to verify the accuracy of drawings or other information furnished by Owner.
- 1.2.12** Providing interior design and other similar services limited to and required for or in connection with the selection, procurement or installation of furniture, furnishings and other related equipment not included in the Construction Documents.
- 1.2.13** Providing services of special consultants not included in Sections 1.4.1 and 1.4.2 of the Agreement when such services are reasonably required by the scope of the Project and specifically requested or agreed to by Owner. Special consultants could include consultants for clean room certification, agricultural, technology special equipment, vibration analysis, food service, theater, acoustical, audio/visual, exhibit design, specialty landscaping and irrigation, traffic analysis, commissioning, and environmental.
- 1.2.14** Providing detailed physical models, artistic renditions, videos or animations for presentations.
- 1.2.15** Providing independent energy analysis, independent models or derivatives of design models of for comparative analysis of energy usage.
- 1.2.16** Providing electronic models beyond that required (A) to represent details greater than ¼"=1'0" scale or (B) by the Tennessee BIM Standards.
- 1.2.17** Providing more extensive representation at the site than is required by Owner in Section 1.1.7 above.
- 1.2.18** Providing additional inspections or services or attending additional meetings as a result of the Contractor:
  - (A) significantly exceeding the contract time as modified, in which event the request for such additional services shall be provided coincident with the Contractor's invoice for Substantial Completion and shall not exceed the amount that would be due to the designer for such a time period of services should the fee for the Construction Phase be calculated on a monthly rate; or

(B) failing to perform its duties so that Designer could perform its obligations under Section 1.1.8 above, (i) within the duration set forth after the Substantial Completion inspection performed pursuant to Section 1.1.7.9 above or (ii) in an efficient manner, in which event the request for such additional services shall be provided coincident with the Contractor's invoice for Final Completion.

- 1.2.19 Providing, supervising or observing activities associated with commissioning, retro-commissioning or re-commissioning of buildings or systems in excess of the requirements of Sections 1.1.7 and 1.1.8 above when required by Owner.
- 1.2.20 Providing excessive evaluations or on-site Project visits after final completion of the Work due to improper building operation by Owner, non-conforming work, or non-responsiveness by the Contractor to make required corrections.
- 1.2.21 Providing services and documentation necessary to comply with requirements of the US Green Building Council, Leadership in Energy and Environmental Design (LEED) or other similar programs that are in excess of the requirements of the Tennessee High Performance Building requirements (TN HPBr), should Owner request certification under such a program.

### 1.3 Miscellaneous

- 1.3.1 All documents and services required under the Agreement shall be prepared or performed by, or under the direct supervision of professionals registered by the State of Tennessee in each discipline required by the scope of services. These registered professionals shall be employees of Designer's firm or of the consulting firms listed in the Agreement, and shall affix their seals in accordance with TCA § 62-2-102, et seq. Professionals in required disciplines not represented in Designer's firm shall be retained by Designer subject to the objection of, and without additional cost to, Owner.
- 1.3.2 Designer's consultants working in disciplines that require registered professionals shall maintain insurance coverage with the limits set forth in Sections 3.1.1 - 3.1.3 of the Agreement and professional liability insurance coverage with limits of \$1,000,000 per claim and \$1,000,000 annual aggregate. Designer shall ascertain that Designer's consultants maintain the insurance required by the Agreement. The consultants' insurance coverage shall be maintained from the date of the Agreement until four (4) years after the date of Substantial Completion of the Project.
- 1.3.3 Designer shall enter into agreements with its Consultants binding them to the appropriate Terms and Conditions of the Agreement.

## Article 2 FEES AND COMPENSATION

### 2.1 Fees

- 2.1.1 Owner shall compensate Designer, in accordance with these Terms and Conditions and as set forth in the Agreement.
- 2.1.2 If the Basic Services Fee is paid as a lump-sum fee, the Basic Services Fee shall be the result of the "Basic Services Fee Formula" unless modified in accordance with these Terms and Conditions. The Basic Services Fee is further defined in Designer **Fee Computation Attachment** to the Agreement. The "Basic Services Fee Formula" is  $35/\log P - 1.15$ , wherein P is the MACC indicated in the Agreement, unless adjusted by agreement between Owner and Designer.
- 2.1.3 The Basic Services Fee Formula shall be adjusted as follows for the following types of projects:
  - .1 For renovation projects affecting facilities of average complexity, the Basic Services Fee shall be 1.25 times the result of the Basic Services Fee Formula, unless adjusted to reflect the particular scope of the project by agreement of Owner and Designer in the Agreement or in a Supplement to the Agreement. A project shall not be considered to be in this category if the project's scope is limited to replacement of existing systems where the existing system is being completely removed or replaced without significant modifications.



