

CITY OF PRAIRIE VILLAGE

June 1, 2015

Council Committee Meeting 6:00 p.m.

City Council Meeting 7:30 p.m.

COUNCIL COMMITTEE OF THE WHOLE
Council Chambers
Monday, June 01, 2015
6:00 PM

AGENDA

BROOKE MOREHEAD, COUNCIL PRESIDENT

AGENDA ITEMS FOR DISCUSSION

COU2015-23 Consider approval of Ordinance 2332 - franchise agreement with Unite Private Networks
Katie Logan

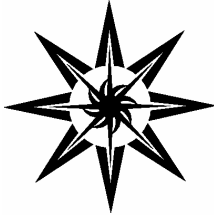
*COU2015-24 Consider design agreement with Affinis Corp for the design of the 2016 Mission Road rehabilitation project from 71st Street to 75th Street
Keith Bredehoeft

*COU2015-25 Consider construction contract with J.M. Fahey Construction Company for the 2015 Paving and CARS programs
Keith Bredehoeft

Updated Council priorities
Quinn Bennion

2016 Budget - funding for committees and outside agencies
Quinn Bennion

*Council Action Requested the same night



ADMINISTRATION

Committee of the Whole Meeting: June 1, 2015
City Council Meeting: June 15, 2015

Ordinance No. 2332 Unite Private Networks, LLC Franchise Agreement

Background:

City staff was contacted by Unite Private Networks, LLC and requested approval to begin construction and installation of a telecommunication network for the Shawnee Mission School District. The construction will require access to City right-of-way which requires a franchise agreement. The City is charged with managing the utilities in the public right-of-way.

There is no anticipated revenue from franchise fees due to the type of services offered. This is a closed network for the Shawnee Mission School District.

Johnson County IT is aware of this project. There are discussions to allow Unite to utilize their current conduit in exchange for sharing the new conduit. If discussions continue and an agreement made, this could allow the City to connect into the Johnson County fiber network.

The City Attorney has reviewed the attached document and will be present to answer any questions.

Attachments:

Ordinance No. 2332
Map of proposed construction route

Prepared By:

Nolan Sunderman
Assistant to the City Administrator
Date: May 22, 2015

ORDINANCE NO. 2332

**AN ORDINANCE GRANTING TO UNITE PRIVATE NETWORKS, LLC
A CONTRACT FRANCHISE TO CONSTRUCT, OPERATE AND
MAINTAIN A TELECOMMUNICATIONS SYSTEM IN THE CITY OF
PRAIRIE VILLAGE, KANSAS AND PRESCRIBING THE TERMS OF
SAID CONTRACT FRANCHISE.**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF PRAIRIE
VILLAGE:**

SECTION 1. DEFINITIONS.

For the purposes of this Ordinance the following words and phrases shall have the meaning given herein. When not inconsistent within the context, words used in the present tense include the future tense and words in the single number include the plural number. The word "shall" is always mandatory, and not merely directory.

- (a) "Access Line" - shall mean and be limited to retail billed and collected residential lines; business lines; ISDN lines; PBX trunks and simulated exchange Access Lines provided by a central office based switching arrangement where all stations served by such simulated exchange Access Lines are used by a single customer of the provider of such arrangement. Access Line may not be construed to include interoffice transport or other transmission media that do not terminate at an end user customer's premises, or to permit duplicate or multiple assessment of Access Line rates on the provision of a single service or on the multiple communications paths derived from a billed and collected Access Line. Access Line shall not include the following: Wireless Telecommunications Services, the sale or lease of unbundled loop facilities, special access services, lines providing only data services without voice services processed by a telecommunications Local Exchange Service provider or private line service arrangements.
- (b) "Access Line Count" - means the number of Access Lines serving consumers within the corporate boundaries of the City on the last day of each month.
- (c) "Access Line Fee" - means a fee determined by the City, up to a maximum as set out in K.S.A. 12-2001(c)(3), and amendments thereto, to be used by Grantee in calculating the amount of Access Line Remittance.
- (d) "Access Line Remittance" - means the amount to be paid by Grantee to City, the total of which is calculated by multiplying the Access Line Fee, as determined in the City, by the number of Access Lines served by Grantee within the City for each month in that calendar quarter.
- (e) "City" - means the City of Prairie Village, Kansas.
- (f) "Contract Franchise" - means this Ordinance granting the right, privilege and franchise to Grantee to install, maintain, operate and provide Telecommunications Services within the City.

- (g) "Facilities" - means telephone and telecommunications lines, conduits, manholes, ducts, wires, cables, pipes, poles, towers, vaults, appliances, optic fiber, and all equipment used to provide Telecommunications Services.
- (h) "Grantee" – means Unite Private Networks, LLC, a Delaware limited liability company and a telecommunications Local Exchange Service provider providing Local Exchange Service within the City. References to Grantee shall also include as appropriate any and all successors and assigns.
- (i) "Gross Receipts" - shall mean only those receipts collected from within the corporate boundaries of the City and which are derived from the following: (1) Recurring Local Exchange Service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (2) Recurring local exchange Access Line services for pay phone lines provided by Grantee to all pay phone service providers; (3) Local directory assistance revenue; (4) Line status verification/busy interrupt revenue; (5) Local operator assistance revenue; (6) Nonrecurring Local Exchange Service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate bills; and (7) Revenue received by Grantee from resellers or others which use Grantee's Facilities. All other revenues, including, but not limited to, revenues from extended area service, the sale or lease of unbundled network elements, nonregulated services, carrier and end user access, long distance, wireless Telecommunications Services, lines providing only data service without voice services processed by a telecommunications Local Exchange Service provider, private line service arrangements, internet, broadband and all other services not wholly local in nature are excluded from Gross Receipts. Gross Receipts shall be reduced by bad debt expenses. Uncollectible and late charges shall not be included within Gross Receipts. If Grantee offers additional services of a wholly local nature which if in existence on or before July 1, 2002 would have been included with the definition of Gross Receipts, such services shall be included from the date of the offering of such services within the City.
- (j) "Local Exchange Service" - means local switched Telecommunications Services within any Local Exchange Service area approved by the Kansas Corporation Commission, regardless of the medium by which the local telecommunications service is provided. The term Local Exchange Service shall not include wireless communication services.
- (k) "Public Right-of-Way" - means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.
- (l) "Telecommunication Services" - means providing the means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

SECTION 2. GRANT OF CONTRACT FRANCHISE.

- (a) There is hereby granted to Grantee this nonexclusive Contract Franchise to construct, maintain, extend and operate its Facilities along, across, upon or under any Public Right-of-Way for the purpose of supplying Telecommunications Services to the consumers or recipients of such service located within the corporate boundaries of the City, for the term of this Contract Franchise, subject to the terms and conditions of this Contract Franchise.
- (b) The grant of this Contract Franchise by the City shall not convey title, equitable or legal, in the Public Right-of-Way, and shall give only the right to occupy the Public Right-of-Way, for the purposes and for the period stated in this Contract Franchise. This Contract Franchise does not:
 - (1) Grant the right to use Facilities or any other property, telecommunications related or otherwise, owned or controlled by the City or a third-party, without the consent of such party;
 - (2) Grant the authority to construct, maintain or operate any Facility or related appurtenance on property owned by the City outside of the Public Right-of-Way, specifically including, but not limited to, parkland property, City Hall property or public works facility property; or
 - (3) Excuse Grantee from obtaining appropriate access or attachment agreements before locating its Facilities on the Facilities owned or controlled by the City or a third-party.
- (c) As a condition of this grant, Grantee is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the Federal Communications Commission or the Kansas Corporation Commission (KCC). Grantee shall also comply with all applicable laws, statutes and/or city regulations (including, but not limited to those relating to the construction and use of the Public Right-of-Way or other public property).
- (d) Grantee shall not provide any additional services for which a franchise is required by the City without first obtaining a separate franchise from the City or amending this Contract Franchise and Grantee shall not knowingly allow the use of its Facilities by any third party in violation of any federal, state or local law. In particular, this Contract Franchise does not provide Grantee the right to provide cable service as a cable operator (as defined by 47 U.S.C. § 522 (5)) within the City. Grantee agrees that this franchise does not permit it to operate an open video system without payment of fees permitted by 47 U.S.C. § 573(c)(2)(B) and without complying with FCC regulations promulgated pursuant to 47 U.S.C. § 573.
- (e) This authority to occupy the Public Right-of-Way shall be granted in a competitively neutral and nondiscriminatory basis and not in conflict with state or federal law.

SECTION 3. USE OF PUBLIC RIGHT-OF-WAY.

- (a) Pursuant to K.S.A. 17-1902, and amendments thereto, and subject to the provisions of this Contract Franchise, Grantee shall have the right to construct, maintain and operate its

Facilities along, across, upon and under the Public Right-of-Way. Such Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use of the Public Right-of-Way by other utilities.

- (b) Grantee's use of the Public Right-of-Way shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the City, including without limitation, Article 5 of Chapter XIII the Prairie Village Municipal Code ("City Code") regarding the use of the City's Right-of-Way. The City may exercise its home rule powers in its administration and regulation related to the management of the Public Right-of-Way; provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. Grantee shall be subject to all applicable laws and statutes, and/or rules, regulations, policies, resolutions and ordinances adopted by the City, relating to the construction and use of the Public Right-of-Way.
- (c) Grantee shall participate in the Kansas One Call utility location program.
- (d) City shall require Grantee to repair all damage to a Public Right-of-Way caused by the activities of Grantee, or of any agent, affiliate, employee, or subcontractor of Grantee, while occupying, installing, repairing or maintaining Facilities in a Public Right-of-Way and to return the Right-of-Way, to its functional equivalence before the damage pursuant to the reasonable requirements and specifications of the City. If Grantee fails to make the repairs required by the City, the City may effect those repairs and charge Grantee the cost of those repairs. If the City incurs damages as a result of a violation of this subsection, then the City shall have a cause of action against Grantee for violation of this subsection and may recover its damages, including reasonable attorney fees, if Grantee is found liable by a court of competent jurisdiction.
- (e) All Facilities of Grantee shall be installed and maintained in accordance with all applicable federal, State and local laws, rules, and regulations, including, but not limited to, the City's applicable permit application and construction requirements for attachments to City Facilities, the City's adopted building and electrical codes, and the City Code and regulations and policies, including, but not limited to those relating to the construction and use of the Public Right-of-Way or other public property or private property, (collectively, the "Codes"). Grantee shall, at its own expense, make and maintain its Facilities in safe condition and good repair, in accordance with all Codes and Grantee shall replace, remove, reinforce or repair any defective Facilities.
- (f) When the City reasonably believes there is an Emergency or Facilities of Grantee present an immediate threat to the safety of any person, interferes with the performance of the City's service obligations or poses an immediate threat to the physical integrity of City Facilities, the City may perform such work and/or take such action as it deems necessary without first giving written notice to Grantee. As soon as practicable thereafter, the City will advise Grantee of the work performed or the action taken. Grantee shall be responsible for all actual and reasonable costs incurred by the City in taking action pursuant to this subsection, and shall indemnify the City from liability for all such work except to the extent of the City's gross negligence or willful misconduct in connection with such liability. An "Emergency" is a condition that in the discretion of City (i) poses an immediate threat to the safety of any person or the public; (ii) materially and adversely

interferes with the performance of City's service obligations; or (iii) poses an immediate threat to the integrity of City's equipment or property.

- (g) If requested by the City, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety and welfare of the public, Grantee promptly shall remove its Facilities from the Public Right-of-Way or shall relocate or adjust its Facilities within the Public Right-of-Way at no cost to the City, providing such request binds all users of such Public Right-of-Way. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any written request by the City for such relocation or adjustment, providing that the City shall use its best efforts to provide Grantee with a minimum of one hundred eighty (180) days advance notice to comply with any such relocation or adjustment. Any damages suffered by the City or its contractors as a result of Grantee's failure to timely relocate or adjust its Facilities shall be borne by Grantee. Grantee shall designate one (1) person within its organization by his/her employment position to whom relocation notices shall be sent and with whom rests the responsibility to facilitate all necessary communications within Grantee's various areas.
- (h) Where a project referenced in the preceding subsection is primarily for private benefit (provided, however, that projects that are a part of a City-created tax increment financing or transportation development district are not considered primarily for private benefit), the City shall require, as a condition of its approval of any request for alteration of the Public Right-of-Way from any private party or parties, that such private party or parties shall reimburse Grantee for the cost of relocation. Grantee understands however that the City has no obligation to collect such reimbursement.

SECTION 4. COMPENSATION TO THE CITY.

- (a) In consideration of this Contract Franchise, Grantee agrees to remit to the City a franchise fee of 5% of Gross Receipts. To determine the franchise fee, Grantee shall calculate the Gross Receipts and multiply such receipts by 5%. Thereafter, subject to subsection (b) hereafter, compensation for each calendar year of the remaining term of this Contract Franchise shall continue to be based on a sum equal to 5% of Gross Receipts, unless the City notifies Grantee prior to ninety days (90) before the end of the calendar year that it intends to switch to an Access Line Fee in the following calendar year; provided, such Access Line Fee shall not exceed the maximum Access Line Fee allowed by Kansas Statute. In the event the City elects to change its basis of compensation, nothing herein precludes the City from switching its basis of compensation back; provided the City notifies Grantee prior to ninety days (90) before the end of the calendar year.
- (b) Beginning January 1, 2016, and every 36 months thereafter, the City, subject to the public notification procedures set forth in K.S.A. 12-2001 (m), and amendments thereto, may elect to adopt an increased Access Line Fee or Gross Receipts fee subject to the provisions and maximum fee limitations contained in K.S.A. 12-2001, and amendments thereto, or may choose to decline all or any portion of any increase in the Access Line Fee.
- (c) Grantee shall pay on a quarterly basis without requirement for invoice or reminder from the City, and within 45 days of the last day of the quarter for which the payment applies franchise fees due and payable to the City. If any franchise fee, or any portion thereof, is

not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate.

- (d) Upon forty-five (45) days prior written request by the City, but no more than once per quarter, Grantee shall submit to the City a certified statement showing the manner in which the franchise fee was calculated.
- (e) No acceptance by the City of any franchise fee shall be construed as an accord that the amount paid is, in fact the correct amount, nor shall acceptance of any franchise fee payment be construed as a release of any claim of the City. Any dispute concerning the amount due under this Section shall be resolved in the manner set forth in K.S.A. 12-2001, and amendments thereto.
- (f) The City shall have the right to examine, upon written notice to Grantee no more often than once per calendar year, those records necessary to verify the correctness of the franchise fees paid by Grantee. Grantee shall fully cooperate in making reasonably available its records and otherwise assisting in these activities as is necessary for City to reasonably verify the correctness of the franchise fees paid by Grantee in the year subject to audit. Grantee agrees that, where it is required to remit additional franchise fees as a result of an audit, it agrees to pay interest as provided in Section 4(c) required for late payment on such additional franchise fees computed from the date on which such additional franchise fees were due and payable.
- (g) Unless previously paid, within sixty (60) days of the effective date of this Ordinance, Grantee shall pay to the City a one-time application fee of Two Thousand Dollars (\$2000.00). The parties agree that such fee reimburses the City for its reasonable, actual and verifiable costs of reviewing and approving this Ordinance.
- (h) The franchise fee required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001 and 17-1902. The franchise fee is compensation for use of the Public Right-of-Way pursuant to K.S.A. 12-2001(j) and shall in no way be deemed a tax of any kind.
- (i) Grantee shall remit an Access Line Fee or a Gross Receipts franchise fee to the City on those Access Lines that have been resold to another telecommunications Local Exchange Service provider, but in such case the City shall not collect a franchise fee from the reseller service provider and shall not require the reseller service provider to enter a contract franchise ordinance. Such Access Line Fee or a Gross Receipts franchise fee shall be in the same amount or percentage as the franchise fee set forth in subsection 4.a. above.

SECTION 5. INDEMNITY AND HOLD HARMLESS.

- (a) It shall be the responsibility of Grantee to take adequate measures to protect and defend its Facilities in the Public Right-of-Way from harm or damage. If Grantee fails to accurately or timely locate Facilities when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 et seq., it has no claim for costs or damages against the City and its authorized contractors unless such parties are responsible for the harm or damage caused by their negligence or intentional conduct. The City and its authorized contractors shall be responsible to take reasonable

precautionary measures including calling for utility locations and observing marker posts when working near Grantee's Facilities.

- (b) Grantee shall indemnify and hold the City and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, arising or accruing from: the exercise of any right or privilege granted under this Contract Franchise and under the City Code, the installation, construction, maintenance, extension, operation of its Facilities in the City, and the negligence or intentional acts or omissions of Grantee, any agent, officer, director, representative, employee, affiliate or subcontractor of Grantee, or its respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining Facilities in the Public Right-of-Way.
- (c) The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the City, its officers, employees, contractors or subcontractors. If Grantee and the City are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the determination of said court without, however, waiving any governmental immunity available to the City under state law and without waiving any defenses of the parties under state or federal law. This Section is solely for the benefit of the City and Grantee and does not create or grant any rights, contractual or otherwise, to any other person or entity.
- (d) Grantee or City shall promptly advise the other in writing of any known claim or demand against Grantee or the City related to or arising out of Grantee's activities in the Public Right-of-Way.

SECTION 6. INSURANCE REQUIREMENT AND PERFORMANCE BOND

- (a) During the term of this Contract Franchise, Grantee shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers that are licensed to do business in the state of Kansas. Should Grantee elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. Grantee shall provide not less than the following insurance:
 - (1) Workers' compensation as provided for under any worker's compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.
 - (2) Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The City shall be included as an additional insured with respect to liability arising from Grantee's operations under this Contract Franchise.

- (b) As an alternative to the requirements of subsection (a), Grantee may demonstrate to the satisfaction of the City that it is self-insured and as such Grantee has the ability to provide the coverage provided in Section 6(a) above, to protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury, death or property damage occasioned by Grantee, or alleged to so have been caused or occurred.
- (c) Grantee shall, as a material condition of this Contract Franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a certificate of insurance or evidence of self-insurance, satisfactory in form and content to the City, evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice. Grantee shall make available to the City on request the policy declarations page and a certified copy of the policy in effect, so that limitations and exclusions can be evaluated for appropriateness of overall coverage.
- (d) Grantee shall provide the performance and maintenance bonds required in Section 15-408(b) of the City Code.

SECTION 7. REVOCATION AND TERMINATION.

In case of failure on the part of Grantee to comply with any of the provisions of this Contract Franchise, or if Grantee should do or cause to be done any act or thing prohibited by or in violation of the terms of this Contract Franchise, Grantee shall forfeit all rights, privileges and franchise granted herein, and all such rights, privileges and franchise hereunder shall cease, terminate and become null and void, and this Contract Franchise shall be deemed revoked or terminated, provided that said revocation or termination, shall not take effect until the City has completed the following procedures: Before the City proceeds to revoke and terminate this Contract Franchise, it shall first serve a written notice upon Grantee, setting forth in detail the neglect or failure complained of, and Grantee shall have sixty (60) days thereafter in which to comply with the conditions and requirements of this Contract Franchise. If at the end of such sixty (60) day period the City deems that the conditions have not been complied with, the City shall take action to revoke and terminate this Contract Franchise by an affirmative vote of the City Council present at the meeting and voting, setting out the grounds upon which this Contract Franchise is to be revoked and terminated; provided, to afford Grantee due process, Grantee shall first be provided reasonable notice of the date, time and location of the City Council's consideration, and shall have the right to address the City Council regarding such matter. Nothing herein shall prevent the City from invoking any other remedy that may otherwise exist at law. Upon any determination by the City Council to revoke and terminate this Contract Franchise, Grantee shall have thirty (30) days to appeal such decision to the District Court of Johnson County, Kansas. This Contract Franchise shall be deemed revoked and terminated at the end of this thirty (30) day period, unless Grantee has instituted such an appeal. If Grantee does timely institute such an appeal, such revocation and termination shall remain pending and subject to the court's final judgment. Provided, however, that the failure of Grantee to comply with any of the provisions of this Contract Franchise or the doing or causing to be done by Grantee of anything prohibited by or in violation of the terms of this Contract Franchise shall not be a ground for the revocation or termination thereof when such act or omission on the part of Grantee is due to any cause or delay beyond the control of Grantee or to bona fide legal proceedings.

SECTION 8. RESERVATION OF RIGHTS.

- (a) The City specifically reserves its right and authority as a public entity with responsibilities towards its citizens, to participate to the full extent allowed by law in proceedings concerning Grantee's rates and services to ensure the rendering of efficient Telecommunications Services and any other services at reasonable rates, and the maintenance of Grantee's property in good repair.
- (b) In granting its consent hereunder, the City does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, its Home Rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- (c) In entering into this Contract Franchise, neither the City's nor Grantee's present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into the Contract Franchise, neither the City nor Grantee waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Grantee may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of any present or future laws, non-franchise ordinances, (e.g. the City's Public Right-of-Way ordinance referenced in Section 3(b) of this Contract Franchise) and/or rulings.

SECTION 9. FAILURE TO ENFORCE.

The failure of either the City or the Grantee to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Contract Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by the City or the Grantee unless said waiver or relinquishment is in writing and signed by both the City and the Grantee.

SECTION 10. TERM AND TERMINATION DATE.

- (a) This Contract Franchise shall be effective for a term of two (2) years from the effective date of this Contract Franchise. Thereafter, this Contract Franchise will renew for two (2) additional one (1) year terms, unless either party notifies the other party of its intent to terminate the Contract Franchise at least one hundred and eighty (180) days before the termination of the then current term. The additional term shall be deemed a continuation of this Contract Franchise and not as a new franchise or amendment.
- (b) Upon written request of either the City or Grantee, this Contract Franchise shall be renegotiated at any time in accordance with the requirements of state law upon any of the following events: changes in federal, state, or local laws, regulations, or orders that materially affect any rights or obligations of either the City or Grantee, including but not limited to the scope of the Contract Franchise granted to Grantee or the compensation to be received by the City hereunder.

- (c) If any clause, sentence, section, or provision of K.S.A. 12-2001, and amendments thereto, shall be held to be invalid by a court or administrative agency of competent jurisdiction, provided such order is not stayed, either the City or Grantee may elect to terminate the entire Contract Franchise. In the event of such invalidity, if Grantee is required by law to enter into a Contract Franchise with the City, the parties agree to act in good faith in promptly negotiating a new Contract Franchise.
- (d) Amendments under this Section, if any, shall be made by contract franchise ordinance as prescribed by statute. This Contract Franchise shall remain in effect according to its terms, pending completion of any review or renegotiation provided by this Section.
- (e) In the event the parties are actively negotiating in good faith a new contract franchise ordinance or an amendment to this Contract Franchise upon the termination date of this Contract Franchise, the parties by written mutual agreement may extend the termination date of this Contract Franchise to allow for further negotiations. Such extension period shall be deemed a continuation of this Contract Franchise and not as a new contract franchise ordinance or amendment.

SECTION 11. POINT OF CONTACT AND NOTICES

Grantee shall at all times maintain with the City a local point of contact who shall be available at all times to act on behalf of Grantee in the event of an emergency. Grantee shall provide the City with said local contact’s name, address, telephone number, fax number and e-mail address. Emergency notice by Grantee to the City may be made by telephone to the City Clerk or the Public Works Director. All other notices between the parties shall be in writing and shall be made by personal delivery, depositing such notice in the U.S. Mail, Certified Mail, return receipt requested, or by facsimile. Any notice served by U.S. Mail or Certified Mail, return receipt requested, shall be deemed delivered five (5) calendar days after the date of such deposit in the U.S. Mail unless otherwise provided. Any notice given by facsimile is deemed received by the next business day. “Business day” for purposes of this Section shall mean Monday through Friday, City and/or Grantee observed holidays excepted.

<p>The City:</p> <p>City of Prairie Village 7700 Mission Prairie Village, Kansas 66208 Attn: City Clerk</p>	<p>Grantee:</p> <p>Matthew Myers General Counsel 120 S. Stewart Rd. Liberty, MO 64068</p>
--	--

or to replacement addresses that may be later designed in writing.

SECTION 12. TRANSFER AND ASSIGNMENT.

This Contract franchise is granted solely to the Grantee and shall not be transferred or assigned without the prior written approval of the City; provided that such transfer or assignment may occur without written consent of the City to a wholly owned parent or subsidiary, or between wholly owned subsidiaries, to an entity with which Grantee is under common ownership or control, or to any entity acquiring all or substantially all of Grantee’s assets, upon written notice to the City. In the event of any transfer or assignment of either this Contract Franchise or Grantee’s business or assets, Grantee shall: timely notify the City of the successor entity; provide

a point of contact for the successor entity; and advise the City of the effective date of the transfer or assignment. Additionally, Grantee's obligations under this Contract Franchise with regard to indemnity, bonding and insurance shall continue until the transferee or assignee has taken the appropriate measures necessary to assume and replace the same, the intent being that there shall be no lapse in any indemnities or insurance coverage as a result of the transfer or assignment.

SECTION 13. CONFIDENTIALITY.

Information provided to the City under K.S.A. 12-2001 shall be governed by confidentiality procedures in compliance with K.S.A. 45-215 and 66-1220a, et seq., and amendments thereto. Grantee agrees to indemnify and hold the City harmless from any and all penalties or costs, including attorney's fees, arising from the actions of Grantee, or of the City at the written request of Grantee, in seeking to safeguard the confidentiality of information provided by Grantee to the City under this Contract Franchise.

SECTION 14. ACCEPTANCE OF TERMS.

Grantee shall have sixty (60) days after the final passage and approval of this Contract Franchise to file with the City Clerk its acceptance in writing of the provisions, terms and conditions of this Contract Franchise, which acceptance shall be duly acknowledged before some officer authorized by law to administer oaths; and when so accepted, this Contract Franchise and acceptance shall constitute a contract between the City and Grantee subject to the provisions of the laws of the state of Kansas, and shall be deemed effective on the date Grantee files acceptance with the City.

SECTION 15. PAYMENT OF COSTS.

In accordance with statute, Grantee shall be responsible for payment of all costs and expense of publishing this Contract Franchise, and any amendments thereof.

SECTION 16. SEVERABILITY.

If any clause, sentence, or section of this Contract Franchise, or any portion thereof, shall be held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared invalid; provided, however, the City or Grantee may elect to declare the entire Contract Franchise is invalidated if the portion declared invalid is, in the judgment of the City or Grantee, an essential part of the Contract Franchise.

SECTION 17. FORCE MAJEURE.

Each and every provision hereof shall be reasonably subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond Grantee's or the City's control.

SECTION 18. PUBLICATION

The City Clerk is hereby directed to publish this Ordinance once in the official city newspaper.

PASSED by the Governing Body of the City of Prairie Village this ____ day of May, 2015.

APPROVED by the Mayor this ____ day of _____, 2015.

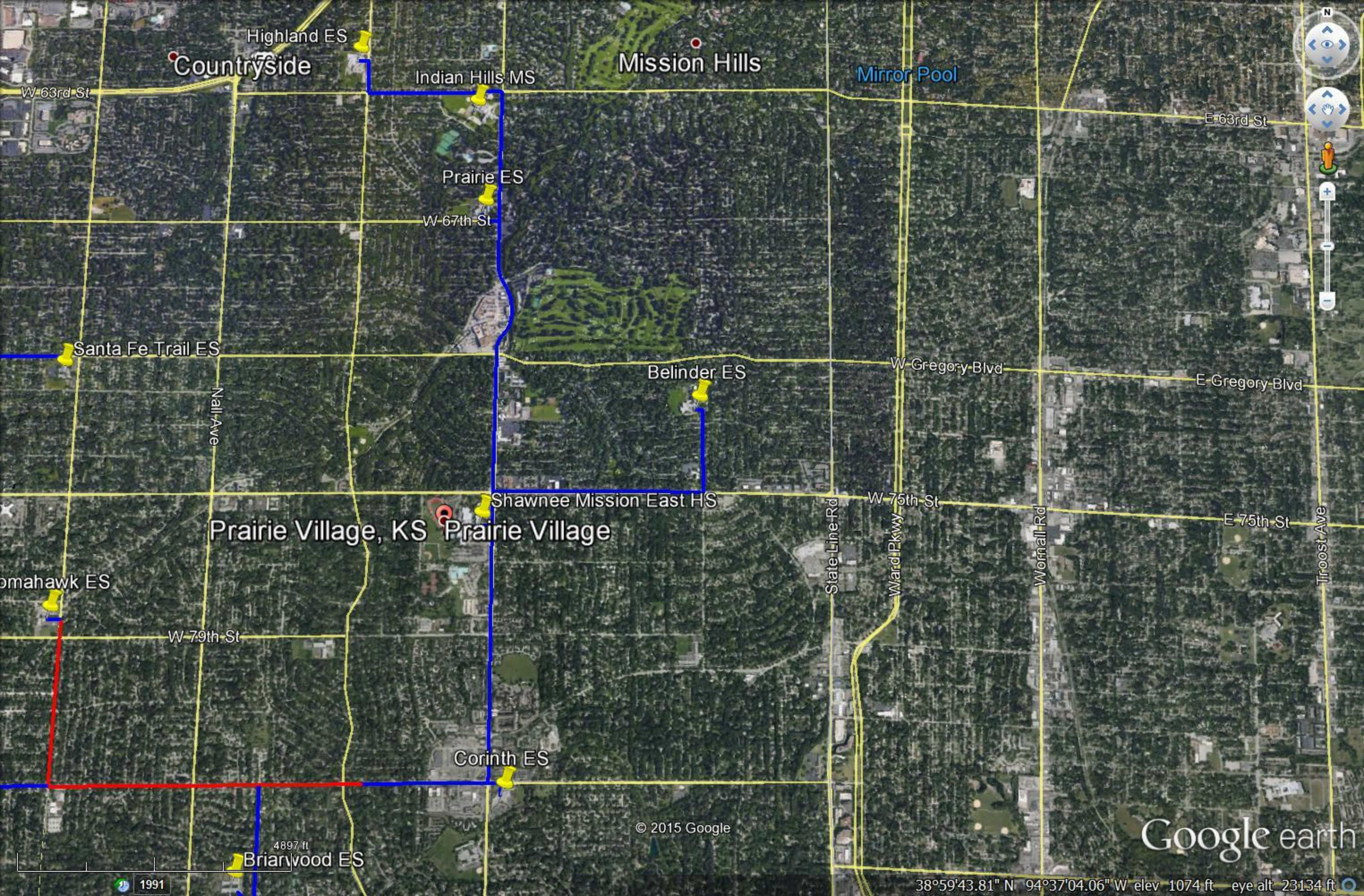
Laura Wassmer, Mayor

ATTEST:

APPROVED AS TO FORM:

Joyce Hagen Mundy, City Clerk

Catherine P. Logan, City Attorney



Highland ES
Country Side

Indian Hills MS

Mission Hills

Mirror Pool

Prairie ES

W-67th St

Santa Fe Trail ES

Belinder ES

Shawnee Mission East HS

Prairie Village, KS
Prairie Village

Omaha ES

Corinth ES

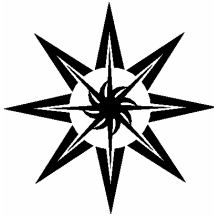
4897 ft
Briarwood ES

© 2015 Google

Google earth

38°59'43.81" N 94°37'04.06" W elev 1074 ft eye alt 23134 ft

1991



PUBLIC WORKS DEPARTMENT

Council Committee Meeting Date: June 1, 2015
Council Meeting Date: June 1, 2015

CONSIDER DESIGN AGREEMENT WITH AFFINIS CORP FOR THE DESIGN OF THE 2016 MISSION ROAD REHABILITATION PROJECT FROM 71ST STREET TO 75TH STREET.

RECOMMENDATION

Move to approve the design agreement with Affinis Corp for the design of the 2016 Mission Road Rehabilitation Project from 71st Street to 75th Street for \$157,528.00.

BACKGROUND

Affinis Corp was selected to be the City's design consultant for 2014, 2015, and 2016. Affinis Corp has been working for the City for the last several years and has performed very well.

This agreement is for the conceptual study and final design of the 2016 Mission Road Rehabilitation project from 71st to 75th Street. This contract will assist the City to study the needs of this corridor including the width of the roadway, the needs of pedestrians and bicyclists, aesthetic improvements as well as other items identified by the City. The final design will also include rehabilitation of the pavement, concrete replacement, drainage improvements, and well as other items of work. Construction is anticipated to begin in the late spring of 2016.

FUNDING SOURCE

Funding for the design of this project is as follows-

2016 CARS CIP Project	\$75,000.00
Additional Street Funds from 2014	\$82,528.00
Project close out.	
TOTAL	\$157,528.00

RELATED TO VILLAGE VISION

TR1c. Ensure that infrastructure improvements meet the needs of all transportation users.

CFS3a. Ensure streets and sidewalks are in good condition by conducting maintenance and repairs as needed.

ATTACHMENTS

1. Design Agreement with Affinis Corp

PREPARED BY

Keith Bredehoeft, Public Works Director

May 27, 2015

AGREEMENT FOR PROFESSIONAL ENGINEER

For

DESIGN SERVICES

Of

PROJECT MIRD0005- 2016 CARS PROJECT

MISSION ROAD 71st STREET TO 75th STREET

THIS AGREEMENT, made at the Prairie Village, Kansas, this ___ day of _____, by and between the City of Prairie Village, Kansas, a municipal corporation with offices at 7700 Mission Road, Prairie Village, Kansas, 66208, hereinafter called the “**City**”, and Affinis Corp, a corporation with offices at 8900 Indian Creek Parkway, Suite 450, Overland Park, KS, 66210 hereinafter called the “**Consultant**”.

WITNESSED, THAT WHEREAS, the City has determined a need to retain a professional engineering firm to provide civil engineering services for the Design of the 2016 CARS Project hereinafter called the “**Project**”,

AND WHEREAS, the City is authorized and empowered to contract with the Consultant for the necessary consulting services for the Project,

AND WHEREAS, the City has the necessary funds for payment of such services,

NOW THEREFORE, the City hereby hires and employs the Consultant as set forth in this Agreement effective the date first written above.

Article I City Responsibilities

- A. Project Definition** The City is preparing to design and construct roadway and stormwater improvements throughout the city as part of CARS Programs.
- B. City Representative** The City has designated, Melissa Prenger, Public Works Senior Project Manager, to act as the City’s representative with respect to the services to be performed or furnished by the Consultant under this Agreement. Such person shall have authority to transmit instructions, receive information, interpret and define the City’s policies and decisions with respect to the Consultant’s services for the Project.
- C. Existing Data and Records** The City shall make available to the Consultant all existing data and records relevant to the Project such as, maps, plans, correspondence files and other information possessed by the City that is relevant to the Project. Consultant shall not be responsible for verifying or ensuring the accuracy of any information or content supplied by City or any other Project participant unless specifically defined by the scope of work, nor ensuring that such information or content does not violate or infringe any law or other third party rights. However, Consultant shall promptly advise the City, in writing, of any inaccuracies in the information provided or any other

violation or infringement of any law or third party rights that Consultant observes. City shall indemnify Consultant for any infringement claims resulting from Consultant's use of such content, materials or documents.

- D. **Review For Approval** The City shall review all criteria, design elements and documents as to the City requirements for the Project, including objectives, constraints, performance requirements and budget limitations.
- E. **Standard Details** The City shall provide copies of all existing standard details and documentation for use by the Consultant for the project.
- F. **Submittal Review** The City shall diligently review all submittals presented by the Consultant in a timely manner.
- G. The City has funded the 2016 CARS Project with this street:
 - 1. Mission Road (71st Street to 75th Street)

Article II Consultant Responsibilities

- A. **Professional Engineering Services** The Consultant shall either perform for or furnish to the City professional engineering services and related services in all phases of the Project to which this Agreement applies as hereinafter provided.
- B. **Prime Consultant** The Consultant shall serve as the prime professional Consultant for the City on this Project.
- C. **Standard Care** The standard of care for all professional consulting services and related services either performed for or furnished by the Consultant under this Agreement will be the care and skill ordinarily used by members of the Consultant's profession, practicing under similar conditions at the same time and in the same locality.
- D. **Consultant Representative** Designate a person to act as the Consultant's representative with respect to the services to be performed or furnished by the Consultant under this Agreement. Such person shall have authority to transmit instructions, receive information, and make decisions with respect to the Consultant's services for the Project.

Article III Scope of Services

A. Concept Phase

1. Schedule and attend one startup meeting with City to confirm project goals, schedule, budget and expectations. At this meeting the City will review the program and create a design memorandum.
2. Identify all utilities that may be affected by the project and make contact with the utility to determine the facilities involved.
3. Review traffic study prepared by others for the City to develop design alternatives for the project corridor. Considerations for design alternatives shall include, but not be limited to, safety, traffic volumes, pedestrian access, vehicular access, intersection control, turning movements, utilities, bicycle facilities, school zone, storm drainage and other design elements.
4. Conduct three (3) meetings with City Council and civic task force. The first meeting will be held prior to development of conceptual alternatives to gather information about issues. The second meeting will be held after conceptual alternatives have been developed and

reviewed by the City. The meetings will be held at City Hall. Notifications for the meetings will be prepared and distributed by the City.

5. Conduct two (2) public meetings for the residents adjacent to the defined project area. The first meeting will be held prior to development of conceptual alternatives to gather information about resident issues. The second meeting will be held after conceptual alternatives have been developed and reviewed by the City. The meetings will be held at City Hall. Notifications for the meetings will be prepared and distributed by the City.
 6. Prepare up to six (6) renderings to be presented at the public and task force meetings.
 7. Prepare opinions of probable project cost for each alternative listing typical construction pay items, construction administration costs and any other project related costs. Add a project contingency equal to 20 percent of the total of construction costs.
 8. Meet with City to review costs and scope of project.
 9. Prepare and submit a report summarizing the following: the project schedule, an evaluation of the alternatives for intersection and roadway improvements, opinions of probable project costs for each alternative and a recommendation of the preferred alternative(s) for the proposed improvements.
 10. Provide one hard copy and electronic copy of any report, or drawing in Microsoft Word or Excel.
 11. Provide files of the report and layouts of the proposed improvement alternatives in PDF Format.
 12. Present recommendations to Council task force. Attend City Council meeting and present recommendations for approval.
- B. Design Phase:** Upon receipt of notice to proceed from the City, the Consultant shall provide all consulting services related to this project including, but not limited, to these phases and tasks. The scope is generally defined below.
1. Schedule and attend one startup meeting with City to confirm project goals, schedule, budget and expectations. Review the design memorandum and modify based on decisions or recommendations resulting from the Concept Phase.
 2. Schedule and attend up to three (3) utility coordination meetings. Request utility comments, coordinate planned relocations among agencies and verify relocation/adjustment schedule.
 3. Conduct field reconnaissance with City to evaluate and identify:
 - a. Design issues.
 - b. Identify existing drainage components in project area (location, size, material, capacity, storm design adequacy and condition).
 - c. Need for drainage improvements.
 - d. Need for full depth pavement repairs.
 - e. Need for sidewalk replacement.
 - f. Location for new sidewalk.
 - g. Need for curb and gutter replacement.
 - h. Need for and limits of driveway replacement.
 - i. Need for which type of ADA ramps.
 - j. Utility locations and conflicts.
 - k. Tree conflicts.
 4. Determine and design storm sewer system modifications resulting from roadway configuration changes.
 5. Use topographic survey information from 2005 CARS Program, Mission Road (71st Street to 75th Street), and supplement or update with the following information:
 - a. Utility facility information provided by current mapping and field locations provided through the Kansas One-Call service and individual utility agencies.
 - b. Curb returns at all intersections.
 - c. Current property owner information as provided through Johnson County AIMS system.

- d. Field check corridor and topographic survey (2004) to identify new landscaping, driveways, walls and other new amenities within the existing right of way.
- e. Verify and identify location of bench marks and section markers.
6. Prepare preliminary construction plans (60%).
 - a. Project title sheet.
 - b. General site plan showing and identifying surface features such as street right-of-way, edge of pavement, sidewalks, driveways, boring locations, trees, house outline, address, owner name based on latest AIMS coverage data, irrigation systems, known electronic dog fences and any other pertinent surface feature.
 - c. Plan sheets for street improvements showing all utilities, sanitary sewer, water, gas, electric, telephone, traffic signals, and street lights, as well as all conflicts and test pits. Profiles will be provided for streets when a topographic survey is performed.
 - d. Typical sections.
 - e. Cross sections for streets with a detailed topographic survey. Intersection details showing the elevation and drainage pattern information.
 - f. Construction phasing showing temporary traffic control measures per MUTCD for various phases of construction.
 - g. Pavement marking and signing measures per MUTCD.
 - h. Erosion control plan.
 - i. City details drawings and other special details pertinent to the project.
 - j. Street lighting design is NOT included in these scope of services.
7. Submit one set (one full size and one half size) of preliminary (60% completion) construction plans for City review.
8. Present one set (half size) of preliminary plans to appropriate governmental agencies and utility companies requesting comments and verification of potential conflicts.
9. Perform field check with City.
10. Prepare legal descriptions with tract maps for temporary and permanent easement documents. Prepare easement documents and/or rights of entry.
11. Schedule, prepare for and attend one (1) public meeting for the 2016 CARS project. The City will be responsible for sending notifications to the residents and property owners.
12. Present a detailed opinion of probable construction cost of City defined construction pay items with quantities and current unit costs. Add to the total construction cost, a contingency of 15 percent.
13. Attend and prepare minutes for up to six (6) project meetings and disperse the minutes to City representative and all other attendees within five working days.
14. Prepare final documents based of review and comments from City and other review agencies of the preliminary plans.
15. Prepare final project manual for City review.
16. Submit one half size set of final (95%) plans and specifications for City review.
17. Submit one half-size set of final (95%) plans and specifications to other appropriate governmental agencies and utility companies with identification of significant changes to preliminary design plans.

18. Prepare a final opinion of probable construction cost.
19. Prepare bid documents for **one bid package** using the City's standard documents for the 2016 CARS Project.
20. Provide one hard copy and electronic copy of any report or plans. Provide files of the plans in PDF Format.

C. Bidding Services Phase

1. Provide the City a notice of bid for publication.
2. Post advertisement for bid on electronic plan room (Drexel Technologies) and provide bid documents for reproduction.
3. Via electronic plan room provide all bid documents for potential bidders to purchase.
4. Provide all utilities with bid set of plans and request attendance at pre-bid meeting.
5. Conduct a pre-bid meeting. Prepare minutes of pre-bid meeting and disperse to City representative and all other attendees within five working days.
6. Prepare and distribute addenda prior to bid opening. Assist bidders with questions during bidding.
7. Provide to the City an Engineer's Estimate and bid tab sheet prior to the bid opening.
8. Attend bid opening.
9. Check accuracy of bids, evaluate the bidders and make a recommendation of award to the City.
10. Prepare five sets construction documents including bonds for execution by the contractor and the City.
11. Provide one hard copy and electronic copy of any report or drawings. Provide files of the plans or drawings in PDF Format.

D. Construction Services Phase

1. Prepare for and attend preconstruction meeting with City and Contractor. Prepare and distribute meeting notes.
2. Prepare for and attend Public meeting with City and Contractor. Present construction schedule, traffic control and other pertinent information to Public.
3. Provide periodic consultation by telephone or email to assist with construction issues.
 - a. Consultation will be initiated by Client and/or Construction Representative.
 - b. Consultant shall provide documentation on invoice that provides a brief description of the issue and/or activity.
 - c. Any consultation resulting from a design error by the Consultant shall be excluded from this scope of work and shall be provided at the expense of the Consultant.
4. Review shop drawings and submittals.
5. Prepare plan revisions as necessitated by conditions encountered in the field during construction, with the exception of traffic control plans.
6. Attend construction progress meetings as directed/requested by the Client. Six (6) meetings are budgeted.
7. Prepare final record drawings which reflect:
 - a. Minor design changes.

- b. Changes made in the field by City representatives and are marked on the construction plan set.
8. Submit to the City electronic CAD files and TIFF images of the revised sheets.

Article IV Time Schedule

- A. **Timely Progress** The Consultant's services under this Agreement have been agreed to in anticipation of timely, orderly and continuous progress of the Project.
- B. **Authorization to Proceed** If the City fails to give prompt written authorization to proceed with any phase of services after completion of the immediately preceding phase, the Consultant shall be entitled to equitable adjustment of rates and amounts of compensations to reflect reasonable costs incurred by the Consultant as a result of the delay or changes in the various elements that comprise such rates of compensation.
- C. **Default Neither** City nor Consultant shall be considered in default of this Agreement for delays in performance caused by circumstances beyond the reasonable control of the nonperforming party. For purposes of this Agreement, such circumstances include, but are not limited to, abnormal weather conditions; floods; earthquakes; fire; epidemics; war, riots, and other civil disturbances; strikes, lockouts, work slowdowns, and other labor disturbances; sabotage; judicial restraint; and delay in or inability to procure permits, licenses, or authorizations from any local, state, or federal agency for any of the supplies, materials, accesses, or services required to be provided by either City or Consultant under this Agreement. Should such circumstances occur, the consultant shall within a reasonable time of being prevented from performing, give written notice to the City describing the circumstances preventing continued performance and the efforts being made to resume performance of this Agreement.
- D. **Completion Schedule** Recognizing that time is of the essence, the Consultant proposes to complete the scope of services as specified in the Scope of Services:

Concept Phase	Due by September 1, 2015
Design Phase	Due by January 12, 2016
Bid Advertisement Date	February 2, 2016
Letting Date	February 26, 2016

Article V Compensation

- A. **Maximum Compensation** The City agrees to pay the Consultant as maximum compensation as defined in Exhibit B for the scope of services the following fees:

2016 CARS

Concept Phase	<u>\$38,782.00</u>
Design Phase	<u>\$94,890.00</u>
Bidding Services Phase	<u>\$ 8,056.00</u>
Construction Services Phase	<u>\$15,800.00</u>
Total Fee	<u>\$157,528.00</u>

- B. Invoices** The compensation will be invoiced by phase, detailing the position, hours and appropriate hourly rates (which include overhead and profit) for Consultant's personnel classifications and the Direct Non-Salary Costs.
- C. Direct Non-Salary Costs** The term "Direct Non-Salary Costs" shall include the Consultant payments in connection with the Project to other consultants, transportation, and reproduction costs. Payments will be billed to the City at actual cost. Transportation, including use of survey vehicle or automobile will be charged at the IRS rate in effect during the billing period. Reproduction work and materials will be charged at actual cost for copies submitted to the City.
- D. Monthly Invoices** All invoices must be submitted monthly for all services rendered in the previous month. The Consultant will invoice the City on forms approved by the City. All properly prepared invoices shall be accompanied by a documented breakdown of expenses incurred and description of work accomplished.
- E. Fee Change** The maximum fee shall not be changed unless adjusted by Change Order mutually agreed upon by the City and the Consultant prior to incurrence of any expense. The Change Order will be for major changes in scope, time or complexity of Project.

Article VI General Provisions

- A. Opinion of Probable Cost and Schedule:** Since the Consultant has no control over the cost of labor, materials or equipment furnished by Contractors, or over competitive bidding or market conditions, the opinion of probable Project cost, construction cost or project schedules are based on the experience and best judgment of the Consultant, but the Consultant cannot and does not guarantee the costs or that actual schedules will not vary from the Consultant's projected schedules.
- B. Quantity Errors:** Negligent quantity miscalculations or omissions because of the Consultant's error shall be brought immediately to the City's attention. The Consultant shall not charge the City for the time and effort of checking and correcting the errors to the City's satisfaction.
- C. Reuse of Consultant Documents:** All documents including the plans and specifications provided or furnished by the Consultant pursuant to this Agreement are instruments of service in respect of the Project. The Consultant shall retain an ownership and property interest upon payment therefore whether or not the Project is completed. The City may make and retain copies for the use by the City and others; however, such documents are not intended or suitable for reuse by the City or others as an extension of the Project or on any other Project. Any such reuse without written approval or adaptation by the Consultant for the specific purpose intended will be at the City's sole risk and without liability to the Consultant. The City shall indemnify and hold harmless the Consultant from all claims, damages, losses and expenses including attorney's fees arising out of or resulting reuse of the documents.
- D. Reuse of City Documents** In a similar manner, the Consultant is prohibited from reuse or disclosing any information contained in any documents, plans or specifications relative to the Project without the expressed written permission of the City.
- E. Insurance** The Consultant shall procure and maintain, at its expense, the following insurance coverage:
 1. Workers' Compensation -- Statutory Limits, with Employer's Liability limits of \$100,000 each employee, \$500,000 policy limit;
 2. Commercial General Liability for bodily injury and property damage liability claims with limits of not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate;
 3. Commercial Automobile Liability for bodily injury and property damage with limits of not less than \$1,000,000 each accident for all owned, non-owned and hired automobiles;

4. Errors and omissions coverage of not less than \$1,000,000. Deductibles for any of the above coverage shall not exceed \$25,000 unless approved in writing by City.
 5. In addition, Consultant agrees to require all consultants and sub-consultants to obtain and provide insurance in identical type and amounts of coverage together and to require satisfaction of all other insurance requirements provided in this Agreement.
- F. Insurance Carrier Rating** Consultant's insurance shall be from an insurance carrier with an A.M. Best rating of A-IX or better, shall be on the GL 1986 ISO Occurrence form or such other form as may be approved by City, and shall name, by endorsement to be attached to the certificate of insurance, City, and its divisions, departments, officials, officers and employees, and other parties as specified by City as additional insureds as their interest may appear, except that the additional insured requirement shall not apply to Errors and Omissions coverage. Such endorsement shall be ISO CG2010 11/85 or equivalent. "Claims Made" and "Modified Occurrence" forms are not acceptable, except for Errors and Omissions coverage. Each certificate of insurance shall state that such insurance will not be canceled until after thirty (30) days' unqualified written notice of cancellation or reduction has been given to the City, except in the event of nonpayment of premium, in which case there shall be ten (10) days' unqualified written notice. Subrogation against City and City's Agent shall be waived. Consultant's insurance policies shall be endorsed to indicate that Consultant's insurance coverage is primary and any insurance maintained by City or City's Agent is non-contributing as respects the work of Consultant.
- G. Insurance Certificates** Before Consultant performs any portion of the Work, it shall provide City with certificates and endorsements evidencing the insurance required by this Article. Consultant agrees to maintain the insurance required by this Article of a minimum of three (3) years following completion of the Project and, during such entire three (3) year period, to continue to name City, City's agent, and other specified interests as additional insureds thereunder.
- H. Waiver of Subrogation** Coverage shall contain a waiver of subrogation in favor of the City, and its subdivisions, departments, officials, officers and employees.
- I. Consultant Negligent Act** If due to the Consultant's negligent act, error or omission, any required item or component of the project is omitted from the Construction documents produced by the Consultant, the Consultant's liability shall be limited to the difference between the cost of adding the item at the time of discovery of the omission and the cost had the item or component been included in the construction documents. The Consultant will be responsible for any retrofit expense, waste, any intervening increase in the cost of the component, and a presumed premium of 10% of the cost of the component furnished through a change order from a contractor to the extent caused by the negligence or breach of contract of the Consultant or its subconsultants.
- J. Termination** This Agreement may be terminated by either party upon seven days written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party; provided, however, the nonperforming party shall have 14 calendar days from the receipt of the termination notice to cure the failure in a manner acceptable to the other party. In any such case, the Consultant shall be paid the reasonable value of the services rendered up to the time of termination on the basis of the payment provisions of this Agreement. Copies of all completed or partially completed designs, plans and specifications prepared under this Agreement shall be delivered to the City when and if this Agreement is terminated, but it is mutually agreed by the parties that the City will use them solely in connection with this Project, except with the written consent of the Consultant (subject to the above provision regarding Reuse of Documents).
- K. Controlling Law** This Agreement is to be governed by the laws of the State of Kansas.
- L. Indemnity** To the fullest extent permitted by law, with respect to the performance of its obligations in this Agreement or implied by law, and whether performed by Consultant or any sub-consultants hired by Consultant, the Consultant agrees to indemnify City, and its agents, servants, and employees against all claims, damages, and losses, including reasonable attorneys' fees and

defense costs, caused by the negligent acts, errors, or omissions of the Consultant or its sub-consultants, to the extent and in proportion to the comparative degree of fault of the Consultant and its sub-consultants.