- .2 For projects to construct an addition on an existing facility where the renovation of the existing facility is not more than 25% of the cost of for construction of the project, the Basic Services Fee shall not exceed 1.10 times the result of the Basic Services Fee Formula.
- .3 For projects comprised of more than one building type, the Basic Services Fee will be calculated by multiplying the result of the Basic Services Fee Formula applicable to each building type included in the project in proportion to its portion of the project, so long as such portion is greater than 25% of the total cost of for construction of the project.
- .4 For projects requiring the utilization of multiple bid packages where the result will be separate construction contracts with Owner or will result in separate, noncumulative Guaranteed Maximum Prices from the same CM/GC, the Basic Service Fee will be separately calculated for each package using the MACC of the separate package multiplied by the percentage of the Basic Services affected.
- .5 For projects comprised of repetitive buildings bid under a single construction contract, the Basic Services Fee will be adjusted to be the sum of the following fees: the fee for the first building (the "Basic Rate") will be the result of the Basic Services Fee Formula with the exception that P is the MACC of the first building; the fee for the second building will be 75% of the Basic Rate; the fee for additional buildings three (3) through ten (10) will be 50% of the Basic Rate; and the fee for each building above ten (10) will be negotiated.
- .6 Owner and Designer may agree to a reduced or increased Basic Services Fee to reflect an appropriate adjustment for the effort and for revisions required to adapt a specific project.

2.1.4 The MACC and the calculation of the lump sum fee may be adjusted while services are being provided in the event of changes in scope or project execution or as a result of bids received for the costs of construction of the project.

**2.2 Direct Personnel Expense**

2.2.1 If required to be paid pursuant to the Agreement, Direct Personnel Expense includes that of individuals engaged on the Project by Designer, including architects, engineers, designers, drafting technicians, specification writers, field administrators and clerical staff in consultation, research, design, production of drawings, specifications, and other documents pertaining to the Project, site visits and inspections of construction of the Project. Hourly rates shall be subject to prior written approval by Owner.

2.2.2 The term "Direct Personnel Expense" means the actual cost of the individual to the company, which may not exceed one hundred thirty nine percent (139%) of the individual's base salary. "Direct Personnel Expense" includes the cost of the individual's base salary and of mandatory and customary benefits such as statutory employee benefits, insurance, sick leave, holidays and vacations, pensions, and similar benefits.

**2.3 Payments to Designer for Basic Services**

2.3.1 As a guide for invoicing, payments of the Basic Services Fee to Designer shall not exceed the following percentages for the phases described below:

1.	Program Verification Phase	3%
2.	Schematic Design Phase	18%
3.	Design Development Phase	20%
4.	Construction Document Phase	30%
5.	Bidding and Negotiation Phase	2%
6.	Construction Phase	23%
7.	Close-Out Phase	4%

2.3.2 Payments shall be as set forth below unless Owner and Designer agree to a different payment schedule for partial payments because of the length of the Project phase durations, but shall in no event be made more frequently than monthly. Designer shall not be due an interim payment or payment for a completed phase unless Owner agrees that Designer's progress is proportionate to the interim payment invoiced or has approved Designer's work for a phase.