- M. Severability** Any provision or part of the Agreement held to be void or unenforceable under any law or regulation shall be deemed stricken and all remaining provisions shall continue to be valid and binding upon the City and the Consultant, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision. The provisions of this Article shall not prevent this entire Agreement from being void should a provision which is of the essence of this Agreement be determined void.
- N. Notices** Any notice required under this Agreement will be in writing, addressed to the appropriate party at the address which appears on the signature page to this Agreement (as modified in writing from item to time by such party) and given personally, by registered or certified mail, return receipt requested, by facsimile or by a nationally recognized overnight courier service. All notices shall be effective upon the date of receipt.
- O. Successors and Assigns** The City and the Consultant each is hereby bound and the partners, successors, executors, administrators, legal representatives and assigns of the City and the Consultant are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators, legal representatives and assigns of such other party in respect of all covenants and obligations of this Agreement.
- P. Written Consent to Assign** Neither the City nor the Consultant may assign, sublet, or transfer any rights under the Agreement without the written consent of the other, which consent shall not be unreasonably withheld; provided, Consultant may assign its rights to payment without Owner's consent, and except to the extent that any assignment, subletting or transfer is mandated by law or the effect of this limitation may be restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Agreement.
- Q. Duty Owed by the Consultant** Nothing in this Agreement shall be construed to create, impose or give rise to any duty owed by the Consultant to any Contractor, subcontractor, supplier, other person or entity or to any surety for or employee of any of them, or give any rights or benefits under this Agreement to anyone other than the City and the Consultant.

IN WITNESS WHEREOF: the parties hereto have executed this Agreement to be effective as of the date first above written.

City:

City of Prairie Village, Kansas

By:

Laura Wassmer, Mayor

Address for giving notices:

City of Prairie Village
Department of Public Works
3535 Somerset Drive
Prairie Village, Kansas 66208

Telephone: 913-385-4640
Email: publicworks@pvkansas.com

ATTEST:

Joyce Hagen Mundy, City Clerk

Consultant:

Affinis Corp

By

Kristen E. Leathers, PE

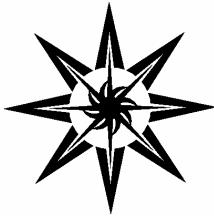
Address for giving notices:

Affinis Corp
8900 Indian Creek Parkway, Suite 450
Overland Park, KS 66210

Telephone: 913-239-1122
Email: kleathers@affinis.us

APPROVED AS TO FORM BY:

Catherine P. Logan, City Attorney



PUBLIC WORKS DEPARTMENT

Council Committee Meeting Date: June 1, 2015

Council Meeting Date: June 1, 2015

CONSIDER CONSTRUCTION CONTRACT FOR THE 2015 PAVING AND CARS PROGRAMS

RECOMMENDATION

Move to authorize the Mayor to sign the construction contract with J.M. Fahey Construction Company for the 2015 Paving and CARS Programs for \$2,335,000.

BACKGROUND

This project includes work on many streets throughout the City. It is funded by the 2015 Paving Program, the 2015 CARS Program, and the Harmon Park Parking Lot Project. These streets will be rehabilitated and will include repair or replacement of the concrete curb/gutter and asphalt pavement.

Street Projects-

- Roe Avenue (75th Street to 83rd Street) CARS
- 66th Street (El Monte to Roe Avenue)
- 70th Street (Nall Avenue to Reeds Road)
- 71st Terrace (Belinder Avenue to Cherokee Drive)
- 77th Street (Norwood Drive to Mission Road)
- 85th Terrace Cul-de-Sac (off of Nall Avenue)
- Ash Street (73rd Street to Tomahawk)
- Maple Street (79th Street to 81st Street)
- Harmon Park Parking Lots

On May 21, 2015, the City Clerk opened bids for the project. Three acceptable bids were received:

JM Fahey Construction Co	\$1,826,989.72
McAnany Construction	\$2,037,600.00
O'Donnell & Sons Construction	\$2,163,938.95
Engineer's Estimate	\$2,404,312.00

The Engineer has reviewed all bids and has recommended award of the low bid.

The contract will be awarded for \$2,335,000. Given the bids we should be able to construct more streets than listed above. Because the scope of work could change on an individual street such as a complete reconstruction versus a mill and overlay the additional streets will be chosen at a later date.

FUNDING SOURCES

Funding is available under the 2015 Paving Project (PAVP2015), 2015 CARS Project (ROAV0003) and the Harmon Park Parking Lot Project (BG300002).

The funding is shown below:

2015 CARS Project (ROAV0003)	\$1,110,000
Harmon Park Parking Lot (BG300002)	\$ 125,000
2015 Paving Program (PAVP2015)	<u>\$1,100,000</u>
Total Contract	\$2,335,000

RELATION TO VILLAGE VISION

- CC1a. Make streetscape improvements to enhance pedestrian safety and attractiveness of the public realm.*
- CFS3a. Ensure streets and sidewalks are in good condition by conducting maintenance and repairs as needed.*
- TR1a. Provide sidewalks in new and existing areas to allow for continuous pedestrian movement around Prairie Village.*
- TR1b. Ensure that infrastructure improvements meet the needs of all transportation users.*

ATTACHMENTS

1. Construction Agreement with JM Fahey Construction Company

PREPARED BY

Melissa Prenger, Senior Project Manager

May 27, 2015

CONSTRUCTION CONTRACT

FOR

PROJECT

PROJECT PAVP2015- 2015 PAVING PROGRAM
PROJECT ROAV0003- 2015 CARS PROJECT

BETWEEN

THE CITY OF PRAIRIE VILLAGE, KANSAS

AND

J.M. FAHEY CONSTRUCTION COMPANY

THIS AGREEMENT, is made and entered into this ____ day of _____, 2015, by and between the City of Prairie Village, Kansas, hereinafter termed the "City", and J.M. Fahey Construction Company, hereinafter termed in this agreement, "Contractor", for the construction and completion of Project 2015 PAVING AND CARS PROGRAM, (the "Project") designated, described and required by the Project Manual and Bid Proposal, to wit:

WITNESSETH:

WHEREAS, the City has caused to be prepared, approved and adopted a Project Manual describing construction materials, labor, equipment and transportation necessary for, and in connection with, the construction of a public improvement, and has caused to be published an advertisement inviting sealed bid, in the manner and for the time required by law;

WHEREAS, the Contractor, in response to the advertisement, has submitted to the City in the manner and at the time specified, a sealed Bid Proposal in accordance with the Bid Documents;

WHEREAS, the City, in the manner prescribed by law, has publicly opened, examined and canvassed the Bid Proposals submitted, and as a result of such canvass has determined and declared the Contractor to be the lowest and best responsible bidder for the construction of said public improvements, and has duly awarded to the said Contractor a contract therefore upon the terms and conditions set forth in this Agreement for the sum or sums set forth herein;

WHEREAS, the Contractor has agreed to furnish at its own cost and expense all labor, tools, equipment, materials and transportation required to construct and complete in good, first class and workmanlike manner, the Work in accordance with the Contract Documents; and

WHEREAS, this Agreement, and other Contract Documents on file with the City Clerk of Prairie Village, Kansas, all of which Contract Documents form the Contract, and are as fully a part thereof as if repeated verbatim herein; all work to be to the entire satisfaction of the City or City's agents, and in accordance with the laws of the City, the State of Kansas and the United States of America;

NOW, THEREFORE, in consideration of the compensation to be paid the Contractor, and of the mutual agreements herein contained, the parties hereto have agreed and hereby agree, the City for itself and its successors, and the Contractor for itself, himself, herself or themselves, its, his/her, hers or their successors and assigns, or its, his/her, hers or their executors and administrators, as follows:

1. DEFINITIONS: Capitalized terms not defined herein shall have the meanings set forth in the General Conditions.

1.1 Following words are given these definitions:

ADVERSE WEATHER shall have the meaning set forth in Section 9.3 hereof.

APPLICATION FOR PAYMENT shall mean a written request for compensation for Work performed on forms approved by the City.

BID shall mean a complete and properly signed proposal to do the Work or designated portion thereof, for the price stipulated therein, submitted in accordance with the Bid Documents.

BID DOCUMENTS shall mean all documents related to submitting a Bid, including, but not limited to, the Advertisement for Bids, Instruction to Bidders, Bid Form, Bid Bond, and the proposed Project Manual, including any Addenda issued prior to receipt of Bids.

BID PROPOSAL shall mean the offer or proposal of the Bidder submitted on the prescribed form set forth the prices for the Work to be performed.

BIDDER shall mean any individual: partnership, corporation, association or other entity submitting a bid for the Work.

BONDS shall mean the bid, maintenance, performance, and statutory or labor and materials payment bonds, together with such other instruments of security as may be required by the Contract Documents.

CERTIFICATE FOR PAYMENT shall mean written certification from the Project Manager stating that to the best of the project manager's knowledge, information and belief, and on the basis of the Project Manager's on-site visits and inspections, the Work described in an Application for Payment has been completed in accordance with the terms and conditions of the Contract Documents and that the amount requested in the Application for Payment is due and payable.

CHANGE ORDER is a written order issued after the Agreement is executed by which the City and the Contractor agree to construct additional items of Work, to adjust the quantities of Work, to modify the Contract Time, or, in lump sum contracts, to change the character and scope of Work shown on the Project Manual.

CITY shall mean the City of Prairie Village, Kansas, acting through a duly appointed representative.

CONTRACT or CONTRACT DOCUMENTS shall consist of (but not necessarily be limited to) the Plans, the Specifications, all addenda issued prior to and all modifications issued after execution of this Agreement, (modifications consisting of written amendments to the Agreement signed by both parties, Change Orders, written orders for minor changes in the Work issued by the Project Manager) this Construction Contract between the City and Contractor (sometimes referred to herein as the "Agreement"), the accepted Bid Proposal, Contractor's Performance Bond, Contractor's Maintenance Bond, Statutory Bond, the Project Manual, the General Conditions, the Special Conditions and any other documents that have bearing the Work prescribed in the Project. It is understood that the Work shall be

carried out and the Project shall be constructed fully in accordance with the Contract Documents.

CONTRACT PRICE shall be the amount identified in the Construction Agreement between the City and the Contractor as the total amount due the Contractor for Total Completion of the Work as per the Contract Documents.

CONTRACT TIME shall be the number of calendar days stated in the Contract Documents for the completion of the Work or shall be a specific date as designated in the Construction Agreement.

CONTRACTOR shall mean the entity entering into the Contract for the performance of the Work covered by this Contract, together with his/her duly authorized agents or legal representatives.

DEFECTIVE WORK shall mean Work, which is unsatisfactorily, faulty or deficient, or not in conformity with the Project Manual.

FIELD ORDER shall mean a written order issued by the Project Manager that orders minor changes in the Work, but which does not involve a change in the Contract Price or Contract Time.

FINAL ACCEPTANCE shall mean the date when the City accepts in writing that the construction of the Work is complete in accordance with the Contract Documents such that the entire Work can be utilized for the purposes for which it is intended and Contractor is entitled to final payment.

GENERAL CONDITIONS shall mean the provisions in the document titled "General Conditions - General Construction Provisions" attached hereto and incorporation herein by reference.

INSPECTOR shall mean the engineering, technical inspector or inspectors duly authorized by the City to monitor the work and compliance tests under the direct supervision of the Project Manager.

NOTICE TO PROCEED shall mean the written notice by the City to the Contractor fixing the date on which the Contract Time is to commence and on which the Contractor shall start to perform its obligations under the Contract Documents. Without the prior express written consent of the City, the Contractor shall do no work until the date set forth in the Notice to Proceed.

PAY ESTIMATE NO. ____ or FINAL PAY ESTIMATE shall mean the form to be used by the Contractor in requesting progress and final payments, including supporting documentation required by the Contract Documents.

PLANS shall mean and include all Shop Drawings which may have been prepared by or for the City as included in the Project Manual or submitted by the Contractor to the City during the progress of the Work, all of which show the character and scope of the work to be performed.

PROJECT shall mean the Project identified in the first paragraph hereof.

PROJECT MANAGER shall mean the person appointed by the Public Works Director for this Contract.

PROJECT MANUAL shall contain the General Conditions, Special Conditions, Specifications, Shop Drawings and Plans for accomplishing the work.

PROJECT SEGMENTS shall have the meaning set forth in Section 7.1 hereof.

PUBLIC WORKS DIRECTOR shall mean the duly appointed Director of Public Works for the City of Prairie Village or designee.

SHOP DRAWINGS shall mean all drawings, diagrams, illustrations, schedules and other data which are specifically prepared by the Contractor, a Subcontractor, manufacturer, fabricator, supplier or distributor to illustrate some portion of the Work, and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams and other information prepared by a manufacturer, fabricator, supplier or distribution and submitted by the Contractor to illustrate material or equipment for some portion of the Work.

SPECIFICATIONS shall mean those portions of the Project Manual consisting of written technical descriptions of materials, equipment, construction methods, standards and workmanship as applied to the Work and certain administrative details applicable thereto. They may include, but not necessarily be limited to: design specifications, e.g. measurements, tolerances, materials, inspection requirements and other information relative to the work; performance specifications, e.g., performance characteristics required, if any; purchase description specifications, e.g. products or equipment required by manufacturer, trade name and/or type; provided, however, equivalent alternatives (including aesthetics, warranty and manufacturer reputation) may be substituted upon written request and written approval thereof by the City.

SPECIAL CONDITIONS shall mean the provisions in the document titled "Special Conditions" attached hereto and incorporation herein by reference.

SUBCONTRACTOR shall mean an individual, firm or corporation having a direct contract with the Contractor or with another subcontractor for the performance of a part of the Work.

SUBSTANTIAL COMPLETION shall be defined as being less than 100 percent of the Work required that will be completed by a specified date as agreed to in writing by both parties.

TOTAL COMPLETION shall mean all elements of a Project Segment or the Total Project Work is complete including all subsidiary items and "punch-list" items.

TOTAL PROJECT WORK shall have the meaning set forth in Section 7.1 hereof.

UNIT PRICE WORK shall mean Work quantities to be paid for based on unit prices. Each unit price shall be deemed to include the Contractor's overhead and profit for each separately identified item. It is understood and agreed that estimated quantities of times for unit price work are not guaranteed and are solely for the purpose of comparison of bids and determining an initial Contract Price. Determinations of actual quantities and classifications of unit price work shall be made by the City.

UNUSUALLY SEVERE WEATHER shall have the meaning set forth in Section 9.4 hereof.

WORK shall mean the work to be done to complete the construction required of the Contractor by the Contract Documents, and includes all construction, labor, materials, tools, equipment and transportation necessary to produce such construction in accordance with the Contract Documents.

WORK SCHEDULE shall have the meaning set forth in Section 7.2 hereof.

- 1.2 Whenever any word or expression defined herein, or pronoun used instead, occurs in these Contract Documents; it shall have and is mutually understood to have the meaning commonly given. Work described in words, which so applied have a well-known technical or trade meaning shall be held to refer to such, recognized standards.
- 1.3 Whenever in these Contract Documents the words "as ordered," "as directed", "as required", "as permitted", "as allowed", or words or phrases of like import are used, it is understood that the order, direction, requirement, permission or allowance of the Project Manager is intended.
- 1.4 Whenever any statement is made in the Contract Documents containing the expression "it is understood and agreed", or an expression of like import, such expression means the mutual understanding and agreement of the parties hereto.
- 1.5 The words "approved", "reasonable", "suitable", "acceptable", "properly", "satisfactorily", or words of like effect in import, unless otherwise particularly specified herein, shall mean approved, reasonable, suitable, acceptable, proper or satisfactory in the judgment of the Project Manager.
- 1.6 When a word, term or phrase is used in the Contract, it shall be interpreted or construed, first, as defined herein; second, if not defined, according to its generally accepted meaning in the construction industry; and, third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage.
- 1.7 All terms used herein shall have the meanings ascribed to them herein unless otherwise specified.

2. ENTIRE AGREEMENT:

The Contract Documents, together with the Contractor's Performance, Maintenance and Statutory bonds for the Work, constitute the entire and exclusive agreement between the City and the Contractor with reference to the Work. Specifically, but without limitation, this Contract supersedes all prior written or oral communications, representations and negotiations, if any, between the City and the Contractor. The Contract may not be amended or modified except by a modification as hereinabove defined. These Contract Documents do not, nor shall they be construed to, create any contractual relationship of any kind between the City and any Subcontractor or remote tier Subcontractor.

3. INTENT AND INTERPRETATION

- 3.1 The intent of the Contract is to require complete, correct and timely execution of the Work. Any Work that may be required, including construction, labor, materials, tools, equipment and transportation, implied or inferred by the Contract Documents, or any one or more of them, as necessary to produce the intended result, shall be provided by the Contractor for the Contract Price.

- 3.2 All time limits stated in the Contract Documents are of the essence of the Contract.
- 3.3 The Contract is intended to be an integral whole and shall be interpreted as internally consistent. What is required by any one Contract Document shall be considered as required by the Contract.
- 3.4 The specification herein of any act, failure, refusal, omission, event, occurrence or condition as constituting a material breach of this Contract shall not imply that any other, non-specified act, failure, refusal, omission, event, occurrence or condition shall be deemed not to constitute a material breach of this Contract.
- 3.5 The Contractor shall have a continuing duty to read, carefully study and compare each of the Contract Documents and shall give written notice to the Project Manager of any inconsistency, ambiguity, error or omission, which the Contractor may discover, or should have discovered, with respect to these documents before proceeding with the affected Work. The review, issuance, or the express or implied approval by the City or the Project Manager of the Contract Documents shall not relieve the Contractor of the continuing duties imposed hereby, nor shall any such review be evidence of the Contractor's compliance with this Contract.
- 3.6 The City has prepared or caused to have prepared the Project Manual. HOWEVER, THE CITY MAKES NO REPRESENTATION OR WARRANTY AS TO ACCURACY OR FITNESS FOR PARTICULAR PURPOSE INTENDED OR ANY OTHER WARRANTY OF ANY NATURE WHATSOEVER TO THE CONTRACTOR CONCERNING SUCH DOCUMENTS. By the execution hereof, the Contractor acknowledges and represents that it has received, reviewed and carefully examined such documents, has found them to be complete, accurate, adequate, consistent, coordinated and sufficient for construction, and that the Contractor has not, does not, and will not rely upon any representation or warranties by the City concerning such documents as no such representation or warranties have been made or are hereby made.
- 3.7 As between numbers and scaled measurements in the Project Manual, the numbers shall govern; as between larger scale and smaller scale drawings, (e.g. 10:1 is larger than 100:1) the larger scale shall govern.
- 3.8 The organization of the Project Manual into divisions, sections, paragraphs, articles (or other categories), shall not control the Contractor in dividing the Work or in establishing the extent or scope of the Work to be performed by Subcontractors.
- 3.9 The Contract Documents supersedes all previous agreements and understandings between the parties, and renders all previous agreements and understandings void relative to these Contract Documents.
- 3.10 Should anything be omitted from the Project Manual, which is necessary to a clear understanding of the Work, or should it appear various instructions are in conflict, the Contractor shall secure written instructions from the Project Manager before proceeding with the construction affected by such omissions or discrepancies.
- 3.11 It is understood and agreed that the Work shall be performed and completed according to the true spirit, meaning, and intent of the Contract Documents.

- 3.12 The Contractor's responsibility for construction covered by conflicting requirements, not provided for by addendum prior to the time of opening Bids for the Work represented thereby, shall not extend beyond the construction in conformity with the less expensive of the said conflicting requirements. Any increase in cost of Work required to be done in excess of the less expensive work of the conflicting requirements will be paid for as extra work as provided for herein.
- 3.13 The apparent silence of the Project Manual as to any detail, or the apparent omission from them of a detailed description concerning any point, shall be regarded as meaning that only the best general practice is to be used. All interpretations of the Project Manual shall be made on the basis above stated.
- 3.14 The conditions set forth herein are general in scope and are intended to contain requirements and conditions generally required in the Work, but may contain conditions or requirements which will not be required in the performance of the Work under contract and which therefore are not applicable thereto. Where any stipulation or requirement set forth herein applies to any such non-existing condition, and is not applicable to the Work under contract, such stipulation or requirement will have no meaning relative to the performance of said Work.
- 3.15 KSA 16-113 requires that non-resident contractors appoint an agent for the service of process in Kansas. The executed appointment must then be filed with the Secretary of State, Topeka, Kansas. Failure to comply with this requirement shall disqualify the Contractor for the awarding of this Contract.

4. CONTRACT COST

The City shall pay the Contractor for the performance of the Work embraced in this Contract, and the Contractor will accept in full compensation therefore the sum (subject to adjustment as provided by the Contract) of Two Million Three Hundred Thirty Five Thousand DOLLARS (\$ 2,335,000.00) for all Work covered by and included in the Contract; payment thereof to be made in cash or its equivalent and in a manner provided in the Contract Documents.

5. WORK SUPERINTENDENT

- 5.1 The Contractor shall provide and maintain, continually on the site of Work during its progress, an adequate and competent superintendent of all operations for and in connection with the Work being performed under this Contract, either personally or by a duly authorized superintendent or other representative. This representative shall be designated in writing at the preconstruction meeting.
- 5.2 The superintendent, or other representative of the Contractor on the Work, who has charge thereof, shall be fully authorized to act for the Contractor, and to receive whatever orders as may be given for the proper prosecution of the Work, or notices in connection therewith. Use of Subcontractors on portions of the Work shall not relieve the Contractor of the obligation to have a competent superintendent on the Work at all times.
- 5.3 The City shall have the right to approve the person who will be the Superintendent based on skill, knowledge, experience and work performance. The City shall also have the right to request replacement of any superintendent.

- 5.4 The duly authorized representative shall be official liaison between the City and the Contractor regarding the signing of pay estimates, change orders, workday reports and other forms necessary for communication and Work status inquiries. Upon Work commencement, the City shall be notified, in writing, within five (5) working days of any changes in the Contractor's representative. In the absence of the Contractor or representative, suitable communication equipment, which will assure receipt of messages within one (1) hour during the course of the workday, will also be required.
- 5.5 The Contractor will be required to contact the Project Manager daily to advise whether and/or where the Contractor and/or the Subcontractor's crews will be working that day, in order that the Project Manager's representative is able to monitor properly the Work.
6. PROJECT MANAGER
- 6.1 It is mutually agreed by and between the parties to this Agreement that the Project Manager shall act as the representative of the City and shall observe and inspect, as required, the Work included herein.
- 6.2 In order to prevent delays and disputes and to discourage litigation, it is further agreed by and between the parties to this Agreement that the Project Manager shall, in good faith and to the best of its ability, determine the amount and quantities of the several kinds of work which are to be paid for under this Contract; that the Project Manager shall determine, where applicable, questions in relation to said Work and the construction thereof; that Project Manager shall, where applicable decide questions which may arise relative to the execution of this Contract on the part of said Contractor; that the Project Manager's decisions and findings shall be the conditions precedent to the rights of the parties hereto, to any action on the Contract, and to any rights of the Contractor to receive any money under this Contract provided, however, that should the Project Manager render any decision or give any direction which, in the opinion of either party hereto, is not in accordance with the meaning and intent of this Contract, either party may file with the Project Manager and with the other party, within thirty (30) days a written objection to the decision or direction so rendered and, by such action, may reserve the right to submit the question to determination in the future.
- 6.3 The Project Manager, unless otherwise directed or agreed to by the City in writing, will perform those duties and discharge those responsibilities allocated to the Project Manager as set forth in this Contract. The Project Manager shall be the City's representative from the effective date of this Contract until final payment has been made. The Project Manager shall be authorized to act on behalf of the City only to the extent provided in this Contract. The City and Project Manager may, from time to time, designate Inspectors to perform such functions.
- 6.4 The City and the Contractor shall communicate with each other in the first instance through the Project Manager.
- 6.5 The Project Manager shall be the initial interpreter of the requirements of the Project Manual and the judge of the performance by the Contractor. The Project Manager shall render written graphic interpretations necessary for the proper execution or progress of the Work with reasonable promptness on request of the Contractor.
- 6.6 The Project Manager will review the Contractor's Applications for Payment and will certify to the City for payment to the Contractor those amounts then due the Contractor as provided

in this Contract. The Project Manager's recommendation of any payment requested in an Application for Payment will constitute a representation by Project Manager to City, based on Project Manager's on-site observations of the Work in progress as an experienced and qualified design professional and on Project Manager's review of the Application for Payment and the accompanying data and schedules that the Work has progressed to the point indicated; that, to the best of the Project Manager's knowledge, information and belief, the quality of the Work is in accordance with the Project Manual (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Project Manual, to a final determination of quantities and classifications for Unit Price Work if such is called for herein, and to any other qualifications stated in the recommendation); and that Contractor is entitled to payment of the amount recommended. However, by recommending any such payment Project Manager will not thereby be deemed to have represented that exhaustive or continuous on-site inspections have been made to check the quality or the quantity of the Work beyond the responsibilities specifically assigned to Project Manager in the Project Manual or that there may not be other matters or issues between the parties that might entitle Contractor to be paid additionally by the City or the City to withhold payment to Contractor.

- 6.7 The Project Manager may refuse to recommend the whole or any part of any payment if, in Project Manager's opinion, it would be incorrect to make such representations to City. Project Manager may also refuse to recommend any such payment, or, because of subsequently discovered evidence or the results of subsequent inspections or tests, nullify any such payment previously recommended, to such extent as may be necessary in the Project Manager's opinion to protect the City from loss because:
- The Work is defective, or completed Work has been damaged requiring correction or replacement,
 - The Contract Price has been reduced by Written Amendment or Change Order,
 - The City has been required to correct Defective Work or complete Work in accordance with the Project Manual.
- 6.8 The City may refuse to make payment of the full amount recommended by the Project Manager because claims have been made against City on account of Contractor's performance or furnishing of the Work or liens have been filed in connection with the Work or there are other items entitling City to a set-off against the amount recommended, but City must give Contractor written notice (with a copy to Project Manager) stating the reasons for such action.
- 6.9 The Project Manager will have the authority to reject Work which is defective or does not conform to the requirements of this Contract. If the Project Manager deems it necessary or advisable, the Project Manager shall have authority to require additional inspection or testing of the Work for compliance with Contract requirements.
- 6.10 The Project Manager will review, or take other appropriate action as necessary, concerning the Contractor's submittals, including Shop Drawings, Product Data and Samples. Such review, or other action, shall be for the sole purpose of determining general conformance with the design concept and information given through the Project Manual.

- 6.11 The Project Manager shall have authority to order minor changes in the Work not involving a change in the Contract Price or in Contract Time and consistent with the intent of the Contract. Such changes shall be effected by verbal direction and then recorded on a Field Order and shall be binding upon the Contractor. The Contractor shall carry out such Field Orders promptly.
- 6.12 The Project Manager, upon written request from the Contractor shall conduct observations to determine the dates of Substantial Completion, Total Completion and the date of Final Acceptance. The Project Manager will receive and forward to the City for the City's review and records, written warranties and related documents from the Contractor required by this Contract and will issue a final Certificate for Payment to the City upon compliance with the requirements of this Contract.
- 6.13 The Project Manager's decisions in matters relating to aesthetic effect shall be final if consistent with the intent of this Contract.
- 6.14 The Project Manager will NOT be responsible for Contractor's means, methods, techniques, sequences, or procedures or construction, or the safety precautions and programs incident thereto and will not be responsible for Contractor's failure to perform the Work in accordance with the Project Manual. The Project Manager will not be responsible for the acts or omissions of the Contractor or any Subcontractor or any of its or their agents or employees, or any other person at the site or otherwise performing any of the Work except as may otherwise be provided.
- 6.15 Any plan or method of work suggested by the Project Manager, or other representatives of the City, to the Contractor, but not specified or required, if adopted or followed by the Contractor in whole or in part, shall be used at the risk and responsibility of the Contractor, and the Project Manager and the City will assume no responsibility therefore.
- 6.16 It is agreed by the Contractor that the City shall be and is hereby authorized to appoint or employ, either directly or through the Project Manager, such City representatives or observers as the City may deem proper, to observe the materials furnished and the work performed under the Project Manual, and to see that the said materials are furnished, and the said work performed, in accordance with the Project Manual therefore. The Contractor shall furnish all reasonable aid and assistance required by the Project Manager, or by the resident representatives for proper observation and examination of the Work and all parts thereof.
- 6.17 The Contractor shall comply with any interpretation of the Project Manual by the Project Manager, or any resident representative or observer so appointed, when the same are consistent with the obligations of the Project Manual. However, should the Contractor object to any interpretation given by any subordinate Project Manager, resident representative or observer, the Contractor may appeal in writing to the City Director of Public Works for a decision.
- 6.18 Resident representatives, observers, and other properly authorized representatives of the City or Project Manager shall be free at all times to perform their duties, and intimidation or attempted intimidation of any one of them by the Contractor or by any of its employees, shall be sufficient reason, if the City so decides, to annul the Contract.
- 6.19 Such observation shall not relieve the Contractor from any obligation to perform said Work strictly in accordance with the Project Manual.

7. WORK SCHEDULE:
- 7.1 The Work is comprised of one large project (sometimes referred to as "Total Project Work") and, in some cases, is partitioned into smaller subprojects referred to in this Agreement as "Project Segments." A Contract Time shall be stated in the Contract Documents for both the Total Project Work and, when applicable, the Project Segments.
- 7.2 At the time of execution of this Contract, the Contractor shall furnish the Project Manager with a schedule ("Work Schedule") setting forth in detail (in the critical path method) the sequences proposed to be followed, and giving the dates on which it is expected that Project Segments will be started and completed within the Contract Time. The Work Schedule is subject to approval by the City.
- 7.3 Monthly Work Schedule reports shall accompany the Contractor's pay request for Work completed. Where the Contractor is shown to be behind schedule, it shall provide an accompanying written summary, cause, and explanation of planned remedial action. Payments or portions of payments may be withheld by the City upon failure to maintain scheduled progress of the Work as shown on the approved Work Schedule.
- 7.4 At a minimum the Contractor shall update and submit the Work Schedule for review weekly, unless otherwise agreed upon by the City.
- 7.5 The Contractor, within ten (10) calendar days after being instructed to do so in a written notice from the City, shall commence the Work to be done under this Contract.
- 7.6 If at any time, in the opinion of the Project Manager or City, proper progress is not being maintained; changes shall be proposed in the Work Schedule and resubmitted for consideration and approval.
- 7.7 If the Contractor has not completed Project Segments and is within a non-performance penalty period, it shall not be allowed to undertake a new Project Segment until the Project Segment in dispute is completed, unless expressly permitted by the City.
- 7.8 The operation of any tool, equipment, vehicle, instrument, or other noise-producing device is prohibited to start before or continue after the hours of 7 AM and 10 PM, Monday through Friday (except Fridays which shall be until Midnight) and 8 AM and midnight on Weekends (except Sunday which shall be 10 PM). Violation of this requirement is Prima Facia Violation of City Municipal Code 11-202.
- 7.9 No work shall be undertaken on Saturdays, Sundays and Holidays (Christmas, New Years, Martin Luther King's Birthday, President's Day, Memorial Day, Independence Day, Labor Day and Thanksgiving) without the express written approval of the City Project Manager. If it is necessary to perform proper care, maintenance, or protection of work already completed or of equipment used, or in the case of an emergency verbal permission may be obtained through the Project Manager.
- 7.10 Night work may be established by the Contractor, as a regular procedure, with the written permission of the City; such permission, however, may be revoked at any time by the City if the Contractor fails to maintain adequate equipment for the proper prosecution and control of all operations performed as part of the Work.

- 7.11 The Contractor shall provide 24 hours notice prior to commencing any work to the City Project Manager. The Contractor shall communicate immediately any changes in the Work Schedule to the Project Manager for approval by the City.
8. DELAYS AND EXTENSIONS OF TIME
- 8.1 In executing the Contract, the Contractor expressly covenants and agrees that, in undertaking the completion of the Work within the Contract Time, it has taken into consideration and made allowances for all of the ordinary delays and hindrances incident to such Work, whether growing out of delays in securing materials, workers, weather conditions or otherwise. No charge shall be made by the Contractor for hindrances or delays from any cause during the progress of the Work, or any portion thereof, included in this Contract.
- 8.2 Should the Contractor, however, be delayed in the prosecution and completion of the Work by reason of delayed shipment orders, or by any changes, additions, or omissions therein ordered in writing by the City, or by strikes or the abandonment of the Work by the persons engaged thereon through no fault of the Contractor, or by any act taken by the U.S. Government such as the commandeering of labor or materials, embargoes, etc., which would affect the fabrication or delivery of materials and/or equipment to the Work; or by neglect, delay or default of any other contractor of the City, or delays caused by court proceedings; the Contractor shall have no claims for damages or additional compensation or costs for any such cause or delay; but it shall in such cases be entitled to such extension of the time specified for the completion of the Work as the City and the Project Manager shall award in writing on account of such delays, provided, however, that claim for such extension of time is made by the Contractor to the City and the Project Manager in writing within one (1) week from the time when any such alleged cause for delay shall occur.
9. ADVERSE WEATHER:
- 9.1 Extensions of time for Adverse Weather shall be granted only under the conditions as hereinafter provided.
- 9.2 For conditions of weather or conditions at the site, so unusual as not to be reasonably anticipated, as determined by the Project Manager, an average or usual number of inclement days when work cannot proceed are to be anticipated during the construction period and are not to be considered as warranting extension of time.
- 9.3 "Adverse Weather" is defined as atmospheric conditions or the impact thereof at a definite time and place, which are unfavorable to construction activities such that they prevent work on critical activities for 50 percent or more of the Contractor's scheduled workday.
- 9.4 "Unusually Severe Weather" is defined as weather, which is more severe than the adverse weather anticipated for the season, location, or activity involved.
- 9.5 Time Extensions for Unusually Severe Weather: In order for any request for time extension due to Unusually Severe Weather to be valid, the Contractor must document all of the following conditions:
- The weather experienced at the Work site during the Contract period is more severe than the Adverse Weather anticipated for the Work location during any given month.

- The Unusually Severe Weather actually caused a delay to the completion of the Work.
- The delay must be beyond the control and without fault or negligence by the Contractor.

9.6 The following schedule of monthly-anticipated Adverse Weather delays will constitute the baseline for monthly weather time evaluations. The Contractor's Work Schedule must reflect these anticipated adverse weather delays in all weather affected activities:

MONTHLY ANTICIPATED ADVERSE WEATHER DELAY
WORK DAYS BASED ON FIVE (5) DAY WORK WEEK

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10	8	7	6	7	7	5	5	5	4	5	9

- 9.7 Upon receipt of the Notice to Proceed, and continuing throughout the Contract, the Contractor shall record on its daily construction report, the occurrence of Adverse Weather and resultant impact to the Work Schedule.
- 9.8 The number of actual Adverse Weather delay days shall include days affected by actual Adverse Weather (even if Adverse Weather occurred in the previous month), and shall be calculated chronologically from the first to the last day of each month, and be recorded as full workdays.
- 9.9 If the number of actual Adverse Weather delay days in a given month exceeds the number of days anticipated above, the difference shall be multiplied by 7/5 to convert any qualifying workday delays to calendar days. The resulting number of qualifying lost days shall be added to the Contract Time.
- 9.10 The determination that Unusually Severe Weather occurred does not automatically mean an extension of time will be granted. The Contractor must substantiate the Unusually Severe Weather delayed work activities on the critical path of the Work Schedule.
- 9.11 Full consideration for equivalent fair weather workdays shall be given. If the number of actual Adverse Weather delays in a given month is less than the number of days anticipated as indicated above, the difference shall be multiplied by 7/5 to convert any workday increases to calendar days. The resulting number of qualifying extra days will be accumulated and subtracted from any future month's days lost due to unusually severe weather.
- 9.12 The net cumulative total of extra days/lost days shall not result in a reduction of Contract Time and the date of Substantial Completion shall not be changed because of unusually favorable weather.
- 9.13 In converting workdays to calendar days, fractions 0.5 and greater shall be rounded up to the next whole number. Fractions less than 0.5 shall be dropped.
- 9.14 The Contractor shall summarize and report all actual Adverse Weather delay days for each month to the Project Manager by the tenth (10th) day of the following month. A narrative indicating the impact of Adverse Weather conditions on the Work Schedule shall be included.

- 9.15 Any claim for extension of time due to Unusually Severe Weather shall be submitted to the Project Manager within 7 days of the last day of the commencement of the event giving rise to the delay occurred. Resolution of any claim shall follow the procedures described above.
- 9.16 The Contractor shall include and indicate the monthly-anticipated Adverse Weather days, listed above, in the Work Schedule. (Reference Section 7.1 for Work Schedule requirements)
- 9.17 The Contractor shall indicate the approved Adverse Weather days (whether less or more than the anticipated days) in its Work Schedule updates.
10. LIQUIDATED DAMAGES
- 10.1 Contractor agrees that time is of the essence and any term pertaining to Contractor timely performing so as to achieve Total Completion within the Contract Time is a material provision of this Contract. Further, the parties acknowledge that City's damages in the event of delay are difficult to ascertain and consequently agree that, in the event and to the extent that actual date of Total Completion is delayed beyond the Contract Time for the Total Project Work or Project Segments attributable solely or concurrently to (i) an act or omission of Contractor or any of its subcontractors or suppliers, or (ii) in whole or in part, to any other event or condition within the Contractor's reasonable control (and not for reasons solely attributable to City), the Contractor shall be assessed a liquidated damage, and not as a penalty, in the amount set forth in the Special Conditions for each calendar day beyond the applicable Contract Time. Such amount shall be deducted from any amounts due Contractor under this Agreement.
- 10.2 Further, the Contractor agrees that, in the event Contractor does not carry out such Work at such rates of progress as required by the Work Schedule approved by the City, the City may, at its option and without Contractor receiving any additional compensation therefore, require Contractor to increase the number of qualified supervisory personnel and/or workers and the amount of equipment employed in the performance of the Work to such extent as City may deem necessary or desirable. In addition, City, at its option, may supplement Contractor's manpower by entering into contracts with other contractors to perform the Work. All costs that are incurred by City, in this regard, including reasonable attorney's fees, shall be deducted from any sums due Contractor or City may make demand on Contractor for reimbursement of such costs.
11. PAYMENT PROCEDURE
- 11.1 Based upon Applications for Payment submitted to the Project Manager by the Contractor and Certificates for Payment issued by the Project Manager, the City shall make progress payments on account of the contract sum to the Contractor as provided below and elsewhere in the Contract Documents.
- 11.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month or on a mutually agreed date by City and Contractor.
- 11.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the City no later than the time of payment. The Contractor further warrants that upon submittal on the first day of each month of an Application for Payment, all Work for which payments have been received from the City shall be free and clear of liens, claims,

- security interest or other encumbrances in favor of the Contractor or any other person or entity whatsoever.
- 11.4 Each application for payment must be submitted with Contractor's waiver for period of construction covered by application. Each Application for Payment will be submitted with executed waivers from the subcontractors or sub-contractors and suppliers for the previous period of construction covered by the previous application. The final payment application must be submitted together with or preceded by final or complete waivers from every entity involved with performance of the Work covered by the payment request.
- 11.5 The Contractor will submit waivers on forms, and executed in a manner, acceptable to City.
- 11.6 The Contractor shall promptly pay each Subcontractor out of the amount paid to the Contractor because of such Subcontractor's Work the amount to which such Subcontractor is entitled. In the event the City becomes informed that the Contractor has not paid a Subcontractor as herein provided, the City shall have the right, but not the duty, to issue future checks in payment to the Contractor of amounts otherwise due hereunder naming the Contractor and such Subcontractor as joint payees. Such joint check procedure, if employed by the City, shall be deemed payment to the Contractor but shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit the City to repeat the procedure in the future.
- 11.7 The Project Manager will, upon receipt of a written Application for Payment from the Contractor, review the amount of Work performed during the preceding period and the value thereof at the unit prices contracted. From the amounts so ascertained, there shall be deducted ten percent (10%) to be retained until after final completion of the entire Work to the satisfaction of the City. The Project Manager will submit an estimate each month to the City for payment to the Contractor, except that no amount less than \$500.00 will be submitted unless the total amount of the Contract remaining unpaid is less than \$500.00.
- 11.8 Deductions will be made from progress payments if the Contract includes a provision for a lump sum or a percentage deduction. Lump sum deductions will be that portion of the stated lump sum computed as the ratio that the amount earned bears to the Contract Price. Percentage deductions will be computed at the stated percentage of the amount earned.
- 11.9 No progress payment, nor any use or occupancy of the Work by the City, shall be interpreted to constitute an acceptance of any Work not in strict accordance with this Contract.
- 11.10 The City may decline to make payment, may withhold funds, and, if necessary, may demand the return of some or all of the amounts previously paid to the Contractor, to protect the City from loss because of:
- Defective Work not remedied by the Contractor;
 - Claims of third parties against the City or the City's property;
 - Failure by the Contractor to pay Subcontractors or others in a prompt and proper fashion;
 - Evidence that the balance of the Work cannot be completed in accordance with the Contract for the unpaid balance of the Contract Price;

- Evidence that the Work will not be completed in the time required for substantial or final completion;
 - Persistent failure to carry out the Work in accordance with the Contract;
 - Damage to the City or a third party to whom the City is, or may be, liable;
 - Evidence that the Work is not progressing according to agreed upon schedule by both parties.
- 11.11 In the event that the City makes written demand upon the Contractor for amounts previously paid by the City as contemplated in this subparagraph, the Contractor shall promptly comply with such demand and refund such monies to the City.
- 11.12 Neither the observation by the City or any of the City's officials, employees, or agents, nor any order by the City for payment of money, nor any payment for, or acceptance of, the whole or any part of the Work by the City or Project Manager, nor any extension of time, nor any possession taken by the City or its employees, shall operate as a waiver of any provision of this Contract, or of any power herein reserved to the City, or any right to damages herein provided, nor shall any waiver of any breach in this Contract be held to be a waiver of any other or subsequent breach.
12. COMPLETION AND FINAL PAYMENT
- 12.1 Upon Total Completion, when the Contractor is ready for a final inspection of the Total Project Work, it shall notify the City and the Project Manager thereof in writing. Thereupon, the Project Manager will make final inspection of the Work and, if the Work is complete in accordance with this Contract, the Project Manager will promptly issue a final Certificate for Payment certifying to the City that the Work is complete and the Contractor is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Contract. If the Project Manager is unable to issue its final Certificate for Payment and is required to repeat its final inspection of the Work, the Contractor shall bear the cost of such repeat final inspection(s), which cost may be deducted by the City from the Contractor's full payment.
- 12.2 The Contractor shall not be entitled to any payment unless and until it submits to the Project Manager its affidavit that all payrolls, invoices for materials and equipment, and other liabilities connected with the Work for which the City, or the City's property might be responsible, have been fully paid or otherwise satisfied; releases and waivers of lien from all Subcontractors and Suppliers of the Contractor and of any and all other parties required by the City; and consent of Surety, if any, to final payment. If any third party fails or refuses to provide a release of claim or waiver of lien as required by the City, the Contractor shall furnish a bond satisfactory to the City to discharge any such lien or indemnify the City from liability.
- 12.3 The City shall make final payment of all sums due the Contractor within thirty days of the Project Manager's execution of a final Certificate for Payment.
- 12.4 Acceptance of final payment shall constitute a waiver of all claims against the City by the Contractor except for those claims previously made in writing against the City by the Contractor, pending at the time of final payment, and identified in writing by the Contractor as unsettled at the time of its request for final inspection.

13. CLAIMS BY THE CONTRACTOR

- 13.1 All Contractor claims shall be initiated by written notice and claim to the Project Manager. Such written notice and claim must be furnished within seven calendar days after occurrence of the event, or the first appearance of the condition, giving rise to the claim.
- 13.2 The Contractor shall diligently proceed with performance of this Contract whether or not there be such a claim pending and the City shall continue to make payments to the Contractor in accordance with this Contract. The resolution of any claim shall be reflected by a Change Order executed by the City, the Project Manager and the Contractor.
- 13.3 Should concealed and unknown conditions which could not, with reasonable diligence, have been discovered in the performance of the Work (a) below the surface of the ground or (b) in an existing structure differ materially with the conditions indicated by this Contract, or should unknown conditions of an unusual nature differing materially from those ordinarily encountered in the area and generally recognized as inherent in Work of the character provided by this Contract, be encountered, the Contract Price shall be equitably adjusted by the Change Order upon the written notice and claim by either party made within seven (7) days after the first observance of the condition. As a condition precedent to the City having any liability to the Contractor for concealed or unknown conditions, the Contractor must give the City written notice of, and an opportunity to observe, the condition prior to disturbing it. The failure by the Contractor to make the written notice and claim as provided in this Subparagraph shall constitute a waiver by the Contractor of any claim arising out of or relating to such concealed or unknown condition.
- 13.4 If the Contractor wishes to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the City therefore, the Contractor shall give the City written notice of such claim within seven (7) days after the occurrence of the event, or the first appearance of the condition, giving rise to such claim. Such notice shall be given by the Contractor before proceeding to execute any additional or changed Work. The failure by the Contractor to give such notice and to give such notice prior to executing the Work shall constitute a waiver of any claim for additional compensation.
- 13.5 The City reserves the right to increase or decrease quantities, and alter the details of construction including grade and alignment as the Project Manager may consider necessary or desirable, by approved Change Order. Such modifications shall not invalidate the Contract nor release the surety. Unless such alterations and increases or decreases change the total cost of the Work, based on the originally estimated quantities and the unit prices bid, by more than 25 percent, or change the total cost of any major item, based on the originally estimated quantities and the unit price bid, by more than 25 percent, the Contractor shall perform the work altered, increased or decreased, at a negotiated price or prices. (A major item shall mean any bid item, the total cost of which exceeds 12-1/2 percent of the total Contract Price based on the proposed quantity and the contract unit price).
- 13.6 When the alterations cause an increase or decrease in excess of the 25 percent indicated above, either the Contractor or the Project Manager may request an adjustment of the unit price to be paid for the item or items.