- .1 Fee for Program Verification Phase shall be invoiced and payable upon completion and approval by Owner of this phase of Designer's work unless otherwise agreed to by Owner.
  - .2 Fee for Schematic Design and Design Development Phases may be invoiced and payable in two (2) approximately equal payments for each phase in proportion to the progress of Designer's work, with the final payment for each phase being due after approval of the deliverables for such phase by Owner.
  - .3 Fee for Construction Document Phase may be invoiced and payable in three (3) approximately equal payments in proportion to the progress of Designer's work, with the final payment being due after approval by Owner of final Construction Documents and any other information and approvals required for receiving bids on the Project.
  - .4 Fee for the Bidding or Negotiation Phase will be invoiced and payable upon execution of the Construction Contract. Alternatively, should Owner choose not to award a Construction Contract nor to require redesign, payment for the Bidding or Negotiation Phase will become due and payable within 45 days following the receipt of a responsive and responsible bid within the MACC.
  - .5 Fee for the Construction Phase shall be made monthly in proportion to the gross progress payments to the Contractor. Final payment for the Construction Phase fee will be invoiced and payable upon Substantial Completion of the Project. There shall be no deduction to Designer's payment for the Construction Phase even if the Contractor is not paid the full amount certified payable by Designer to Owner during the Construction Phase.
  - .6 Fee for the Close-Out Phase will be invoiced and payable upon completion of the Final Certificate for Payment and all requirements of the Designers' Manual for Close-Out and Record Documents.
- 2.3.3** If the Project is suspended in writing by Owner for more than 45 consecutive days due to no fault of Designer prior to the commencement of the Construction Phase, the following shall apply. If the Project is suspended for more than 45 consecutive days but less than 90 consecutive days, Designer shall be compensated for services completed prior to the date the suspension commenced. If the Project is suspended for 90 consecutive days or more, then Designer shall be compensated for services completed prior to the date the suspension commenced and for the resumption of services after the suspension is terminated. In the event that the suspension occurs prior to the completion of a phase that has commenced, then Designer's compensation for services completed prior to the date of the suspension shall be mutually agreed upon and based on the demonstrated services that have been completed and the percentage of the time remaining in the phase. If Designer is entitled to compensation for the resumption of services, then such amount shall be mutually agreed upon and based on documented additional costs incurred.
- 2.3.4** All approved payments to Designer shall be made within forty-five (45) days after being properly invoiced and payable in accordance with TCA Title 12, Chapter 4, Part 7.
- 2.4 Payments to Designer for Reimbursable Expenses**
- 2.4.1** "Reimbursable Expenses" are expenses of Designer that will be compensated to Designer by Owner with no mark up and are limited to expenses expressly allowed in the Agreement and actually incurred by Designer and Designer's consultants while performing services under the Agreement. Reimbursable Expenses are paid to Designer in addition to compensation for Basic and Additional Services.
- 2.4.2** Travel expenses within the State of Tennessee are not reimbursable unless they are beyond the requirements of Basic Services and approved in advance by Owner in writing. Travel expenses to and from out-of-state locations directed by or approved in advance by Owner in writing, in connection with the Project, will be considered as reimbursable expenses. Reimbursement for allowable travel, meals, and lodging shall be in the amount of actual costs, subject to maximum amounts and limitations specified in the "State Comprehensive Travel Regulations" as they are amended from time to time.
- 2.4.3** If Owner elects to have Designer pay for advertisements for bids, such costs will be considered as reimbursable expenses.
- 2.4.4** The actual costs of printing and reproduction of the hard copy documents required in Section 1.1.8.2 and 1.1.10 are Reimbursable Expenses.
- 2.5 Payments to Designer for Additional Services**

**2.5.1** Amounts due to Designers for Additional Services shall be negotiated as a not to exceed amount billed at an hourly rate and paid in accordance with Sections 2.3.1, 2.3.2 or 2.5 of the Agreement, as applicable. Compensation for Additional Services shall not be payable to Designer unless prior to the time such Additional Services are rendered, Owner shall have approved by written agreement the payment to Designer for those Additional Services.

## **2.6 Miscellaneous Payment Provisions**

**2.6.1** Designer shall complete and sign an "Authorization Agreement for Automatic Deposits" (ACH Credits) Form and a W-9 Form prior to commencing work or invoicing Owner. These forms shall be provided by Owner. All payments to Designer under the Agreement shall be made through Owner's automated clearing house wire transfer system.

**2.6.2** Owner reserves the right to deduct from amounts which are or shall be invoiced and payable to Designer under the Agreement or any other agreement between the State and Designer any amounts which are or shall become due and payable to Owner by Designer.

## **Article 3 OWNER'S RESPONSIBILITY**

**3.1** Owner shall provide adequate information regarding requirements for the Project, including a written program which shall set forth Owner's objectives and budget constraints and other criteria. If required by the Project type the program shall include a summary of all required spaces, related square footages, relationship of spaces, functional requirements, description of special features, and unique requirements. The program shall provide an allowance of square footage to compensate for the ratio between the net square footage to gross square footage. The program shall be in sufficient detail to allow Designer to carry out the design and shall align with Owner's budget constraints.