- 13.7 If a mutually agreeable adjustment cannot be obtained, the City reserves the right to terminate the Contract as it applies to the items in question and make such arrangements as may be deemed necessary to complete the Work.
- 13.8 In connection with any claim by the Contractor against the City for compensation in excess of the Contract Price, any liability of the City for the Contractor's costs shall be strictly limited to direct costs incurred by the Contractor and shall not include standby costs, indirect costs or consequential damages of the Contractor. The City shall not be liable to the Contractor for claims of third parties.
- 13.9 If the Contractor is delayed in progressing any task which at the time of the delay is then critical or which during the delay becomes critical, as the sole result of any act or neglect to act by the City or someone acting in the City's behalf, or by changes ordered in the Work, unusual delay in transportation, unusually adverse weather conditions not reasonably anticipated, fire or any causes beyond the Contractor's control, then the date for achieving Final Acceptance of the Work shall be extended upon the written notice and claim of the Contractor to the City, for such reasonable time as the City may determine. Any notice and claim for an extension of time by the Contractor shall be made not more than seven calendar days after the occurrence of the event or the first appearance of the condition-giving rise to the claim and shall set forth in detail the Contractor's basis for requiring additional time in which to complete the Work. In the event the delay to the Contractor is a continuing one, only one notice and claim for additional time shall be necessary. If the Contractor fails to make such claim as required in this subparagraph, any claim for an extension of time shall be waived.
- 13.10 The Contractor shall delay or suspend the progress of the work or any part thereof, whenever so required by written order of the City, and for such periods of time as required; provided, that in the event of such delay or delays or of such suspension or suspensions of the progress of the work, or any part thereof, the time for completion of work so suspended or of work so delayed by such suspension or suspensions shall be extended for a period equivalent to the time lost by reason of such suspension or suspensions; but such order of the City or Project Manager shall not otherwise modify or invalidate in any way, any of the provisions of this Contract. In the event that the work shall be stopped by written order of the City, any expense, which, in the sole opinion and judgment of the City, is caused by the City, shall be paid by the City to the Contractor.
- 13.11 In executing the Contract Documents, the Contractor expressly covenants and agrees that, in undertaking to complete the Work within the time herein fixed, it has taken into consideration and made allowances for all hindrances and delays incident to such work, whether growing out of delays in securing materials or workers or otherwise. No charge shall be made by the Contractor for hindrances or delays from any cause during the progress of the work, or any portion thereof, included in this Contract, except as provided herein.
- 13.12 In addition to the Project Manual particular to Mobilization found elsewhere in this document, additional mobilization shall not be compensable for work outside of the designated areas for work deemed essential by the City. A quantity of work equal to as much as 10% of the total Contract may be required to be performed beyond the boundaries of the designated work areas

14. CHANGES IN THE WORK
- 14.1 Changes in the Work within the general scope of this Contract, consisting of additions, deletions, revisions, or any combination thereof, may be ordered without invalidating this Contract, by Change Order or by Field Order.
- 14.2 The Project Manager shall have authority to order minor changes in the Work not involving a change in the Contract Price or in Contract Time and consistent with the intent of the Contract. Such changes shall be effected by verbal direction and then recorded on a Field Order and shall be binding upon the Contractor. The Contractor shall carry out such Field Orders promptly.
- 14.3 Any change in the Contract Price resulting from a Change Order shall be by mutual agreement between the City and the Contractor as evidenced by the change in the Contract Price being set forth in the Change Order, and, together with any conditions or requirements related thereto, being initialed by both parties.
- 14.4 If no mutual agreement occurs between the City and the Contractor relative to a change in the Work, the Contractor shall proceed with the Work that is the subject of the Change Order, and the change in the Contract Price, if any, shall then be determined by the Project Manager on the basis of the reasonable expenditures or savings of those performing, deleting or revising the Work attributable to the change, including, in the case of an increase or decrease in the Contract Price, a reasonable allowance for direct job site overhead and profit. In such case, the Contractor shall present, in such form and with such content to the City, as the Project Manager requires, an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order. Reasonable expenditures or savings shall be limited to the following: reasonable costs of materials, supplies or equipment, including delivery costs, reasonable costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and worker's compensation insurance, reasonable rental costs of machinery and equipment exclusive of hand tools, whether rented from the Contractor or others, permit fees, and sales, use or other taxes related to the Work, and reasonable cost of direct supervision and job site field office overhead directly attributable to the change. In no event shall any standby time or any expenditure or savings associated with the Contractor's home office or other non-job site overhead expense be included in any change in the Contract Price. Further, in no event shall the Contractor's overhead expense exceed ten (10%) percent of the reasonable expenditures. Pending final determination of reasonable expenditures or savings to the City, payments on account shall be made to the Contractor on the Project Manager's Certificate for Payment.
- 14.5 If unit prices are provided in the Contract, and if the quantities contemplated are so changed in a proposed Change Order that the application of such unit prices to the quantities of Work proposed would cause substantial inequity to the City or to the Contractor, the applicable unit prices shall be equitably adjusted.
- 14.6 The execution of a Change Order by the Contractor shall constitute conclusive evidence of the Contractor's agreement to the ordered changes in the Work, this Contract as thus amended, the Contract Price and the Contract Time. The Contractor, by executing the Change Order, waives and forever releases any claim including impact against the City for additional time or compensation for matters relating to or arising out of or resulting from the Work included within or affected by the executed Change Order.

15. INSURANCE AND BONDS.

15.1 The Contractor shall secure and maintain, throughout the duration of the agreement, insurance (on an occurrence basis unless otherwise agreed to) of such types and in at least such amounts as required herein. Contractor shall provide certificates of insurance and renewals thereof on forms acceptable to the City. The City shall be notified by receipt of written notice from the insurer or the Contractor at least thirty (30) days prior to material modification or cancellation of any policy listed on the Certificate.

15.2 The Contractor, upon receipt of notice of any claim in connection with this Agreement, shall promptly notify the City, providing full details thereof, including an estimate of the amount of loss or liability. The Contractor shall monitor and promptly notify the City of any reduction in limits of protection afforded under any policy listed in the Certificate (or otherwise required by the Contract Documents) if the Contractor's limits of protection shall have been impaired or reduced to such extent that the limits fall below the minimum amounts required herein. The Contractor shall promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the City.

15.3 Minimum Requirements Commercial General Liability Policy Limits -

General Aggregate:	\$2,000,000
Products / Completed Operations Aggregate:	\$2,000,000
Personal & Advertising Injury:	\$1,000,000
Each Occurrence:	\$1,000,000

Policy MUST include the following conditions:

- A. Pollution Liability (Applicable only to contracts involving pollutants such as asbestos & lead abatement, sludge or other waste abatement, etc.)
- B. NAME CITY OF PRAIRIE VILLAGE AS "ADDITIONAL INSURED"

15.4 Automobile Liability Policy shall protect the Contractor against claims for bodily injury and/or property damage arising from the ownership or use of any owned, hired and/or non-owned vehicle.

Limits (Same as Commercial General Liability) -

Combined Single Limits, Bodily Injury and Property Damage - Each Accident:

Policy MUST include the following condition:

NAME CITY OF PRAIRIE VILLAGE AS "ADDITIONAL INSURED"

15.5 Umbrella Liability. The Umbrella / Excess Liability must be at least as broad as the underlying general liability and automobile liability policies.

Limits -

Each Occurrence	\$1,000,000
General Aggregate	\$1,000,000

15.6 Workers' Compensation. This insurance shall protect the Contractor against all claims under applicable state workers' compensation laws. The Contractor shall also be protected

against claims for injury, disease or death of employees which, for any reason, may not fall within the provisions of workers' compensation law. The policy limits shall not be less than the following:

Workers' Compensation:	Statutory
Employer's Liability:	
Bodily Injury by Accident	\$100,000 each accident
Bodily Injury by Disease	\$500,000 policy limit
Bodily Injury by Disease	\$100,000 each employee

- 15.7 The City will only accept coverage from an insurance carrier who offers proof that it:
- Is authorized to do business in the State of Kansas;
 - Carries a Best's policy holder rating of A- or better; and
 - Carries at least a Class VIII financial rating, or
 - Is a company mutually agreed upon by the City and Contractor.
- 15.8 Subcontractor's Insurance. If a part of the Agreement is to be sublet, the Contractor shall either:
- A. Cover all subcontractor's in its insurance policies, or
 - B. Require each subcontractor not so covered to secure insurance which will protect subcontractor against all applicable hazards or risks of loss as and in the minimum amounts designated.
- Whichever option is chosen, Contractor shall indemnify and hold harmless the City as to any and all damages, claims or losses, including attorney's fees, arising out of the acts or omissions of its Subcontractors.
- 15.9 Prior to commencing any work, Contractor shall provide City with certificates evidencing that (1) all Contractor's insurance obligations required by the contract documents are in full force and in effect and will remain in effect until Contractor has completed all of the work and has received final payment from City and (2) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to City. Contractor's property insurance shall not lapse or be canceled if City occupies a portion of the work. Contractor shall provide City with the necessary endorsements from the insurance company prior to occupying a portion of the work.
- 15.10 Waiver of Subrogation. All insurance coverage required herein shall contain a waiver of subrogation in favor of the City. Contractor's insurance policies shall be endorsed to indicate that Contractor's insurance coverage is primary and any other insurance maintained by City is non-contributing as respects the work of Contractor.
- 15.11 Additional Insurance. Excess Liability coverage or additional insurance covering special hazards may be required on certain projects. Such additional insurance requirements shall be as specified in Special Conditions.
- 15.12 Bonds and Other Performance Security. Contractor shall provide a Performance Bond, Maintenance Bond and a Statutory Bond in the amount of one hundred percent (100%) of the Contract Price to cover the entire scope of Work and any other specific performance

security that may be indicated in this Contract. With each bond there shall be filed with the City one copy of "Power of Attorney" certified to include the date of the bonds.

16. INDEMNITY

16.1 For purposes of indemnification requirements as set forth throughout the Contract, the following terms shall have the meaning set forth below:

"The Contractor" means and includes Contractor, all of his/her affiliates and subsidiaries, his/her Subcontractors and material men and their respective servants, agents and employees; and "Loss" means any and all loss, damage, liability or expense, of any nature whatsoever, whether incurred as a judgment, settlement, penalty, fine or otherwise (including attorney's fees and the cost of defense), in connection with any action, proceeding, demand or claim, whether real or spurious, for injury, including death, to any person or persons or damages to or loss of, or loss of the use of, property of any person, firm or corporation, including the parties hereto, which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of this Contract whether arising before or after the completion of the work required hereunder.

16.2 For purposes of this Contract, and without in any way limiting indemnification obligations that may be set forth elsewhere in the Contract, the Contractor hereby agrees to indemnify, defend and hold harmless the City from any and all Loss where Loss is caused or incurred or alleged to be caused or incurred in whole or in part as a result of the negligence or other actionable fault of the Contractor, his/her employees, agents, Subcontractors and suppliers.

16.3 It is agreed as a specific element of consideration of this Contract that this indemnity shall apply notwithstanding the joint, concurring or contributory or comparative fault or negligence of the City or any third party and, further, notwithstanding any theory of law including, but not limited to, a characterization of the City's or any third party's joint, concurring or contributory or comparative fault or negligence as either passive or active in nature.

16.4 Nothing in this section shall be deemed to impose liability on the Contractor to indemnify the City for Loss when the negligence or other actionable fault the City is the sole cause of Loss.

16.5 With respect to the City's rights as set forth herein, the Contractor expressly waives all statutory defenses, including, but not limited to, those under workers compensation, contribution, comparative fault or similar statutes to the extent said defenses are inconsistent with or would defeat the purpose of this section.

17. SUCCESSORS AND ASSIGNS

17.1 The City and Contractor bind themselves, their successors, assigns and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in this Contract.

17.2 The Contractor shall not assign or sublet the work, or any part thereof, without the previous written consent of the City, nor shall it assign, by power of attorney or otherwise, any of the money payable under this Contract unless by and with the like written consent of the City. In case the Contractor assigns all, or any part of any moneys due or to become due under

- this Contract, the instrument of assignment shall contain a clause substantially to the affect that it is agreed that the right of the assignee in and to any moneys due or to become due to the Contractor shall be subject to all prior liens of all persons, firms and corporations for services rendered or materials supplied for the performance of the Work called for in this Contract.
- 17.3 Should any Subcontractor fail to perform in a satisfactory manner, the work undertaken, its subcontract shall be immediately terminated by the Contractor upon notice from the City. Performing in an unsatisfactory manner is defined as consistently having more than 10% of work unacceptable. The Contractor shall be as fully responsible to the City for the acts and omissions of the subcontractors, and of persons either directly or indirectly employed by them, as Contractor is for the acts and omissions of persons directly employed. Nothing contained in this Contract shall create any contractual relations between any Subcontractor and the City, nor shall anything contained in the Contract Documents create any obligation on the part of the City to pay or to see to the payment of any sums due any Subcontractor.
- 17.4 The Contractor shall not award subcontracts which total more than forty-five (45%) of the Contract Price and shall perform within its own organization work amounting to not less than fifty-five percent (55%) of the total Contract Price. Approval by the City of any Subcontractor shall not constitute a waiver of any right of the City to reject Defective Work, material or equipment not in compliance with the requirements of the Contract Documents. The Contractor shall not make any substitution for any Subcontractor accepted by the City unless the City so agrees in writing.
- 17.5 The Contractor shall not subcontract, sell, transfer, assign or otherwise dispose of the Contract or any portion thereof without previous written consent from the City. In case such consent is given, the Contractor, shall be permitted to subcontract a portion thereof, but shall perform with his/her own organization work amounting to not less than fifty five (55%) of the total Contract Price. No subcontracts, or other transfer of Contract, shall release the Contractor of its liability under the Contract and bonds applicable thereto.
- 17.6 The Contractor shall cause appropriate provisions to be inserted in all subcontracts relative to the Work to bind Subcontractors to the Contractor by the terms of the Contract Documents insofar as applicable to the work of the Subcontractor and to give the Contractor the same power to terminate any Subcontract as the City has to terminate the Contractor under any provisions of the Contract Documents.
- 17.7 Prior to the City's approval of the Contract bid, the successful bidder shall submit to the City for acceptance, a list of names of all Subcontractors proposed for portions of the work and shall designate which work each is to perform.
- 17.8 The City shall, prior to the City's approval of the Contract bid, notify the successful bidder, in writing, if the City, after due investigation, has reasonable objection to any Subcontractor on such list, and the Contractor shall substitute a Subcontractor acceptable to the City at no additional cost to the City or shall be allowed to withdraw his/her Bid, and the City shall either re-bid the Work or accept the next best lowest and responsible bidder. The failure of the City to make objection to a Subcontractor shall constitute an acceptance of such Subcontractor but shall not constitute a waiver of any right of the City to reject Defective Work, material or equipment not in conformance with the requirements of the Project Manual.

18. NON-DISCRIMINATION LAWS

18.1 The Contractor agrees that:

- A. The Contractor shall observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and shall not discriminate against any person in the performance of Work under the present contract because of race, religion, color, sex, disability, national origin, ancestry or age;
- B. In all solicitations or advertisements for employees, the Contractor shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission (Commission);
- C. If the Contractor fails to comply with the manner in which the Contractor reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Contractor shall be deemed to have breached the present contract and it may be cancelled, terminated or suspended, in whole or in part, by the contracting agency;
- D. If the Contractor is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the Commission which has become final, the Contractor shall be deemed to have breached the present contract and it may be cancelled, terminated or suspended, in whole or in part, by the contracting agency; and
- E. The Contractor shall include the provisions of Subsections A through D in every subcontract or purchase order so that such provisions will be binding upon such Subcontractor or vendor.
- F. The provisions of this Section shall not apply to a contract entered into by a Contractor: (1) Who employs fewer than four employees during the term of such contract; or (2) Whose contracts with the City cumulatively total \$5,000 or less during the fiscal year of the City.

18.2 The Contractor further agrees that it shall abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 et seq.) and the applicable provision of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) as well as all other federal, state and local laws.

19. FEDERAL LOBBYING ACTIVITIES [THIS PROVISION ONLY APPLIES IF THE CITY IS RECEIVING FEDERAL FUNDS]

19.1 31 USCS Section 1352 requires all subgrantees, Contractors, Subcontractors, and consultants/Architects who receive federal funds via the City to certify that they will not use federal funds to pay any person for influencing or attempting to influence a federal agency or Congress in connection with the award of any federal contract, grant, loan, or cooperative agreements.

19.2 In addition, contract applicants, recipients, and subrecipients must file a form disclosing any expenditure they make for lobbying out of non-federal funds during the contract period.

- 19.3 Necessary forms are available from the City and must be returned to the City with other Contract Documents. It is the responsibility of the general contractor to obtain executed forms from any Subcontractors who fall within the provisions of the Code and to provide the City with the same.
20. RELATIONS WITH OTHER CONTRACTORS:
- 20.1 The Contractor shall cooperate with all other contractors who may be performing work on behalf of the City, and workers who may be employed by the City, or any other entity on any work in the vicinity of the Work to be done under this Contract, and the Contractor shall so conduct his/her operations as to interfere to the least possible extent with the work of such contractors or workers. The Contractor shall be responsible for any injury or damage, that may be sustained by other contractors, workers, their work or employees of the City, because of any fault or negligence on the Contractor's part, and shall, at his/her own expense, repair or pay for such injury or damage. If the work of the Contractor is delayed because of any acts or omissions of any other Contractor or Contractors, the Contractor shall have no claim against the City on that account other than for an extension of time.
- 20.2 When two or more Contracts are being executed at one time in such manner that work on one Contract may interfere with that on another, the City shall decide which Contractor shall progress at which time.
- 20.3 Other projects the Contractor may have to coordinate shall be listed in the Special Conditions.
- 20.4 When the territory of one Contract is the necessary or convenient means of access for the transportation or movement of workers, materials, or appliances required for the execution of another Contract, such privileges of access or any other responsible privilege may be granted by the City to the Contractor so desiring, to the extent such may be reasonably necessary.
- 20.5 Upon execution of the Contract, the Contractor shall furnish the City, in writing, the names of persons or entities proposed by the Contractor to act as a Subcontractor on the Work. The City shall promptly reply to the Contractor, in writing, stating any objections the City may have to such proposed Subcontractor. The Contractor shall not enter into a Subcontract with a proposed Subcontractor with reference to whom the City has made timely objection. The Contractor shall not be required to Subcontract with any party to whom the Contractor has objection.
21. RIGHT OF CITY TO TERMINATE
- 21.1 If the Contractor persistently or repeatedly refuses or fails to prosecute the Work in a timely manner, or supply enough properly skilled workers, supervisory personnel or proper equipment or materials, or if it fails to make prompt payment to Subcontractors or for materials or labor, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or if this Contract is assigned by Contractor without authorization or if Contractor is adjudged as bankrupt, or if a general assignment of assets be made for the benefit of creditors; or if a receiver is appointed, or otherwise is guilty of a substantial violation of a provision of this Contract, then the City may by written notice to the Contractor, without prejudice to any right or remedy, terminate the employment of the Contractor and take possession of the site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Contractor and may finish the

Work by whatever methods it may deem expedient. In such case, the Contractor and its surety shall be liable to the City for all excess cost sustained by the City because of such prosecution and completion including any additional legal, Project Manager or bid-letting costs therefore. In such case, the Contractor shall not be entitled to receive further payment. In the event the Contractor is found in a court of law to have been wrongfully terminated for cause, then such termination shall be deemed a termination for convenience and the Contractor shall be compensated as provided herein. Any termination of the Agreement for alleged default by Contractor that is ultimately determined to be unjustified shall automatically be deemed a termination for convenience of the City.

21.2 The City, within its sole discretion, may elect to terminate the Contract with the Contractor for convenience upon three (3) days written Notice to Contractor. In the event of such termination, Contractor shall cease immediately all operations and shall be compensated for all work performed as of the date of termination in accordance with the terms of payment in this contract. Contractor shall not be entitled to any anticipatory profits, consequential damages or other costs other than direct costs of demobilization.

22. MISCELLANEOUS:

22.1 The Contractor warrants to the City that all labor furnished to progress the Work under the Contract will be competent to perform the tasks undertaken, that the product of such labor will yield only first-class results, that materials and equipment furnished will be of good quality and new unless otherwise permitted by this Contract, and that the Work will be of good quality, free from faults and defects and in strict conformance with the Project Manual. All Work not conforming to these requirements may be considered defective.

22.2 The Contractor shall obtain and pay for all permits, fees and licenses necessary or ordinary for the Work. The Contractor shall comply with all lawful requirements, including federal and state laws, City and County laws and ordinances and building codes, applicable to the Work and shall give and maintain copies of all notices required by applicable law pertaining to the Work.

22.3 Provision for Emergencies. Whenever, in the opinion of the City, the Contractor has not taken sufficient precaution for the safety of the public or the protection of the Work to be constructed under this Contract, or of adjacent structures or property which may be injured by process of construction, and whenever, in the opinion of the City, an emergency shall arise and immediate action shall be considered necessary in order to protect property interests and to avoid personal injury and/or death, then the City, with or without notice to the Contractor, shall provide suitable protection to the said interests by causing such Work to be done and materials to be furnished at places as the City may consider necessary and adequate. The cost and expense of such Work and material so furnished shall be borne by the Contractor and, if the same shall not be paid on presentation of the bills therefore, such costs shall be deducted from any amounts due or to become due the Contractor. The performance of such emergency Work shall in no way relieve the Contractor of responsibility for damages which may occur during or after such precaution has been duly taken.

22.4 Both the business address of the Contractor given in the Bid or proposal upon which this Contract is founded, and the Contractor's Office near the Work, is hereby designated as the places to which all notices, letters, and other communications to the Contractor may be mailed or delivered. The delivering at either of the above named addresses, or depositing

in any mailbox regularly maintained by the Post Office, of any notice, letter or other communication so addressed to the Contractor, and the date of said service shall be the date of such delivery or mailing. Such addresses may be changed at any time by an instrument in writing, executed by the Contractor, presented, and delivered to the Project Manager and to the City. Nothing herein contained shall be deemed to preclude or render inoperative the service of any notice, letter, or communication upon the Contractor personally.

- 22.5 It is mutually agreed by and between the parties to this Contract that all royalties and fees for and in connection with patents, or patent infringement, claims for materials, articles, apparatus, devices or equipment (as distinguished from processes) used in or furnished for the work shall be included in the Contract Price and the Contractor shall satisfy all demands that may be made at any time for such, and the Contractor shall at its cost and expense, defend any and all suits or proceedings that may be instituted at any time against the City for infringement or alleged infringement of any such patents involved in the work, and Contractor shall pay any award of damages.
- 22.6 The right of general administration of the City shall not make the Contractor an agent of the City, and the liability of the Contractor for all damages to persons, firms, and corporations, arising from the Contractor's execution of the Work, shall not be lessened because of such general administration, but as to all such persons, firms, and corporations, and the damages, if any, to them or their property. The Contractor herein is an independent Contractor in respect to the work.
- 22.7 For a period of time, from the inception of the Contract to three (3) years from the date of final payment under the Contract, the Contractor and subcontractors shall maintain books, accounts, ledgers, invoices, drafts, pages and other records pertaining to the performance of this Contract. At all reasonable times during this period these records shall be available within the State of Kansas at a field or permanent business office for inspection by authorized representatives of the City or of any other agency, which has contributed funds in connection with the Contract or to which the City is obligated to make such inspections available. In addition, this requirement shall be included in all subcontracts entered into in connection with this Contract.
- 22.8 Titles, subheadings used herein, and other Contract Documents are provided only as a matter of convenience and shall have no legal bearing on the interpretation of any provision of the Contract Documents.
- 22.9 No waiver of any breach of this Contract shall be construed to be a waiver of any other subsequent breach.
- 22.10 Should any provision of this Agreement or other Contract Documents be determined to be void, invalid, unenforceable or illegal for whatever reason, such provision(s) shall be null and void; provided, however, that the remaining provisions of this Agreement and/or the other Contract Documents shall be unaffected thereby and shall continue to be valid and enforceable.
- 22.11 Without in any manner limiting Contractor's responsibilities as provided elsewhere in the Contract Documents, the Contractor shall assume full responsibility for the protection of all public and private property, structures, sewers, and utilities, for both above ground and underground facilities, along, beneath, above, across or near the site or sites of the Work

being performed under this Agreement, or which are in any manner affected by the prosecution of the Work or the transportation of men/women or materials in connection therewith. Barriers shall be kept in place at all times to protect persons other than those engaged on or about the Work from accident, and the Contractor will be held responsible for all accidents to persons or property resulting from the acts of Contractor or its employees.

- 22.12 The Contractor shall keep fully informed of all existing and current regulations of the City, county, state, and federal laws, which in any way limit or control the actions or operations of those engaged upon the work, or affecting materials supplied, to or by them. The Contractor shall at all times observe and comply with all ordinances, laws, and regulations, and shall protect and indemnify the City and the City's officers and agents against any claims or liability arising from or based on any violation of the same.
- 22.13 Nothing contained in the Contract Documents shall create, or be interpreted to create, privity or any other contractual agreement between the City and any person or entity other than the Contractor.
- 22.14 Duties and obligations imposed by the Contract Documents, rights, and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.
- 22.15 No action or failure to act by the City, Project Manager or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval or acquiescence in a breach hereunder, except as may be specifically agreed in writing.
- 22.16 Contractor specifically acknowledges and confirms that: (i) it has visited the site, made all inspections it deems appropriate and has read and fully understands the Contract Documents, including all obligations and responsibilities undertaken by it as specified herein and in other Contract Documents and knowingly accepts the same; (ii) it has furnished copies of all Contract Documents to its insurance carrier(s) and its surety(ies); and (iii) its insurance carrier(s) and surety(ies) agree to be bound as specified herein, in the Contract Documents and in the insurance policy(ies) and bonds as to liability and surety coverage.
- 22.17 It is specifically agreed between the parties executing this Agreement that the Contract Documents are not intended to create any third party beneficiary relationship nor authorize anyone not a party to this Agreement to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this Agreement. The duties, obligations and responsibilities of the parties to this Agreement with respect to third parties shall remain as imposed by law.
- 22.18 This Agreement is entered into, under and pursuant to, and is to be construed and enforceable in accordance with the laws of the State of Kansas. Venue of any litigation arising in connection with this Agreement shall be the State courts of Johnson County, Kansas.