**3.2** At the time of execution of the Agreement, Owner shall make available on-line to Designer the Designers' Manual that is consistent with the Agreement containing contract requirements of Owner and the provisions and requirements of the State of Tennessee.

**3.3** Owner shall designate a representative authorized to act on Owner's behalf with respect to the Project. Owner shall render decisions and approve Designer's submittals in a timely manner to avoid unreasonable delay in the orderly and sequential progress of Designer's services.

**3.4** Owner may make project site visits, may consult with Designer on issues, and may assist Designer in resolving issues related to the Project. Except as otherwise provided in the Agreement, or when direct communications have been specially authorized, Owner shall endeavor to communicate with the Contractor and Designer's consultants through Designer about matters arising out of or relating to the Agreement and the Contract Documents. Owner shall promptly notify Designer of any direct communications that may affect Designer's services.

**3.5** Required Owner furnished information shall be made available to Designer as expeditiously as necessary for the orderly progress of the Work.

**3.6** Prompt written notice shall be given by Owner to Designer if the authorized representative of Owner actually becomes aware of any fault or defect in the Project or nonconformance with the Contract Documents. However, failure to do so will not limit the responsibility of Designer and no approval by Owner or any other party shall relieve Designer of its responsibilities under the Agreement and these Terms and Conditions and for designing the Project in accordance with sound and accepted engineering and architectural practices.

**3.7** If required for the Project, Owner shall coordinate the services of its own consultants with those services provided by Designer.

**3.8** Owner shall provide Designer access to the Project site during the Basic Services phases prior to commencement of construction and shall obligate the Contractor to provide Designer access to the construction site during construction.

## **Article 4**

### **TERMINATION OF AGREEMENT**

#### **4.1 Termination of Agreement for Cause**

**4.1.1** If, through any cause, Designer shall fail to fulfill in timely and proper manner its obligations under the Agreement, or if Designer shall violate any of the covenants, agreements, or stipulations of the Agreement, Owner shall thereupon have the right to terminate the Agreement by giving twenty one (21) days written notice to Designer of such termination and specifying the effective date of termination. Owner may include in such notice of termination a request for corrective action or other restoration of performance, normally within fourteen (14) days, and stipulating that correction by Designer, which is satisfactory to Owner, may lead Owner to rescind the termination. At the option of Owner, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports prepared by Designer shall become Owner's property, and Designer shall be entitled to receive just and equitable compensation, calculated in accordance with Article 2 herein as applicable, for any satisfactory work completed on such documents and other materials. Owner may withhold any reasonable payments to Designer for the purpose of setoff until such time as the exact amount of damages due Owner from Designer is determined. Designer shall not be responsible for the further use of documents and designs prepared by Designer that were incomplete and unsealed as of the time of termination.

**4.1.2** If Owner fails to make payment to Designer in accordance with Section 2.14 of the Agreement, Designer may, upon fourteen (14) days' written notice to Owner, suspend performance of services under the Agreement. Unless payment in full is received by Designer within fourteen (14) days of the date of the notice, the suspension shall take effect without further notice. In the event of a proper suspension of services, Designer shall have no liability to Owner for delay or damage caused Owner because of such suspension of services. Failure of Owner to make payments to Designer in accordance with the Agreement shall be considered substantial nonperformance and cause for termination. In the event of a good faith dispute between Owner and Designer regarding whether, and to what extent, an amount is properly due, this Section 4.1.2 shall not be applicable.

#### **4.2 Termination for Convenience of Owner**

**4.2.1** Owner may terminate the Agreement at any time, without cause, by providing written notice of termination to Designer. In that event, all finished or unfinished documents and other materials prepared by Designer in connection with the Agreement shall, at the option of Owner, become the property of Owner. If the Agreement is terminated by Owner as provided herein, Designer will be paid for the services in an amount which bears the same ratio to the total compensation as the services actually performed bear to the total services of Designer covered by the Agreement.

## **Article 5**

### **PRACTICES AND PROHIBITIONS**

#### **5.1 Gratuities and Compensation from Contractors**

**5.1.1** Designer hereby agrees that neither it nor any of its employees or consultants shall offer or agree to offer gifts or gratuities to any employee of the State of Tennessee. Evidence of an offer of a gift or gratuity may be cause for termination of the Agreement and other penalties.

**5.1.2** Designer agrees that neither it nor any of its employees or consultants shall accept gratuities or receive any compensation from the Contractor, subcontractors, or material suppliers involved in the construction of the Project. Designer shall notify each of its employees and all consultants of Designer's commitments under this provision of the Agreement. This provision expressly precludes any compensation to Designer, any employee or consultant of Designer, from the Contractor, subcontractors, or material suppliers involved in the construction of the Project for preparation of detail drawings, shop drawings, or checking shop drawings, or any other service for work performed by Designer under the Agreement.

- 5.1.3** Designer acknowledges its familiarity with and agrees to make its employees and consultants familiar with the requirements of Chapter 529 of the Public Acts of 1995, known as the "Lobbying Reform Act of 1995" and any amendments thereto.
- 5.1.4** No State appropriated funds have been paid or will be paid, by or on behalf of Designer, to any person for influencing or attempting to influence an officer and/or employee of an agency, a member of the Tennessee State Legislature, an officer and/or employee of the Tennessee State Legislature, and/or an employee of a member of the Tennessee State Legislature in connection with the awarding of the Agreement, and/or any State contract; and/or the extension, continuation, renewal, amendment, and/or modification of any State contract. Designer shall comply with all State laws and regulations relating to lobbying, including but not limited to, The Tennessee Ethics Commission Act of 2006, T.C.A. Sections 3-6-101. et.seq., and T.C.A. Section 2-10-127(a), and any successor acts or provisions thereof.

## **5.2 Employment Practices**

- 5.2.1** Except to the extent permitted by Federal or State laws and regulations for a bona fide occupational qualification, Designer agrees as follows:
- 5.2.2** No person on the grounds of handicap or disability, age, race, color, religion, sex, national origin, or any other classification protected by Federal and/or Tennessee State constitutional and/or statutory law, shall be excluded from participation in, or be denied benefits of, or be otherwise subjected to discrimination in the performance of the Agreement, or in the employment practices of Designer. Designer shall, upon request, show proof of such non-discrimination, and shall post in conspicuous places, available to all employees and applicants, notices of non-discrimination.
- 5.2.3** Designer will, in all solicitations for employees or job orders for employees placed with any employment agency, union, or other firm or agency, state that all qualified applicants will receive consideration for employment without regard to race, disability, creed, color, national origin, sex, or age. The utilization of the words "equal opportunity employer" in advertisements shall constitute compliance with this Section.
- 5.2.4** Designer warrants that no part of Designer's compensation shall be paid directly or indirectly to an employee or official of the State as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to Designer in connection with any work contemplated or performed under the Agreement. Designer acknowledges and agrees that the Agreement shall be null and void if Designer is, or within the past six (6) months has been, an employee of the State or if Designer is an entity in which a controlling interest is held by an individual who is, or within the past six (6) months has been, an employee of the State.
- 5.2.5** Designer will include the provisions of this Section 5.2 in every subcontract or purchase order for any and all goods and/or services provided in connection with the Agreement. In the event of noncompliance by Designer with any of these nondiscrimination provisions of the Agreement, Owner shall have the right, at its option, to terminate the Agreement and obtain any remedies available at law or in equity.

## **5.3 Prohibition of Illegal Immigrants**

- 5.3.1** The requirements of Tennessee Code Annotated, Section 12-3-309, et seq., addressing the use of illegal immigrants in the performance of any contract to supply goods or services to the state of Tennessee, shall be a material provision of the Agreement, a breach of which shall be grounds for monetary and other penalties, up to and including termination of the Agreement.
- 5.3.2** Designer hereby attests, certifies, and assures that Designer shall not knowingly utilize the services of an illegal immigrant in the performance of the Agreement and shall not knowingly utilize the services of any consultant who will utilize the services of an illegal immigrant in the performance of the Agreement. Designer shall reaffirm this attestation, in writing, by submitting to Owner a completed and signed attestation form semi-annually during the period of the Agreement. Such attestations shall be maintained by Designer and made available to state officials upon request.
- 5.3.3** Prior to the use of any consultant in the performance of the Agreement, and semi-annually thereafter, during the period of the Agreement, Designer shall obtain and retain a current, written attestation that the consultant shall not knowingly utilize the services of an illegal immigrant to perform work relative to the Agreement and shall not knowingly utilize the services of any subconsultant who will utilize the

services of an illegal immigrant to perform work relative to the Agreement. Attestations obtained from such consultants shall be maintained by Designer and made available to state officials upon request.