IN WITNESS WHEREOF, the City has caused this Agreement to be executed in its behalf, thereunto duly authorized, and the said Contractor has executed five (5) counterparts of this Contract in the prescribed form and manner, the day and year first above written.

CITY OF PRAIRIE VILLAGE

(typed company name)

By: _____
(signed)

By: _____
(signed)

Laura Wassmer _____

(typed name)

Mayor _____

(typed title)

City of Prairie Village _____

(typed company name)

7700 Mission Road _____

(typed address)

Prairie Village, Kansas 66208 _____

(typed city, state, zip)

(typed telephone number)

(date of execution)

(date of execution)

SEAL

ATTEST:

APPROVED BY:

City Clerk, Joyce Hagen-Mundy

City Attorney, Catherine Logan

(If the Contract is not executed by the President of the Corporation, general partner of the Partnership, or manager of a limited liability company, please provide documentation, which authorizes the signatory to bind the corporation, partnership or limited liability company. If a corporation, the Contractor shall furnish the City a current certificate of good standing, dated within ten (10) days of the date of this Contract.)

Priority / Initiative List

#	Scope	2015	2016	2017	Initiative/project	Impact on budget
1	Lg	X	X		Meadowbrook property development	TIF, IRB contemplated with bond issue. Planner & attorney review.
2	Lg	X			Review revised plan for former Mission Valley school site	
3	Lg	Apr 15	Apr 15		Mission Rd - 71st to 75th - enhancements / pedestrian	\$1M estimate
4	Lg				Review and update the City Code book	Attorney costs for legal review
5	Lg				Review and update City policies	Attorney costs for legal review
6	Med	X	X		Coordination of installation of Google Fiber network	Hired consultant to assist with additional inspections
7	Med	X	X		Coordination of installation of ATT GigaPower product	Hired consultant to assist with additional inspections
8	Med	X			Prairie Village HOA overlay district - HOA and resident group exploring overlay district	Attorney & planning costs for review
9	Med	X	X		Discussions with First Washington about future plans for the two shopping centers	Depends on scope and CID funds
10	Med	X	X		Kansas City Christian school upgrades / expansion	
11	Med	→	X		Efforts to secure additional parkland	Depends on location, scope.
12	Med	X			Reestablish / strengthen the Island Committee & develop plan for island statuary maintenance. Inventory audit being conducted.	Currently \$4k per year is budgeted. Likely need additional funding based on audit.
13	Med	C			Comprehensive review of committees, role and structure	New Council Policy adopted / implemented
14	Med		Apr 15		Review & update zoning code (allowable uses, SUP process)	Planning & attorney costs for review
15	Med		Apr 15		Desire for more maintenance code inspections. Promote homeownership, review rental licensing program and property maintenance ordinance	Council approved adding Full FTE starting in 2015 (from 0.5 FTE)
16	Med		Apr 15		Explore a more proactive approach to the location and size of wireless tower facilities. Compliance with FCC updates.	May include a consultant
17	Med		Apr 15		Restructure of the Prairie Village Foundation	City / Foundation funded PT position at \$50k per year
18	Med				Initiate a bike/ped master plan	Estimated at \$30k city cost w/ grant in 2016
19	Med				More effective / proactive communication with residents	
20	Med				Explore curbside city-wide glass recycling	Depends on approach. Individual resident contracts, city contract or status quo
21	Med				Determine and develop economic development strategies and incentives	Attorney costs for legal review
22	Med				Consider developing small business program: business incubator. Look into JCCC programs	Depends on scope. Use Econ Dev funds.
23	Med				Research and possibly pursue restrictions for short term rentals or lodging in residential neighborhoods (such as Airbnb)	Attorney costs for legal review
24	Med				Discussion & enforcement of screening of garbage receptacles	
25	Med				Establish or reenergize dormant homes associations where they do not currently exist	
26	Med				Develop form based codes and comprehensive plan amendments	Planning & attorney costs for review

Priority / Initiative List

#	Scope	2015	2016	2017	Initiative/project	Impact on budget
27	Med				Research the possibility of initiating a transportation program for seniors and special needs residents	Based on other cities' experience - \$40k annual
28	Med				Proactive approach for regional transit related topics	
31	Sm	X			Installation of KCPL electric charging station at City Hall complex - second round	Electricity cost for stations \$2k per year
32	Sm	X			Explore the purchase of the city's street light and/or traffic signal system. Audit currently underway.	Other cities experience 3 to 5 year payback. Then significant cost savings.
33	Sm	X			Conduct cost recovery study & review of city fees	
34	Sm	X			Selection of a new planning consultant	
35	Sm		Apr 15		Explore the use/cost of body-cams in PD	Early estimates are \$35k for the department
36	Sm		Apr 15		Research and review KP&F plan	Could be additional cost for employer portion
37	Sm		Apr 15		Organize Ward meetings - Ward 1 held meeting summer 2014	Minimal. Primary cost is for mailer.
38	Sm		Apr 15		Ordinances related to public antenna networks	Attorney costs for legal review
39	Sm			→ Apr 15	Review of Code of Ethics	
40	Sm				Pedestrian crossings - education/enforcement/evaluation of signage for optimum compliance	Cost associated with new signage.
41	Sm				Revisit use of the Consent Agenda	
42	Sm				Explore the use of alternative fuel vehicles	
43	Sm				Determine level of involvement in Community of All Ages - MARC initiative	
44	Sm				Review of smoking ordinance and e-cigarettes	Attorney costs for legal review
45	Sm				Explore other alternatives to the City owned fuel tanks	
46	Sm				Program to encourage neighborhood block parties	Estimate of \$2k annual
47	Sm				Cultivate an environment that celebrates diversity	
48	Sm				Review of solicitation ordinance in relation to ice cream trucks	Attorney costs for legal review

Key

Lg, Med, Sm Large, Medium & Small. Estimated scope of council & staff time commitment and involvement

X Initiative is underway, committed or significantly in progress

R Recommended project by Mayor and staff

C Completed

Apr 15 City Council identified at work session April 13, 2015

May 28, 2015 version

Prepared by Q. Bennion

**City of Prairie Village
Outside Agency Funding**

	2012 Actual	2013 Actual	2014 Actual	2015 Budget	2016 Preliminary Budget
Outside Agencies					
Alcohol Funds - dispersed to various agencies	15,000	15,000	14,915	24,000	30,000
United Community Services - Human Service Fund	6,825	6,825	6,825	7,000	7,000
Minor Home Repair (Jo Co administered)	6,000	6,000	6,000	6,000	6,000
National League of Cities	1,861	1,861	3,722	2,000	2,000
League of Kansas Municipalities	13,362	13,275	13,388	14,000	14,000
MARC	5,749	5,749	5,862	6,100	6,100
Home Repair Program (ED Funds)	20,000	20,000	20,000	20,000	20,000
Exterior Grant (ED Funds)	39,294	46,208	43,527	50,000	50,000
KCADC (ED Funds)	2,964	2,664	3,064	3,000	3,000
NE Jo CO Chamber Membership	2,000	1,000	1,000	1,200	1,500
NE Jo CO Chamber for Events and Chamber dinner	2,575	2,050	2,290	2,500	1,700
SMEF (Shawnee Mission Educational Foundation)	1,500	1,500	1,500	1,700	1,500
Committees					
Village Fest (estimated revenue of \$9,000)	19,188	22,895	27,251	25,000	11,000
Arts Council	17,358	14,330	20,045	17,500	0
Environmental Committee	4,037	4,512	6,199	10,000	8,000
Sister City	1,256	3,533	1,779	4,000	400
Jazz Fest	0	10,000	0	10,000	10,000

**COUNCIL MEETING AGENDA
CITY OF PRAIRIE VILLAGE
Council Chambers
Monday, June 01, 2015
7:30 PM**

- I. **CALL TO ORDER**
- II. **ROLL CALL**
- III. **PLEDGE OF ALLEGIANCE**
- IV. **INTRODUCTION OF STUDENTS & SCOUTS**
- V. **PUBLIC PARTICIPATION**

(5 minute time limit for items not otherwise listed on the agenda)

VI. **CONSENT AGENDA**

All items listed below are considered to be routine by the Governing Body and will be enacted by one motion (Roll Call Vote). There will be no separate discussion of these items unless a Council member so requests, in which event the item will be removed from the Consent Agenda and considered in its normal sequence on the regular agenda.

By Staff

- 1. Approve regular City Council meeting minutes - May 18, 2015
- 2. Ratify the Mayor's appointment of Jeffery Valentino for Planning Commission
- 3. Approve amendment to cooperation agreement with Johnson County for participation in the Johnson County Community Development Block Grant (CDBG) and Home Investment Partnership (HOME) programs

By Committee

- 4. Authorize the current part-time Code Enforcement Officer position to become a full-time position effective immediately.

VII. **COMMITTEE REPORTS**

Council Committee of the Whole

- COU2015-24 Consider design agreement with Affinis Corp for the design of the 2016 Mission Road rehabilitation project from 71st Street to 75th Street
- COU2015-25 Consider construction contract with J.M. Fahey Construction Company for the 2015 Paving and CARS programs

VIII. **MAYOR'S REPORT**

IX. STAFF REPORTS

X. OLD BUSINESS

Consider request for extension to SUP for Mission Chateau

XI. NEW BUSINESS

XII. ANNOUNCEMENTS

XIII. ADJOURNMENT

If any individual requires special accommodations - for example, qualified interpreter, large print, reader, hearing assistance - in order to attend the meeting, please notify the City Clerk at 385-4616, no later than 48 hours prior to the beginning of the meeting.

If you are unable to attend this meeting, comments may be received by e-mail at cityclerk@pvkansas.com

CONSENT AGENDA
CITY OF PRAIRIE VILLAGE

June 1, 2015

**CITY COUNCIL
CITY OF PRAIRIE VILLAGE
May 18, 2015**

The City Council of Prairie Village, Kansas, met in regular session on Monday, May 18, 2015 at 7:30 p.m. in the Council Chambers at the Municipal Building, 7700 Mission Road, Prairie Village, Kansas.

ROLL CALL

Mayor Laura Wassmer called the meeting to order and roll call was taken with the following Council members present: Ashley Weaver, Jori Nelson, Steve Noll, Eric Mikkelson, Andrew Wang, Sheila Myers, Brooke Morehead, Dan Runion, David Morrison, Ted Odell and Terrence Gallagher.

Staff present was: Tim Schwartzkopf, Chief of Police; Keith Bredehoeft, Director of Public Works; Katie Logan, City Attorney; Quinn Bennion, City Administrator; Wes Jordan, Assistant City Administrator; Nolan Sunderman, Assistant to the City Administrator; Lisa Santa Maria, Finance Director; Amy Hunt, Human Resources Manager and Joyce Hagen Mundy, City Clerk.

Mayor Laura Wassmer led all present in the Pledge of Allegiance.

PRESENTATIONS

Mayor Wassmer read a proclamation recognizing retiring Shawnee Mission School teachers and presented the proclamation and individual certificates of appreciation to the following educators: Linda Galloway from Tomahawk Elementary, Diane Lampton from Indian Hills Middle School, Jennifer Mitchell from Belinder Elementary, Debra Ogden from Shawnee Mission East, Mike Salierno from Indian Hills

Middle School and Janine Sisk from Shawnee Mission East. These educators represent a total of 203 years of teaching experience with the Shawnee Mission School District. She thanked Council member Jori Nelson for coordinating this special recognition.

PUBLIC PARTICIPATION

No one was present to address the City Council on issues not listed on the Council Agenda.

CONSENT AGENDA

Ashley Weaver requested that item #4 be removed from the Consent Agenda; Terrence Gallagher noted corrections to the May 4th minutes on page 12.

Council President Ashley Weaver moved for the approval of the Consent Agenda for May 4, 2015 with the correction noted to the minutes and removal of item #4:

1. Approve regular City Council Minutes - May 4, 2015 with corrections noted.
2. Approve claims ordinance #2929
3. Adopt Ordinance 2331 approving the Prairie Village Art Fair as a special event and authorizing the sale, consumption and possession of alcoholic liquor and cereal malt beverages within the boundaries of barricaded public areas of the event.
4. Removed
5. Ratify the Mayor's appointment of the following committee members:
Melissa Brown, Elizabeth Holliday, Stephen LeCerf and Stacy Krieg to the Prairie Village Arts Council for two year terms ending April, 2017; Maurine Kierl to the Environment/Recycle Committee for a two year term ending April, 2017; Jonathan Birkel to the Planning Commission/Board of Zoning Appeals for a two year term ending April, 2017 and Patrick Lenahan to the Planning Commission/Board of Zoning Appeals for a three year term ending April, 2018.
6. Approve the 2015 TIPS Hotline Agreement.

A roll call vote was taken with the following members voting "aye": Weaver, Nelson, Noll, Mikkelson, Wang, Myers, Morehead, Runion, Morrison, Odell and Gallagher.

Mayor Wassmer clarified an e-mail sent to Council members on May 17th regarding her basis for the selection of Planning Commission appointments and reappointments in which she asked for feedback prior to the city council meeting. This was not intended to be an advance vote of the council. Knowing that several council members were seeking changes on the Planning Commission, she wanted to share in advance her process and thought for the recommended appointments. She feels that the two new Commission members bring excellent background and experience and the reappointment of two members will provide the critical understanding of Prairie Village codes, culture and processes providing history of the past that will no longer be available with a new Planning Consultant. She asked for feedback so that as a courtesy to the applicants she could advise them of any concerns held by Council members.

Dan Runion responded the wording "if you are not able to support the recommended appointments" raised concerns for lack of transparency and compliance with open meeting regulations. Mayor Wassmer stated that was not her intent and assured the public that the council has not "pre-voted" on any of the nominees and that the consideration of all the nominees will be fully discussed and considered this evening.

Ashley Weaver expressed concerns with the reappointment of Nancy Vennard and noted there were several candidates equally qualified that she felt would be more respectful of residents wishes. Jori Nelson thanked Mrs. Vennard for her service on the Commission, but stated that she did not feel Mrs. Vennard could remain neutral and impartial. She felt it was time to give other qualified individuals the opportunity to serve.

David Morrison expressed concerns with the reappointment of Nancy Wallerstein. He noted that when he first ran for City Council in 2008, the ward 5 seat

was vacant, until Mayor Shaffer appointed Mrs. Wallerstein to fill the seat. When she was appointed to the Planning Commission by Mayor Shaffer, Mr. Morrison noted he supported that appointment. However, since observing her actions while on the Commission and that she also currently sits on the Johnson County Park & Recreation Board that this would be unethical and a conflict of interest in any applications filed for Meadowbrook. This is one of the biggest applications anticipated to come before the Commission and her service on interlocking boards should disqualify her. Mr. Morrison also noted that Mrs. Wallerstein had served as chairman of Mayor Shaffer's past two campaigns for Mayor and County Commissioner taking funds from developers who would be appearing before the Commission. He feels she should have either resigned from the Commission or stepped down from her role in Mayor Shaffer's campaign. She brings a lot of past baggage with her, including a vote in support of the development of Meadowbrook as a mixed use district, not park land. He feels there should be a clean break on the Commission from the past administration.

Andrew Wang noted as Council Liaison to the Planning Commission during the most contentious projects before the city with earlier proposed development of Meadowbrook and the development of the Mission Valley site, he witnessed both these individuals during several long and difficult meetings. He never saw anything other than respect and professionalism displayed by these individuals to both the public and to applicants throughout long laborious meetings.

Sheila Myers stated it is not a conflict of interest to sit on two boards but only when hearing specific applications at which time the individual could recuse themselves. Mr. Morrison replied in his training it was clearly stated that it was not ethical to serve on interlocking boards that do business with one another.

City Attorney Katie Logan stated she does not view this as a conflict of interest as Mrs. Wallerstein has no financial interest. She noted there are certain offices held on boards that are not compatible and viewed as conflicts, but this is not that situation.

Sheila Myers agreed that the Board needed individuals with specialized skill but also felt the inclusion of a regular citizen who has resided in the city for a length of time also brings a unique and valuable perspective and understanding of Prairie Village culture to the Commission. She does not feel that all members need technical expertise.

David Morrison noted he is not talking about a legal standard for conflict of interest, but the ethical standard.

Eric Mikkelson felt the question was if Mrs. Wallerstein premade decisions on the Meadowbrook and if so she should recuse herself.

Ted Odell asked if the vote on the reappointment will be taken as one vote or separately. Mayor Wassmer stated separate votes will be taken. Mr. Odell hoped that the disconnect between the Council and the Commission will be resolved with the Commission moving forward with more respect to the residents of Prairie Village. He is hopeful that both groups can work together and learn from this experience.

Jori Nelson stated she felt the Commission members have not been responsive to the residents and that new individuals would be more professional. She noted that volunteers for the Planning Commission need more than the desire to serve, they need the expertise and working knowledge to make strong decisions on behalf of the city. Mrs. Myers stated she felt this knowledge and experience can come from other sources than a professional degree.

Mayor Wassmer confirmed with the City Clerk that historically the City has had a resident member sit on the Planning Commission. Jori Nelson stated she did not feel the Commission represented the residents.

Quinn Bennion noted that Johnson County Park & Recreation Board will not be participating in any rezoning application that would come before the Planning Commission. The park land is currently zoned R-1a and will remain R-1a. Eric Mikkelson noted their involvement in the negotiation for land. Mrs. Logan responded that would come before the Governing Body, not the Planning Commission.

Mayor Wassmer invited Mrs. Wallerstein and Vennard to address the Council.

Nancy Vennard stated her 11 years on the Commission give her the historic perspective and knowledge for consideration of future projects. The Commission is regulated by both the state and the city's code in what must be considered in the evaluation of an application and on what a decision must be based. These are not always clear to residents, but must be upheld. She feels her background and experience on the Commission will be particularly beneficial with the retirement of Ron Williamson and hiring of a new City Planner who will not have that perspective. Mrs. Vennard noted the Commission deals with several different types of issues from signage, fences, building height, parking regulations, revisions to code, cell towers as well as making recommendations to the Governing Body who makes the final decision. Mrs. Vennard requested the Council's support of her reappointment.

Nancy Wallerstein thanked the Mayor for the opportunity to speak. She noted in 10 years on the City Council and 16 years on the Johnson County Park Board she had never before been accused of an ethics violation. She did a due diligence check with the City Attorney who advised her there was no conflict of interest and stated she is

aware of when to recuse herself from participating in actions as an appointed or elected official. She has used her past experience from serving on the City Council in her position on the Planning Commission and would like to continue to do so with their support.

Andrew Wang moved the City Council ratify the reappointment of Nancy Vennard to the Planning Commission for a three year term to end in April, 2018. The motion was seconded by Sheila Myers and was defeated by a vote of 7 to 4. Mayor Wassmer withdrew her recommendation for appointment of Nancy Vennard.

Andrew Wang moved the City Council ratify the reappointment of Nancy Wallerstein to the Planning Commission for a two year term to end in April, 2017. The motion was seconded by Sheila Myers and passed by a vote of 7 to 4.

Steve Noll moved the City Council ratify the Mayor's reappointment of the following individuals:

Prairie Village Arts Council	Daniel Andersen	term ending April, 2017
Prairie Village Arts Council	Julie Flanagan	Term ending April, 2017
Prairie Village Arts Council	Jack Shearer	Term ending April, 2017
Environment/Recycle Committee	Barbara Brown	Term ending April, 2017
Environment/Recycle Committee	Pete Jarchow	Term ending April, 2017
Environment/Recycle Committee	Margaret Goldstein	Term ending April, 2017
Environment/Recycle Committee	Al Pugsley, Jr.	Term ending April, 2017
Parks & Recreation Committee	Dianne Pallanich	Term ending April, 2017
Parks & Recreation Committee	Lauren Wolf	Term ending April, 2017
Parks & Recreation Committee	Kevin Letourneau	Term ending April, 2017
Parks & Recreation Committee	Peggy Couch	Term ending April, 2017
Parks & Recreation Committee	Clarence Munsch	Term ending April, 2017
Parks & Recreation Committee	Kellie O'Toole	Term ending April, 2016

The motion was seconded by Sheila Myers and passed unanimously.

COMMITTEE REPORTS

Council Committee of the Whole

COU2015-22 Consider the Construction Administration Agreement with Affinis Corporation for On-Call Field Services for Telecommunication Installation Right-of-Way Activities

Keith Bredehoeft reported that Public Works recently requested proposals from firms to provide construction administration services for Prairie Village in the areas of Right of Way Inspection and Construction Inspection for the next three years. Eleven firms submitted proposals. A selection committee consisting of Terrence Gallagher, Ted Odell, Keith Bredehoeft, Melissa Prenger and Kenny Khongmaly selected Affinis to be the City's On-Call consultant for telecommunication installation for right-of-way activities in 2015, 2016, and 2017.

Staff are proposing to utilize an on-call consultant for approximately 20 hours per week of inspection time for the on-call service with a total maximum value of the contract at \$100,000. The hours per week will be managed by city staff and will be adjusted as needed. The on-call services will include inspection of permitted activities in the right-of-way associated with the telecommunication installation to ensure city specifications are followed, reviewing permits, attending bi-weekly construction meetings, and assist in facilitating the process of resident concerns. Mr. Bredehoeft noted he anticipates the need for this assistance for roughly the next year as telecommunications companies complete their build out in Prairie Village. This was not anticipated in the 2015 budget so it is proposed to use City Contingency for this work; however, he anticipates approximately \$30,000 in funding to be captured from right-of-way fees.

Ted Odell moved the City Council approve the construction administration agreement with Affinis Corp for On-Call Field Services for Telecommunication

Installation Right-of-Way Activities. The motion was seconded by Andrew Wang and passed unanimously.

Planning Commission

PC2015-104 Consider Final Plat for Chadwick Court

Authorize the Mayor to execute the Final Plat for Chadwick Court for acceptance of rights-of-way and easements subject to the conditions of approval required by the Planning Commission.

Wes Jordan noted that at its regular meeting on March 3, 2015, the Planning Commission recommended approval of the rezoning for this property from RP-1B to RP-1A and approval of the Preliminary Development Plan to the Governing Body.

The applicant requested four waivers as a part of the Planned District: 1) Required 30-foot front setback reduced to 15 feet; 2) Required-25 foot rear yard setback reduced to 20 feet; 3) Increase in the maximum allowed lot coverage from 30% to 35% and 4) Required lot depth from 125 feet to 99 feet which were approved by the Governing Body.

The Planning Commission also approved the Preliminary Plat and authorized preparation of the Final Plat subject to the approval of the rezoning and Preliminary Development Plan by the Governing Body and subject to eight conditions that have been met and include the dedication of an additional 10 feet of right-of-way for the south side of 75th Street which is reflected on the Final Plat; the provision of a private gas line easement for gas service.

Prior to the recording of the Final Plat, it will be necessary for the property owner to either construct all the proposed improvements or provide a financial guarantee to the City that the proposed improvements will be constructed. The applicant has expressed a

preference to construct all the improvements prior to recording the Final Plat. It is the responsibility of the City to ensure that all improvements are made and the lots are buildable when the Final Plat is recorded.

The Final Plat for Chadwick Court was presented, having met the conditions required by the Commission in approval of the preliminary plat, to the Planning Commission on May 5, 2015. The Planning Commission approved the Final Plat of Chadwick Court and forwarded it on to the Governing Body for its acceptance of the rights-of-way and easements, subject to the following conditions:

1. That the applicant show easements for water, sewer and gas on the Final Plat, subject to approval of Staff. The Final Plat will not be released for recording until such time as the easements are shown on the plat.
2. That the applicant construct and install all proposed improvements prior to the recording of the Final Plat. The Mayor and City Clerk shall not sign the Final Plat and the City will not release the Final Plat for recording until all improvements are installed, subject to the approval of Public Works.
3. That the applicant submit three (3) copies of the revised Final Plat to Staff for final review and approval.
4. That the applicant revise the Declaration of Conditions and Covenants, and the Declaration of Restrictions as recommended by Staff and submit three (3) revised copies to the City for the record.
5. That the applicant submit a receipt showing all taxes due and payable have been paid.

Steve Noll moved the City Council authorize the Mayor to execute the Final Plat for Chadwick Court for acceptance of rights-of-way and easements subject to the conditions of approval required by the Planning Commission. The motion was seconded by Ted Odell and passed unanimously.

Arts Council Presentation

Wes Jordan noted that over the past year the Arts Council had been considering two new programs. Under the recently adopted Council Policy new initiatives that will require additional funding or staff time need to come before the City Council to determine if and where it fits on the city's priority list and obtain City Council approval to

proceed. Wes Jordan called upon Arts Council Chair Shelly Trewolla who was present with several committee members. Mrs. Trewolla noted the Arts Council will have a table at the upcoming Prairie Village Art Fair and would like to be able to promote their proposed new programs at that event and are therefore seeking approval of the Council to proceed.