**5.3.4** Designer shall maintain records for all personnel used in the performance of the Agreement. Said records shall be subject to review and random inspection at any reasonable time upon reasonable notice by Owner.

**5.4.5** Designer understands and agrees that failure to comply with this Section Prohibition of Illegal Immigrants will be subject to the sanctions of Tennessee Code Annotated, Section 12-3-309, et seq. for acts or omissions occurring after its effective date.

**5.3.6** For purposes of the Agreement, "illegal immigrant" shall be defined as any person who is not either a United States citizen, a lawful permanent resident, or a person whose physical presence in the United States is authorized or allowed by the federal Department of Homeland Security and who, under federal immigration laws and/or regulations, is authorized to be employed in the U.S. or is otherwise authorized to provide services under the Agreement.

#### **5.4 Conflicts of Interest**

**5.4.1** Designer shall, at all times, conduct and carry out its duties and responsibilities in a manner intended to avoid Organizational Conflicts of Interest and to uphold high ethical standards which serve to:

- .1 Promote full and open competition, integrity, and transparency in the procurement and contracting process in which Designer participates;
- .2 Prevent persons from obtaining an unfair competitive advantage in the procurement and contract process in which Designer participates;
- .3 Promote an environment conducive to other parties providing services to the State in connection with the Project in an impartial and objective manner; and
- .4 Protect the validity of the State's contracts, protect the State's interests, and protect the State's confidential and sensitive information.

## **Article 6 MISCELLANEOUS PROVISIONS**

#### **6.1 Ownership of Documents**

**6.1.1** Upon completion or termination of the Agreement, the documents provided by Designer to Owner as instruments of professional services shall be the property of the State of Tennessee, and may be used again by Designer only for the benefit of the State and on authority of the State Building Commission. Originals of these documents may remain in the files of Designer. Designer and Designer's consultants may reuse any portion of the work prepared for this Project for other projects. Except as set forth in the Agreement or any subsequent agreements between Designer and Owner, Designer shall have no liability for any future use by Owner of the instruments of professional service provided by Designer under the Agreement where Designer is not engaged to provide services for such future use.

#### **6.2 Designer's Accounting Records**

**6.2.1** Designer shall maintain documentation for all charges against the State under the Agreement. The books, records and documents of Designer, insofar as they relate to work performed or monies received under the Agreement, shall be maintained for a period of five full years from the date of the final payment, and shall be subject to audit and inspection, at any reasonable time and upon reasonable notice, by Owner or the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be maintained in accordance with generally accepted accounting principles.

#### **6.3 Successors and Assigns**

**6.3.1** Neither Owner nor Designer shall assign, sublet, or transfer its interest in the Agreement without the written consent of the other. Owner and Designer each binds itself, its partners, successors, assigns,

and legal representatives to the other party of the Agreement and to the partners, successors, assigns, and such other legal representatives of such other party in respect to all covenants of the Agreement.

#### **6.4 Extent of the Agreement**

**6.4.1** The Agreement represents the entire and integrated agreement between Owner and Designer and supersedes all prior negotiations, representations or agreements, either written or oral. The Agreement may be amended only by written instrument signed by both Owner and Designer. Owner is not bound by the Agreement until it is approved by the appropriate State officials as indicated on the signature page of the Agreement. The Agreement may be amended only by obtaining the signature of officials hereto or as may be allowed by State Building Commission Policy & Procedures.

#### **6.5 General Terms**

**6.5.1** Designer agrees, to the fullest extent permitted by law and to the extent of Designer's required insurance coverage, to indemnify and hold Owner harmless from and against damages, liabilities and costs (including, to the extent allowable by law, reasonable attorney's fees) to the extent caused by the negligent acts, errors or omissions of Designer, the Design Team or anyone for whom Designer or Design Team is legally responsible in the performance of professional services pursuant to the Agreement.