Dan Andersen presented the proposed "Future of the Arts" event that would be similar to but smaller than the "State of the Arts" event with the focus on students. The event would be held in lieu of the regular April gallery exhibit. Mr. Andersen noted that the artists will submit their art and forms via a computer program which will be monitored by Mr. Andersen with very little involvement by city staff. Awards sponsorships will be raised by the committee. Other funding necessary for the event will come from the Arts Council funds available in their Municipal Foundation account. As with the "State of the Arts" event the committee will hang the exhibit, prepare food and provide setup and cleanup for the reception. The event will be coordinated by Arts Council member and art teacher Julie Flanagan.

Ashley Weaver suggested combining the event with the "State of the Arts" event. Mr. Andersen replied it is the desire of the committee to keep them separate. Ted Odell noted the committee has been talking about this for the past couple of years. Jori Nelson asked if this would be limited to Prairie Village students. Mr. Andersen replied that is still being worked out but the event would probably take a regional focus including students from other school districts. Shelly Trewolla noted the Arts Council has featured art shows for Prairie Village students previously with limited participation. Not all of the work will meet the criteria for acceptance and therefore a broader base for participation is desired.

Mayor Wassmer stated that she loved the idea, but noted how other projects have bloomed into huge success requiring unanticipated funding and staff time, noting in particular the jazz festival. She noted the policy was put into place to address “event creep”. The city has limited financial and staff resources. She is wary of the impact on staff and funding.

Dan Andersen replied the funding will come from available Prairie Village Foundation funds. One of the major time requirements is the acceptance of art and that will be done electronically and monitored by a committee member, not a staff member. The event replaces the regular monthly exhibit so it is not an additional event. It will not be as large as the “State of the Arts” event and will be contained within the municipal building. It is not meant to compete with “State of the Arts”, but to provide a showcase for exceptional student art.

Quinn Bennion noted past underestimates of the amount of staff time involved and that staff time will take staff away from their other responsibilities. The expectation for this event is greater than a regular monthly exhibit. He does not know where this staff time will come from and is concerned. Mr. Andersen replied that there will be staff time, but it will be minimal.

Terrence Gallagher asked what staff time is involved. Mr. Bennion reviewed some of the functions performed by staff for the regular art exhibits.

Shelly Trewolla noted the committee is willing to take more of the responsibility for the event than it has in the past. It was noted that more coordination will be necessary working with more than 40 different artists, the reception will be twice the length of a regular monthly reception with more setup and clean up required. Mayor Wassmer asked what advertising would be required.

Jori Nelson stated she supported combining this with the “State of the Arts” event. Shelly Trewolla replied that doing so would negatively impact that event as artists are not inclined to participate in shows that include student art and the quality of art would decrease.

Terrence Gallagher noted that this has been discussed by the committee for two years and there is no additional space to accommodate adding this to the existing “State of the Arts” event. It is proposed to be a smaller venue and felt comparisons to the “State of the Art” event are not appropriate. He feels it is a good idea and proposes that it be a joint venture with staff stating what they can do and the committee agreeing to cover the rest.

Quinn Bennion responded he liked the idea, but was trying to manage where staff spends their time. He would be willing to commit staff to the level of support given for a regular monthly exhibit.

Sheila Myers asked if this was something that the teen council could be involved in. Jori Nelson responded it would be discussed.

Mayor Wassmer stated she is willing to try this with the expectation that staff does not commit any additional time and re-evaluate for next year. Shelly Trewolla noted that there is only one other show that includes Middle School students.

David Morrison moved the Council approve the “Future of the Arts” event with the understanding that staff is only committing to the level of support provided for a monthly art exhibit and any related costs are covered by the foundation or committee raised funds. The motion was seconded by Sheila Myers and passed unanimously.

The second initiative is for a Prairie Village Arts Grant program through the Prairie Village Foundation Fund. The projects must take place within the boundaries of

the city. They may consist of exhibits, performance or educational projects. Grants would range from \$100 up to \$1000 and are awarded three times a year. Applications would be submitted to the Arts Council. A funding committee comprised of a PVAC member, a local arts expert and an invited PV resident will be the final judge for awards. Grants will be awarded in three groups a year with a total of \$1000 given out in January, May and September. Applications will be submitted on-line and monitored by the committee and processed through the funding committee.

Mayor Wassmer noted the funds available in the Foundation are limited and that this could become a future funding request to the City. Dan Anderson confirmed that the funds were limited.

Eric Mikkelson stated program has funding and would require minimal staff time. He is supportive.

Ted Odell moved the Council approve the Prairie Village Arts Council Grant Program as presented. The motion was seconded by Terrence Gallagher and passed unanimously.

MAYOR'S REPORT

Mayor Wassmer welcomed Jonathan Birkel and Patrick Lenahan, whose appointments to the Planning Commission were approved on the Consent Agenda and asked them to introduce themselves. Both gentlemen gave their professional background and expressed appreciation for the opportunity to serve on the Planning Commission.

Mayor Wassmer stated she completed the committee assignments for 2015-2016 trying to match interests and requests. She encouraged council members to be open to

serving on different committees for the increased perspective and knowledge that is gained. Mayor Wassmer attended the Tip-A-Cop fund-raiser at Johnny's raising funds for Special Olympics, interviewed candidates for the open Planning Commission positions with the help of Brooke Morehead and Terrence Gallagher and attended the promotion ceremony for several police department staff.

STAFF REPORTS

Public Safety

- Chief Schwartzkopf noted the annual Tip a Cop fundraiser for Special Olympics held at Johnny's on May 14th raised \$1740 plus a \$250 donation from Johnny's.
- The annual Torch Run for Special Olympics will be held on June 2nd.
- The department is currently in a "click it or ticket it" campaign until May 31st with grant funds received from the Kansas Department of Transportation.

Public Works

- Keith Bredehoeft provided an update on the 75th Street Project noting work on stormwater and the sidewalk on the east side of 75th Street.
- Public Works employee Chris Worden has been hired for the position of inspector, replacing retiring employee John Nunnamaker.
- Public Works staff is putting the final touches on the pool complex in preparation for its opening this weekend.
- Mr. Bredehoeft responded to questions on 83rd & Somerset and Mission Road 71st to 75th Street noting planning is underway for both.

Administration

- Nolan Sunderman announced the pool opens for the 2015 season this weekend and distributed the 2015 Parks & Recreation brochure.
- Wes Jordan provided an update on the property on the southeast corner of 75th & Mission Road. The owner was not successful selling the property and will be making improvements to the building instead of demolishing it.
- Quinn Bennion stated the Villagefest Committee is looking for volunteers. He will send out an e-mail with the areas and times that help is needed.
- Staff is looking at bringing the Memorandum of Understanding for the Meadowbrook Development to City Council for approval at a June meeting. This will be more of a conceptual agreement rather than specific details.

OLD BUSINESS

Mayor Wassmer reported that she has heard from both parties regarding the proposed revised plan and agreement for the development of the Mission Valley

property with both reporting that progress was being made and optimistic that they would have an agreement reached by the June 1st City Council meeting.

New Business

Election of Council President

Ashley Weaver thanked the City Council for the opportunity to serve as Council President during the past year.

Ashley Weaver nominated Brooke Morehead to serve as Council President from May, 2015 through April, 2016. The motion was seconded by Jori Nelson and passed unanimously.

Committee meetings scheduled for the next two weeks:

Environment/Recycle Committee	05/27/2015	5:30 p.m.
VillageFest Committee	05/28/2015	5:30 p.m.
Council Committee of the Whole	06/01/2015	6:00 p.m.
City Council	06/01/2015	7:30 p.m.

=====

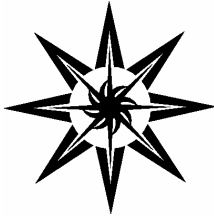
The Prairie Village Arts Council is pleased to present an Acrylic on canvas exhibit by Stacy Krieg in the R. G. Endres Gallery during the month of May. The artist reception will be Friday, May 8, from 6:00 - 7:30 p.m.

Recreation sales have begun. The pool opens on Saturday, May 23rd at 11 a.m.

ADJOURNMENT

With no further business to come before the City Council the meeting was adjourned at 9:15 p.m.

Joyce Hagen Mundy
City Clerk



MAYOR

**Council Meeting Date: June 1, 2015
CONSENT AGENDA**

Consider Appointment to Planning Commission

RECOMMENDATION

Mayor Wassmer requests Council ratification of the appointment of Jeffrey Valentino to the Prairie Village Planning Commission replacing Nancy Vennard with a term expiring in April, 2018.

BACKGROUND

A committee consisting of Mayor Wassmer, Terrence Gallagher, Brooke Morehead, Wes Jordan and Ron Williamson interviewed candidates after the review of several volunteer applications from individuals interested in serving on the Planning Commission. The committee has recommended the appointment of Jeffrey Valentino to the Planning Commission. Mr. Valentino has a B.S. degree in Architectural Engineering from KU and serves as a Project Manager for JE Dunn Construction Company. He will bring a strong and unique perspective to the Commission.

PREPARED BY

Joyce Hagen Mundy
City Clerk

Date: May 26, 2015

Jeffrey M. Valentino

WORK EXPERIENCE

Project Manager II, JEDunn Construction Co. Summer 2006 - Present

- Involvement with initial job pursuit and procurement including RFQ/RFP deliverables and job interviews
- Management of all project pre-construction, construction and post-construction coordination
- Management of self perform contracts including concrete, carpentry, precast and masonry
- Management of JE Dunn office staff including direct reports and support staff
- Responsible for budget setup, tracking and continued management throughout all projects
- Responsible for owner correspondence and maintaining overall client satisfaction
- Responsible for presentation of all major owner cost issues and related coordination
- Responsible for subcontractor buyout including individual contract negotiations
- Responsible for subcontractor coordination, correspondence and management
- Responsible for all city-related communication including permit and special inspection coordination

Notable Projects:

One Light Tower, Kansas City, MO (\$60 million) 2013 - Present

The Sovereign, Houston, TX (\$60 million) 2013

SVN Charter School, Kansas City, MO (\$5 million) 2013

Alta Vista Charter High School, Kansas City, MO (\$5 million) 2013

Rockhurst University – Academic Building, Kansas City, MO (\$25 million) 2011 - 2012

UMKC School of Business, Kansas City, MO (\$25 million) 2012 – 2013

Spring Hill School District Bond Issue – Multiple Projects, Spring Hill, KS (\$39 million) 2011 – 2013

Rockhurst University – North Garage, Kansas City, MO (\$8 million) 2010 – 2012

West Platte School District – Phase III, Weston, MO (\$5 million) 2010 – 2011

Warrensburg School District Additions & HVAC Retrofits, Warrensburg, MO (\$15 million) 2009 - 2010

West Platte School District – Phase II, Weston, MO (\$6 million) 2009 – 2010

Bell Prairie Elementary, Kansas City, MO (\$24 million) 2007 – 2009

West Platte School District – Phase I, Weston, MO (\$1 million) 2009

NKC Auditorium Alterations, Kansas City, MO (\$500,000) 2009

New Fourth Staley High School, Kansas City, MO (\$87 million) 2006 – 2007

EDUCATION

University of Kansas, Lawrence, Kansas

Major: Bachelor of Science in Architectural Engineering, May 2006

CONTINUED EDUCATION

- DUNN 101 – Project Engineer Training
- DUNN 200 – Project Management Training
- Harvard Business Manager Essentials

ADDITIONAL EXPERIENCE

Honors/Activities:

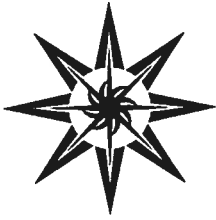
- LEED Accredited Professional (2006-Present)
- KU Recent Grad Advisory Board (2007-2013)
- Construction Leadership Council Member (2008-2014)

Community Activities & Interests:

- KU Alumni Association member and annual School of Engineer donor
- Annual participant in Kansas City Waddell & Reed Half Marathon
- Annual participate in Habitat for Humanity

Company Activities & Interests:

- Team Lead for internal PM training courses (DUNN 101 and DUNN 200)
- Member of internal JE Dunn Midwest Improvement Committee



CITY CLERK DEPARTMENT

**Council Meeting Date: June 1, 2015
CONSENT AGENDA**

Consider Amendment to Cooperation Agreement with Johnson County for Participation in the Johnson County Community Development Block Grant (CDBG) and Home Investment Partnership (HOME) Programs

RECOMMENDATION

Authorize the Mayor to execute a Cooperation Agreement with Johnson County for renewing participation in the Johnson County Urban County for participation in the Community Development Block Grant (CDBG) and Home Investment Partnership (HOME) program for the Federal Fiscal Years 2016 - 2018.

BACKGROUND

Every three years Johnson County asks the City to join with the County to request CDBG funds. If the City joins with the County, the County will have the authority to allocate funding based on applications from those parties who have executed the Cooperation Agreement with the County. This standard and routine agreement has been reviewed by the City Attorney and will be included on the Consent Agenda for Council approval.

ATTACHMENTS

Cover Letter from Johnson County
Amendment to Cooperation Agreement

PREPARED BY

Joyce Hagen Mundy
City Clerk

May 27, 2015

Chairman Ed Eilert
Board of County Commissioners
111 S Cherry Street Suite 3300
Olathe, Kansas 66061



May 7, 2015

Mayor Laura Wassmer
7700 Mission Road
Prairie Village, KS 66208

Dear Mayor Wassmer:

Johnson County is beginning the process to re-qualify as an urban county for continued participation in the Community Development Block Grant (CDBG) and Home Investment Partnerships (HOME) Programs for Federal Fiscal Years 2016-2018. During Federal Fiscal Years 2013-2015, your city was included in the urban county. This letter is to notify the City of its right to elect to be excluded from the urban county or to remain included.

The Cooperation Agreement between the City and Johnson County for Fiscal Years 2004-2006 contained an automatic renewal provision, which stated: "The COUNTY and CITY agree that this agreement will renew automatically at the end of each three-year qualification period, unless the county or the participating unit of general local government provides written notice it elects not to participate in a new qualification period." If the City elects to continue its participation, then no further action by the City is necessary.

If the City elects to be included in the urban county, the City will maintain its eligibility to apply for funding from the urban county's CDBG Program. However, as an included city in the urban county, the City would not be eligible to apply for grants under the Small Cities or State CDBG programs administered by the U.S. Department of Housing and Urban Development (HUD).

Also, in remaining part of the urban county, the City automatically participates in the HOME Program, provided that the urban county receives HOME Program funding. This does not preclude the urban county or a unit of local government within the urban county from applying for State Home funds.

If the City elects to be excluded, written notification must be provided both to Johnson County and to HUD no later than **June 19, 2015**, in order to comply with the timeline established by HUD. An election to be excluded will be effective for the entire three-year period for which the urban county qualifies, unless the City specifically elects to be included in a subsequent year for the remainder of the urban county's three-year qualification period.

The County must provide a provision in the Cooperation Agreement that a unit of general local government may not sell, trade, or otherwise transfer all or any portion of such funds to another such metropolitan city, urban county, unit of general local government, or Indian tribe, or insular area that directly or indirectly receives CDBG funds in exchange for any other funds, credits, or non-Federal considerations, but must use such funds for activities eligible under title I of the Housing and Community Development Act of 1974, as amended. This requirement is contained in the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235. Urban counties requalifying in 2015 for FYs 2016-2018 must incorporate this language into Cooperation Agreements by revision or Amendment.

913-715-0430 office
800-766-3777 TDD
913-715-0440 fax

jocogov.org
f/jocogov
@jocogov

Chairman Ed Eilert
Board of County Commissioners
111 S Cherry Street Suite 3300
Olathe, Kansas 66061



Due to a timeline established by HUD, we are requesting that the city take action on the Amendment as soon as practicable. For the county to satisfy HUD's requirements for requalification, we must receive executed copies of the Amendment and certified copies of the Council Minutes no later than **June 19, 2015**.

We have provided three (3) copies of the Amendment. Please return:

1. All three (3) fully executed copies of the Amendment. One copy of the document will be returned to the city after obtaining county signatures;

AND

2. Three (3) certified copies of the minutes where action on the Amendment was taken by the governing body.

The above documents should be returned no later than June 19, 2015 to:

Viki Schmidt
Community Development Coordinator
11811 South Sunset Drive, Suite 1300
Olathe, Kansas 66061-3441

If you have any questions related to this matter, Ms. Schmidt can be reached at 913-715-8991 or by email at viki.schmidt@jocogov.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ed Eilert".

Ed Eilert
Chairman of the Board

Enclosure

AMENDMENT TO COOPERATION AGREEMENT

AN AMENDMENT TO THE COOPERATION AGREEMENT BETWEEN THE CITY OF PRAIRIE VILLAGE, KANSAS AND THE BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, KANSAS, FOR THE PURPOSE OF AMENDING THE COOPERATION AGREEMENT FOR PARTICIPATION IN THE JOHNSON COUNTY COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) AND HOME INVESTMENT PARTNERSHIPS (HOME) PROGRAMS.

THIS AMENDMENT is made and entered into by and between the **BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, KANSAS**, hereinafter referred to as “**COUNTY**” and the **CITY OF PRAIRIE VILLAGE, KANSAS**, hereinafter referred to as “**CITY**”, each party having been duly organized and now existing under the laws of the State of Kansas.

WITNESSETH:

WHEREAS, on June 5, 2003, the parties hereto entered into a Cooperation Agreement for participation in the COUNTY’S Community Development Block Grant Program (“CDBG Program”) and HOME Investment Partnerships Program (“HOME Program”), for each triennial federal fiscal period that the Department of Housing and Urban Development (“HUD”) determines that the COUNTY qualifies for “urban county status” under the HUD entitlement CDBG and HOME Programs (the “Cooperation Agreement”); and

WHEREAS, the Cooperation Agreement remains in effect and provides that the same will renew automatically at the end of each three-year period, unless either party hereto provides written notice it elects not to participate in a new qualification period; and

WHEREAS, the Cooperation Agreement provides that the COUNTY and CITY agree to adopt any amendment(s) to the Cooperation Agreement incorporating changes that are necessary to meet HUD requirements for cooperation agreements set forth in any future Urban County

Qualification Notice(s) that apply to a subsequent three-year urban county qualification period;
and

WHEREAS, on April 17, 2015, HUD issued Community Planning and Development (CPD) Notice CPD-15-04 containing certain instructions for Urban County Qualification for Participation in the CDBG Program for Fiscal Years (FYs) 2016-2018, which requires the COUNTY and CITY to amend their Cooperation Agreement to add a provision pertaining to the use of CDBG funds; and

WHEREAS, the governing body of the CITY did approve and authorize its mayor to execute this Amendment by official action of said governing body on the ____ of _____, 2015; and

WHEREAS, the governing body of the COUNTY did approve and authorize its chairman to execute this Amendment by official action of said governing body on the ____ of _____, 2015.

NOW, THEREFORE, in consideration of the above and foregoing recitals, the mutual covenants and agreements herein contained, and for the other good and valuable consideration, the parties hereto agree as follows:

1. **Incorporated Provision**. The COUNTY and CITY hereby amend their Cooperation Agreement by adding and incorporating therein the following new Section XIV:

XIV. USE OF CDBG FUNDS

For purposes of counties wishing to qualify or requalify for HUD entitlement status as urban counties in the CDBG Program, and pursuant to the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, the COUNTY and CITY hereby expressly acknowledge and agree that a unit of general local government may not sell, trade, or otherwise

transfer all or any portion of such funds to another such metropolitan city, urban county, unit of general local government, or Indian tribe, or insular area that directly or indirectly receives CDBG funds in exchange for any other funds, credits, or non-Federal considerations, but must use such funds for activities eligible under Title I of the Housing and Community Development Act of 1974, as amended.

2. **Agreement Status.** All of the terms and conditions of the Cooperation Agreement, including its automatic renewal provision, which is not otherwise modified by, or made inconsistent with, the incorporated provision of this Amendment, shall remain in full force and effect and be made binding on the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused the above and foregoing Amendment to be executed in triplicate by their respective and duly authorized officers.

CITY OF PRAIRIE VILLAGE, KANSAS

Mayor

ATTEST

City Clerk

APPROVED AS TO FORM:

City Attorney

**BOARD OF COUNTY COMMISSIONERS
OF JOHNSON COUNTY, KANSAS**

Ed Eilert, Chairman

ATTEST:

Linda Barnes
Clerk of the Board

APPROVED AS TO FORM:

Nicholas Saldan
Assistant County Counselor

COUNCIL COMMITTEE OF THE WHOLE
May 18, 2015

The Council Committee of the Whole met on Monday, May 18, 2015 at 6:00 p.m. in the Council Chambers. The meeting was called to order by Council President Ashley Weaver with the following members present: Mayor Laura Wassmer, Ashley Weaver, Jori Nelson, Steve Noll, Eric Mikkelson, Andrew Wang, Laura Wassmer, Brooke Morehead, Dan Runion, David Morrison, Ted Odell and Terrence Gallagher. Staff Members present: Tim Schwartzkopf, Chief of Police; Captains Wes Lovett and Byron Roberson; Keith Bredehoeft, Public Works Director; Katie Logan, City Attorney; Quinn Bennion, City Administrator; Wes Jordan, Assistant City Administrator; Lisa Santa Maria, Finance Director; Nolan Sunderman, Assistant to the City Administrator; Amy Hunt, Human Resources Manager and Joyce Hagen Mundy, City Clerk.

Presentation of the 2014 Audit

Lisa Santa Maria introduced Karen Linn with Berberich Trahan & Company, PA, to present the results of the 2014 Financial Audit for the City. Ms. Linn reviewed their responsibilities as auditors, the process followed and the findings of the audit as presented in their draft audit report which was distributed. She was pleased to report the city was given an unqualified opinion which is the highest available designation for the 2014 audit. The management letter reflected issues. There were no unusual transactions, recommendations for changes in processes or procedures and they found the accounting estimates and transaction adjustments to be appropriate and in line with standard accounting practices. Only one uncorrected error was discovered in accounts payable which was not of significance. Ms Linn commended the staff for their preparation and cooperation during the audit process. She directed the Council to review the draft letter and if they had any questions to contact Mrs. Santa Maria.

Eric Mikkelson asked for an explanation on the error. Mrs. Linn responded it was a timing issue with the payment of a bill received late in the year related to 2014 but not recorded in 2014.

COU2015-22 Consider 2016 Operating Budget

Finance Director Lisa Santa Maria stated the proposed budget is fiscally sound, maintains the current level of services, mill levy rate remains the same (19.493), stormwater utility fee rate remains the same and reflects a nominal increase in the 2015 general fund department budgets of 1.5% which is offset by a projected 1.5% increase in revenues. The proposed budget converts a current seasonal code enforcement position to a full time Code Enforcement Officer. The budget reflects an emphasis on the use of an Equipment Reserve Fund for non-routine equipment purchases. The General Fund ending fund balance will be 25% of revenues excluding transfers. Staff continues to tighten the actual budget ratio by reducing budget (96% estimated) with more reliance on contingency for unexpected expenditures.

The General Fund budget is reflected in the following four expenditure categories:

- Personal Services - wages and benefits
- Contract Services - contracts for auxiliary services
- Commodities - used to purchase goods
- Capital Outlay - used to acquire assets or improve the useful life of existing assets

The 2016 budget contains the following Restricted Funds:

- Economic Development Fund
- Solid Waste Fund
- Stormwater Utility Fund
- Alcohol Tax Fund
- Community Improvement District Fund

In addition to the General Fund the city also maintains two other unrestricted funds:

- Risk Management Reserve Fund
- Equipment Reserve Fund
- General Fund - fund balance that exceeds 25% of the budget revenue will be used to increase the transfer to the Capital Infrastructure Program.

Presentation of 2015 Public Safety Operating Budget

Chief Tim Schwartzkopf reviewed the budget process followed by his department in their review of their eleven programs and 500+ budget line items. The proposed overall budget for 2016 is \$6,091,278 for a decrease of 0.28% from 2015.

Administration - \$427,319.00

Includes 2 staff - Chief of Police and Executive Assistant

Largest portion of the budget which covers general administration costs goes toward applicant testing, psychological testing and physicals for new hires. The significant increase in this budget is \$23,000 for police pension administration which is based on the value of the pension fund and required.

Off-duty Contractual - \$49,685.00

Services provided by department staff reimbursed by contractor. This area reflects a decrease of \$5,800 with an average hourly cost of \$47.54.

Captain Wes Lovett

Communications - \$819,521.00

Includes 1 Sergeant, 6 dispatchers, 2 records clerks, 1 property custodian

This area is responsible for building security with large cost items including COPLINK, NotifyCoJo, LiveScan maintenance (\$9,000)

Crime Prevention - \$90,505.50

Includes 1 officer and vehicle Captain Lovett noted that this position is currently vacant and the services are being provided by the Investigations Unit. Chief Schwartzkopf

noted that when the department is fully staffed, this position will be filled with a designated individual. No changes are proposed from the 2015 budget.