**6.5.2** Designer waives all claims against Owner for consequential and incidental damages.

**6.5.3** The failure of either party at any time to demand performance of the Agreement shall not be deemed a waiver thereof. Each party may at any time demand performance of the Agreement.

**6.5.4** The provisions of the Agreement are severable, and if any part of it is found to be unenforceable, the other parts shall remain fully valid and enforceable.

**6.5.5** The Agreement may be executed in any number of counterparts, each of which shall constitute an original and all of which together shall constitute one and the same instrument. Execution of an electronic, scanned or facsimile copy shall have the same force and effect as execution of an original. Electronic, scanned or facsimile signatures shall have the same force and effect as original signatures.

**6.5.6** The Agreement shall be construed and enforced in accordance with the laws of the State of Tennessee, without regard to its choice of law provisions, and any disputes arising therefrom or related thereto shall be determined by a commission or state court of competent jurisdiction in Davidson County, Tennessee. Designer acknowledges and agrees that any rights or claims against the State, or its employees, and any remedies arising therefrom, shall be subject to and limited to those rights and remedies available under T.C.A. §9-8-101 through §9-8-407.

**6.5.7** Designer understands the importance to Owner of completing Designer's services within the durations specified in the Agreement and acknowledges that if delays in providing services under the terms of the Agreement have a negative impact on Owner, Owner shall have the right to seek compensation from Designer for the expenses, costs, damages and claims associated with such negative impact.

**6.5.8** In accordance with the applicable standard of care, Designer shall endeavor to comply with all applicable Federal and State laws and regulations in the performance of the Agreement.

**6.5.9** Designer shall pay all taxes incurred by Designer in Designer's performance of the Agreement.

**6.5.10** Owner shall have no liability except as specifically provided in the Agreement.

**6.5.11** Designer and Owner agree to work together in good faith to resolve any disputes that may arise during the term of the Agreement at the lowest level possible and may engage in non-binding mediation in an attempt to resolve any disputes.

**6.5.12** All claims and legal notices required under the Agreement shall be in writing and delivered by personal delivery or by certified U.S. mail, return receipt requested, or a nationally recognized overnight courier service, postage and charges prepaid, addressed to the parties at their addresses as set in the Agreement, and shall be effective when received.

**6.5.13** Designer shall comply with all applicable registration requirements contained in T.C.A. §67-6-601 et seq. Compliance with applicable registration requirements is a material requirement of the Agreement.

**6.5.14** The bid target is an integral component of the “budget” as that term is used in these Terms and Conditions. The bid target is the portion of the budget that Designer is to use as the targeted cost of the work under their responsibility for design.

**6.6 Subject to Funds Availability**

**6.6.1** The Agreement is subject to the appropriation by the General Assembly and availability of funds. In the event the General Assembly fails to appropriate funds, reduces an appropriation, or the funds are otherwise unavailable, then the Agreement shall terminate, at Owner election, as if Owner executed its rights to terminate for convenience under Section 4.2 above.

**6.7 Definitions**

**6.7.1** “Work” shall mean the work of the construction contractor pursuant to the Construction Contract.

**6.7.2** “Contract Documents” means, collectively, the Construction Documents and the Construction Contract.

**6.7.3** “Organizational Conflicts of Interest” means a circumstance arising out of a Designer’s relationship with the State, a circumstance arising out of a Designer’s existing or past activities, business or financial interests, familial relationships, contractual relationships, and/or organizational structure (i.e., parent entities, subsidiaries, Affiliates, etc.) that results in:

- .1 Impaired Objectivity of Designer;
- .2 An Unfair Competitive Advantage;
- .3 Biased Ground Rules; and/or
- .4 A perception or appearance of impropriety, as determined by a member of the State Building Commission or the State Architect, with respect to any of the State’s procurements or contracts, or a perception or appearance of Unfair Competitive Advantage with respect to a State procurement.

As used in the above definition, the following terms shall have the following meanings: “Impaired Objectivity”, “Unfair Competitive Advantage”; and “Biased Ground Rules” are defined in the By-laws, Policy and Procedure of the State Building Commission, Item 12.

**6.7.4** Any other capitalized terms used but not defined herein shall have the meaning ascribed to such capitalized term in the Agreement, these Terms and Conditions or the Designers’ Manual.

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