Eric Mikkelson noted a discrepancy in the costs reflected in the budget pages. Lisa Santa Maria responded that the error was discovered after the budget books were printed.

Investigations - \$608,516.00

Includes 1 captain, 1 sergeant, 2 detectives, 2 School Resource Officers

Major Case fund is a significant cost for this area as well as CIRT gear, Leads on Line and vehicles. The 2016 budget includes an increase of \$25,500 for a new vehicle and related equipment.

Special Investigations (SIU) - \$185,821.00

1 corporal and 1 officer

No significant changes

D.A.R.E. - \$94,229.50

Includes 1 officer

This program is fully funded by the Alcohol Tax Revenue. Lisa noted funding has been increased as alcohol tax revenues have increased. The expenditures are restricted and focus primarily on items for the related to drug prevention education. Chief Schwartzkopf noted that the D.A.R.E vehicle will probably need to be replaced in 2017 and these funds could be used for that purchase.

No significant changes

Professional Standards - \$169,003.00

Includes 1 sergeant

This budget reflects a \$1,000 increase in training based on an average of actual training costs over the past three to five years.

Terrence Gallagher asked what percentage of overtime is a reflection of officers filling other positions. Captain Lovett responded in his area of supervision this is not a significant problem as he has more flexibility for to use comp time or flex time with investigators. However, in the patrol area this is much more prevalent as there are required minimum levels of service.

Chief Schwartzkopf stated the department is currently three officers short and are currently in a hiring process. He noted that they will be running hiring processes on a more regular basis, rather than on an as needed basis. They are not getting an appropriate number of candidates.

Captain Byron Roberson

Community Services (Animal Control) - \$187,705.00

Includes 2 CSO (Community Service Officers)

Also included is cost for School Crossing Guards which is now contracted out.

This budget reflects a \$4,000 decrease primarily from costs related to the animal boarding services with Great Plains SPCA as they charge per actual boarding use, not under a flat rate as the previous provider charged.

Patrol - \$3,104,810.75

Includes 1 captain, 5 sergeants, 3 corporals and 22 officers (8.2 FTEs for Mission Hills) Significant changes include: \$8,687 decrease in projected fuel costs; \$1,000 decrease in school crossing beacon repairs; \$9,500 decrease in field equipment; a \$4,000 increase for mobile computers and APS repairs and a \$3,000 increase for air cards. They are seeking to have computers in every vehicle instead of requiring computers to be taken out of vehicles and placed in others as needed. Captain Roberson noted moving radar equipment is purchased with grant funds. Search and body armor are replaced every five years and included in the 2016 budget.

Brooke Morehead asked if there was an AED unit in City Hall. Captain Roberson responded there are currently not AED units at City Hall, there is one at the pool. Mrs. Morehead stated she would like to have council members have the opportunity to be trained to use AED's. Chief Schwartzkopf responded the department has certified trainers.

Dan Runion asked how the Mission Hills percentages for funding are computed. Chief Schwartzkopf responded that Mission Hills pays for a percentage of costs for 9 program area where they are provided service. The percentage is based on a formula using crime data reflective of the services being provided, for example, the Communications percentage is based on the number of calls received. Eric Mikkelson confirmed that the formula is the same as what was used for the 2015 budget.

Lisa Santa Maria noted the percentages are reflected as revenue and total approximately \$1.2M. Eric Mikkelson asked for clarification as to charges for patrol officers vs. supervisors.

Traffic - \$354,162.00

Includes 4 officers; however, this program is currently operating one officer short. The proposed budget reflects a \$1200 decrease in fuel costs.

Sheila Myers asked the role of the traffic unit. Captain Roberson responded their focus is on traffic safety and enforcement. They have specific area throughout the city, including resident complaints and school zones that they regularly patrol. Chief Schwartzkopf added they are also used to investigate traffic area complaints. Lisa Santa Maria noted a decrease in city revenue is reflective of this unit being operated with one less officer.

Presentation of 2015 Public Works Operating Budget

Keith Bredehoeft stressed the importance of the operating budget as it reflects the city's support for the maintenance and care of its existing property and facilities. He complemented the Council and past council's on their care of city property and facilities.

The proposed 2016 Public Works Operating Budget is \$5,768,165 for a 3.9% increase of \$218,977 over the 2015 budget. His budget presentation does not include personnel costs and reflects significant changes only.

Administration - Increase of 19%

Includes 8 employees

By policy the city is required to do a citywide traffic study every 5 years. The last study was done in 2006. \$75,000 is included in the budget for this study in 2016. Ted Odell asked what is included in the study. Keith Bredehoeft responded that in addition to accident data traffic counts are taken on all major streets and intersections. Residential streets are not studied unless there is a problem identified. The City is also required to do Biennial Bridge inspections and \$5000 has been included in the budget for this work. The budget reflects a decrease of \$5000 under general engineering contracts. Replacement work stations for three shop employees are also included.

Jori Nelson asked why there is a significant increase between 2015 and 2016. Mr. Bredehoeft responded the primary cost is the addition of a Project Inspector with salary and related costs this is approximately a \$100,000 increase. Jori Nelson noted the budget has increased approximately \$400,000 since 2013. Mr. Bredehoeft replied the primary cost has been the additional staff. Quinn Bennion noted that the actual costs reflected are significantly lower in 2013 due to vacant positions with Keith acting as Interim Public Works Director as well as filling his previous position and a vacancy in the Field Superintendent position.

Drainage - 0.0% Change

Includes 5 employees

This program is funded through the Stormwater Utility Fee with half of the funds going toward operations and half towards Capital Improvement Projects. \$2,000 has been removed from the budget for maintenance and vehicle repair.

Mayor Wassmer asked if there was a five-year plan for drainage areas or was work done on a complaint basis. Mr. Bredehoeft replied that the work was done primarily on a case by case basis, but noted that drainage facilities are inspected on a yearly basis with all facilities inspected over a five year period. Lisa Santa Maria noted that a transfer from the Stormwater Management Fee covers the operating costs for this program.

Vehicles - 0.0% Change

Includes 3 employees

This program provides limited maintenance for police and public works vehicles. Funds for two shop items have been added to the equipment reserve for future purchase.

Streets - 0.0% Change

Includes 5 employees

This budget was prepared based on past history of use.

Significant changes made in this program area:

- \$51,000 increase for Streetlight and Traffic Signal Lease

- \$5,000 decrease for rental costs for street repairs
- \$5,000 decrease for Asphalt for street repairs
- \$2,000 decrease for APWA Snow Conference
- \$5,000 decrease for Street sign supplies
- No significant equipment purchases.

Mr. Bredehoeft noted that staff is investigating the possible purchase of street lights from KCP&L rather than lease. The budget includes \$500,000 for contractual street maintenance and repair, paving and concrete repair. Brooke Morehead asked if there was any change in highway salt cost. Mr. Bredehoeft replied there was not. Sheila Myers confirmed that cost is reflected under commodities.

Eric Mikkelson asked with the minimal snow falls this past year were reflected in the proposed budget. Lisa Santa Maria stated that unused funds are returned to the General Fund. Mr. Bredehoeft noted that he will be providing the Council with a full report on 2015 snow operations and costs.

Council President Ashley Weaver recessed the Council Committee of the Whole meeting to be reconvened at the conclusion of the City Council meeting for continuation of budget discussion.

Council Committee of the Whole meeting was recessed at 7:28 p.m.

Council President Ashley reconvened the Council Committee of the Whole meeting at 9:15 p.m.

Parks and Grounds - Increase of 7.6%

Includes 8 employees

Significant changes made in this program area:

- \$3,000 increase for Portable Toilets with more cleaning provided
- \$5,000 increase in tree planting (not related to Emerald Ash Borer)
- \$10,000 increase for tree removal (not related to Emerald Ash Borer). Over 150 trees were removed in 2015.
- \$2,000 increase for building repairs
- \$2,000 increase for park hardware (tables, benches, trash cans, etc.)
- \$2,000 increase for plantings
- \$3,000 increase for playground part replacements
- \$3,000 increase for turf supplies
- \$20,000 increase for 61" riding mower and 36" walk behind mower

Pool Maintenance - 0.0% Change

Significant changes made in this program area:

- \$5,000 increase for electricity costs
- \$5,000 increased for water costs
- \$50,000 decrease in pool painting (no pools to be painted in 2016)
- \$2,000 decrease in pool equipment repairs
- \$3,300 increase in current cleaning contract

- \$2,000 increase in plumbing repairs
- \$2,000 decrease in equipment supplies (filters)

Tennis Courts - No change

Buildings - Decrease of 9%

Significant changes made in this program area:

- \$7,000 increase for electricity costs
- \$2,500 increased for Natural Gas
- \$5,000 increase for telephone service
- \$2,000 decrease for HVAC Repair
- \$30,000 decrease in Building Improvements (Community Center Improvements included in 2015 budget)

Police Building - 0.0% Change The following significant changes are proposed:

Significant changes made in this program area:

- \$3,000 increase for Natural Gas costs
- \$2,000 increased for telephone services
- \$2,000 decrease for Plumbing Repairs
- \$30,000 continued for building improvements.

Presentation of the Administration 2016 Operating Budget

Finance Director Lisa Santa Maria presented the proposed 2016 Administration operating budget, including personnel costs, of \$1,856,309 for an overall of 2.5% with an increase of \$45,614.

Mayor & Council - Decrease of 4.10%

Reductions were made in conferences and commodities based on expenditure history. Jori Nelson noted this budget has more than doubled in the past three years. Quinn Bennion responded this is due to the transfer of election costs from the City Clerk's budget to the Mayor & Council budget. The city is charged for the cost of any elections that do not also include a county required election. Brooke Morehead noted with the proposed calendar changes these costs would go down.

Brooke Morehead asked if the budget included the Christmas ornaments and the holiday party. Mr. Bennion responded that it did and that those items were the Mayor's discretion. Mayor Wassmer the holiday event is the only thing done for volunteers in recognition of their service and will continue. Jori Nelson stated she would like to look at alternatives for the holiday party. Mayor Wassmer responded this is a tradition and would continue while she was Mayor. David Morrison noted his opposition to the serving of alcohol at this event. Ted Odell supports the event as a way to express the city's appreciation to volunteers for their service. Jori Nelson stated she would like to find a way to offset the costs for the alcohol.

Management & Planning - Increase of 2.32%

This area includes newsletter costs, planning services, training, dues and employee events.

Legal Services - Increase of 15%

This budget area reflects costs for services provided at an hourly rate and is reflective of expenses over the past years. Services are difficult to predict as history demonstrates. Expenditures from the past five years were presented to demonstrate both the increases and the wide variation from year to year.

- 2011 actual - \$110,516
- 2012 actual - \$225,682
- 2013 actual - \$249,735
- 2014 budget - \$160,000
- 2015 budget - \$200,000
- 2016 preliminary budget - \$230,000

Finance - Increase of 0.89%

Mrs. Santa Maria noted this increase reflects an increase in the credit card processing fees. Staff is also looking at options for new card readers for the pool.

Information Technology - Increase of 12.3% Decrease of 12.67%

Wes Jordan stated an inventory of city computers revealed that 43 units were purchased prior to 2011. This budget includes funds for the replacement of 33 units. Mr. Jordan noted this increase is relatively the same as the decrease in the 2015 budget. Staff would like to see this budget area remain flat in future years.

Human Resources - Decrease of 3.15%

This program area includes payroll fees, recruitment expenses and contract services for benefits.

Municipal Court - Decrease of 0.7%

This budget decrease is attributable to a change in personnel/wages. Positions include a Court Administrator and 4 court clerks.

Eric Mikkelson asked why the judges have been moved to contract employees. Wes Jordan stated the judges are currently considered seasonal employees. Staff feels this structural change is more consistent with the prosecutor and public defenders who are contract employees. Eric Mikkelson asked who the judges reported to. Mr. Jordan replied they are mayoral appointments. Mr. Mikkelson stated that judges hold a unique position and need to be independent of the city. Mr. Jordan noted some issues, such as consistency between judges, have been addressed in meetings with the judges.

Codes Administration - Increase of 4.3%

This budget increases the part-time code enforcement position authorized in 2015 to a full-time position in 2016. Mr. Jordan noted that funding is available to make that change in June of 2015 if desired by the City Council. Ted Odell noted that original discussions three years ago were for an additional full-time position. Dan Runion

confirmed that the costs include benefits for a full-time position. Mr. Jordan stated that with the implementation of the new RV and truck ordinances as well as rental and property inspections there is sufficient work to keep two full-time code enforcement officers busy. Staff is currently having a difficult time keeping up with timely reinspections.

Brooke Morehead made the following motion, which was seconded by Ted Odell and passed unanimously:

**RECOMMEND THE CITY COUNCIL AUTHORIZE THE CURRENT
PART-TIME CODE ENFORCEMENT POSITION TO BECOME
A FULL-TIME POSITION EFFECTIVE IMMEDIATELY
COUNCIL ACTION REQUIRED
CONSENT AGENDA**

Wes Jordan advised the council that the Codes Department Staff on the building side will not be able to handle the proposed projects anticipated to be under construction in 2016. New projects include Meadowbrook, Mission Chateau, Briarwood School, Chadwick Court, Homestead Estates and a proposed overlay district. To date, the department has issued 130 more permits than were issued at this time last year. They are operating at capacity. Mr. Jordan noted he doesn't know what changes will be needed at this time to best address the situation whether it be additional full-time staff, contracted assistance or part-time staff. Staff is currently investigating and will bring them forward to the City Council for consideration as project timetables become more finalized.

City Clerk - Decrease of 2.36%

License and reservation history was provided for 2014. No changes are proposed in this program area.

Parks & Recreation - Increase of 1.23%

Most expenditures remained the same with an increase in personnel costs. Recreation program participation data was presented for 2014.

Terrence Gallagher asked if credit card fees for pool use could be charged to the users. Lisa Santa Maria noted there are strict compliance guidelines that do not allow for that. Nolan Sunderman stated they are looking at credit card readers at the front desk where there are higher dollar transactions. Eric Mikkelson asked if the revenue vs. expenditures for the pool/concession area is monitored. Mr. Sunderman stated that most seasonal pools do not breakeven and are subsidized by the operating budget. The city's pool is operating \$130,000 in the red without including his personnel costs as program director.

Lisa Santa Maria noted that in the past it has been suggested that the pools close earlier than Labor Day to reduce costs. Andrew Wang asked if the costs could be covered by raising fees. Mrs. Santa Maria replied there is a breaking point to what can be charged. Brooke Morehead questioned the possible placement of an ATM. Mrs. Santa Maria

stated they too have related expenses and Mr. Sunderman noted security issues and monitoring costs related to ATMs.

Community Programs - Decrease of 26.9%

This includes \$5,000 for the repair and replacement of furniture at the Community Center, however, the decrease is primarily due to the \$16,000 increase in the 2015 for Community Center Improvements. The Arts Council will receive funding from their funds in the Prairie Village Foundation. Jori Nelson questioned the funding for Sister City. Mayor Wassmer responded this is to cover their membership fees or dues in the Sister City or related organization.

Equipment Reserve

Mrs. Santa Maria noted this funding source is a transfer from General Fund and interest on idle funds to set aside funds in anticipation of large item purchases that will need to be made in the future. The 2016 budget does not reflect any transfer from the General Fund.

General Budget Items

The following general budget costs are reflected in the proposed 2016 operating budget:

- Fuel: \$3.25 per gallon - a decrease of \$0.50 from 2015
- Health Insurance - 10.0% increase
- Dental Insurance - 5.0% increase
- Vision Insurance - 3.5% increase
- Property & Casualty insurance - 5.1% increase
- Worker's Compensation insurance - 6.7% increase
- KPERS - Employer rate 9.68%
- Police Pension Contribution - same as 2015 - \$450,000
- Employee Merit Pool - 3.5%
- City Supplemental Pension match - same as 2015
- General Fund Contingency - \$500,00
- Bond Obligation - \$814,050

Mrs. Santa Maria noted that these are projections and some costs may come in lower than projected.

General Fund Transfer to CIP

The proposed general fund transfer to CIP for 2015 is \$4.09M.

Salary Merit Pool

Quinn Bennion provided an overview of recommended personnel and salary costs. He recommended a salary pool increase of 3.5%. This amount is arrived at after examining other city projections, salary history, turnover rate and salary indexes. Overall personal services budget reflects an increase of \$16,223 from the 2015 budget for a 0.18% increase.

Recommended Benefit Change

Quinn Bennion noted the City currently provides a Long Term Care benefit to employees at a cost of \$5,760 annually. The premium quote for this benefit was a significant increase and staff is proposing to replace the LTC benefit with a Lifelock Security benefit which would provide identity theft and personal protection coverage. This benefit would be provided to City Council at no cost and to employees with the city paying 50% of the cost. The City is waiting for confirmation on a group rate with the change being made in January. Employees would have the option of continuing their LTC coverage independently.

Terrence Gallagher stated he would like to simply see the funds added to the employee merit pool. Mayor Wassmer stated she is supportive of staff looking into this future as an alternative. Staff was directed to bring back more information on the program.

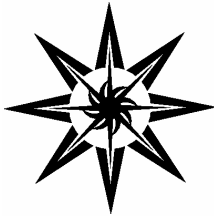
Next Steps

- June 1st - Outside Agency and Committee Funding discussion
- June 8th - Special meeting (if needed)
- June 15th - CIP Budget presentation and Economic Development Fund
- July 6th - Permission to publish the budget
- August 3rd - Public hearing and adoption of the budget

ADJOURNMENT

With no further business to come before the Council Committee of the Whole, Council President Ashley Weaver adjourned the meeting at 10:30 p.m.

Ashley Weaver
Council President



PUBLIC WORKS DEPARTMENT

Council Committee Meeting Date: June 1, 2015
Council Meeting Date: June 1, 2015

CONSIDER DESIGN AGREEMENT WITH AFFINIS CORP FOR THE DESIGN OF THE 2016 MISSION ROAD REHABILITATION PROJECT FROM 71ST STREET TO 75TH STREET.

RECOMMENDATION

Move to approve the design agreement with Affinis Corp for the design of the 2016 Mission Road Rehabilitation Project from 71st Street to 75th Street for \$157,528.00.

BACKGROUND

Affinis Corp was selected to be the City's design consultant for 2014, 2015, and 2016. Affinis Corp has been working for the City for the last several years and has performed very well.

This agreement is for the conceptual study and final design of the 2016 Mission Road Rehabilitation project from 71st to 75th Street. This contract will assist the City to study the needs of this corridor including the width of the roadway, the needs of pedestrians and bicyclists, aesthetic improvements as well as other items identified by the City. The final design will also include rehabilitation of the pavement, concrete replacement, drainage improvements, and well as other items of work. Construction is anticipated to begin in the late spring of 2016.

FUNDING SOURCE

Funding for the design of this project is as follows-

2016 CARS CIP Project	\$75,000.00
Additional Street Funds from 2014	\$82,528.00
Project close out.	
TOTAL	\$157,528.00

RELATED TO VILLAGE VISION

TR1c. Ensure that infrastructure improvements meet the needs of all transportation users.

CFS3a. Ensure streets and sidewalks are in good condition by conducting maintenance and repairs as needed.

ATTACHMENTS

1. Design Agreement with Affinis Corp

PREPARED BY

Keith Bredehoeft, Public Works Director

May 27, 2015

AGREEMENT FOR PROFESSIONAL ENGINEER

For

DESIGN SERVICES

Of

PROJECT MIRD0005- 2016 CARS PROJECT

MISSION ROAD 71st STREET TO 75th STREET

THIS AGREEMENT, made at the Prairie Village, Kansas, this ___ day of _____, by and between the City of Prairie Village, Kansas, a municipal corporation with offices at 7700 Mission Road, Prairie Village, Kansas, 66208, hereinafter called the “**City**”, and Affinis Corp, a corporation with offices at 8900 Indian Creek Parkway, Suite 450, Overland Park, KS, 66210 hereinafter called the “**Consultant**”.

WITNESSED, THAT WHEREAS, the City has determined a need to retain a professional engineering firm to provide civil engineering services for the Design of the 2016 CARS Project hereinafter called the “**Project**”,

AND WHEREAS, the City is authorized and empowered to contract with the Consultant for the necessary consulting services for the Project,

AND WHEREAS, the City has the necessary funds for payment of such services,

NOW THEREFORE, the City hereby hires and employs the Consultant as set forth in this Agreement effective the date first written above.

Article I City Responsibilities

- A. Project Definition** The City is preparing to design and construct roadway and stormwater improvements throughout the city as part of CARS Programs.
- B. City Representative** The City has designated, Melissa Prenger, Public Works Senior Project Manager, to act as the City’s representative with respect to the services to be performed or furnished by the Consultant under this Agreement. Such person shall have authority to transmit instructions, receive information, interpret and define the City’s policies and decisions with respect to the Consultant’s services for the Project.
- C. Existing Data and Records** The City shall make available to the Consultant all existing data and records relevant to the Project such as, maps, plans, correspondence files and other information possessed by the City that is relevant to the Project. Consultant shall not be responsible for verifying or ensuring the accuracy of any information or content supplied by City or any other Project participant unless specifically defined by the scope of work, nor ensuring that such information or content does not violate or infringe any law or other third party rights. However, Consultant shall promptly advise the City, in writing, of any inaccuracies in the information provided or any other

violation or infringement of any law or third party rights that Consultant observes. City shall indemnify Consultant for any infringement claims resulting from Consultant's use of such content, materials or documents.

- D. **Review For Approval** The City shall review all criteria, design elements and documents as to the City requirements for the Project, including objectives, constraints, performance requirements and budget limitations.
- E. **Standard Details** The City shall provide copies of all existing standard details and documentation for use by the Consultant for the project.
- F. **Submittal Review** The City shall diligently review all submittals presented by the Consultant in a timely manner.
- G. The City has funded the 2016 CARS Project with this street:
 - 1. Mission Road (71st Street to 75th Street)

Article II Consultant Responsibilities

- A. **Professional Engineering Services** The Consultant shall either perform for or furnish to the City professional engineering services and related services in all phases of the Project to which this Agreement applies as hereinafter provided.
- B. **Prime Consultant** The Consultant shall serve as the prime professional Consultant for the City on this Project.
- C. **Standard Care** The standard of care for all professional consulting services and related services either performed for or furnished by the Consultant under this Agreement will be the care and skill ordinarily used by members of the Consultant's profession, practicing under similar conditions at the same time and in the same locality.
- D. **Consultant Representative** Designate a person to act as the Consultant's representative with respect to the services to be performed or furnished by the Consultant under this Agreement. Such person shall have authority to transmit instructions, receive information, and make decisions with respect to the Consultant's services for the Project.

Article III Scope of Services

A. Concept Phase

- 1. Schedule and attend one startup meeting with City to confirm project goals, schedule, budget and expectations. At this meeting the City will review the program and create a design memorandum.
- 2. Identify all utilities that may be affected by the project and make contact with the utility to determine the facilities involved.
- 3. Review traffic study prepared by others for the City to develop design alternatives for the project corridor. Considerations for design alternatives shall include, but not be limited to, safety, traffic volumes, pedestrian access, vehicular access, intersection control, turning movements, utilities, bicycle facilities, school zone, storm drainage and other design elements.
- 4. Conduct three (3) meetings with City Council and civic task force. The first meeting will be held prior to development of conceptual alternatives to gather information about issues. The second meeting will be held after conceptual alternatives have been developed and

reviewed by the City. The meetings will be held at City Hall. Notifications for the meetings will be prepared and distributed by the City.

5. Conduct two (2) public meetings for the residents adjacent to the defined project area. The first meeting will be held prior to development of conceptual alternatives to gather information about resident issues. The second meeting will be held after conceptual alternatives have been developed and reviewed by the City. The meetings will be held at City Hall. Notifications for the meetings will be prepared and distributed by the City.
6. Prepare up to six (6) renderings to be presented at the public and task force meetings.
7. Prepare opinions of probable project cost for each alternative listing typical construction pay items, construction administration costs and any other project related costs. Add a project contingency equal to 20 percent of the total of construction costs.
8. Meet with City to review costs and scope of project.
9. Prepare and submit a report summarizing the following: the project schedule, an evaluation of the alternatives for intersection and roadway improvements, opinions of probable project costs for each alternative and a recommendation of the preferred alternative(s) for the proposed improvements.
10. Provide one hard copy and electronic copy of any report, or drawing in Microsoft Word or Excel.
11. Provide files of the report and layouts of the proposed improvement alternatives in PDF Format.
12. Present recommendations to Council task force. Attend City Council meeting and present recommendations for approval.

B. Design Phase: Upon receipt of notice to proceed from the City, the Consultant shall provide all consulting services related to this project including, but not limited, to these phases and tasks. The scope is generally defined below.

1. Schedule and attend one startup meeting with City to confirm project goals, schedule, budget and expectations. Review the design memorandum and modify based on decisions or recommendations resulting from the Concept Phase.
2. Schedule and attend up to three (3) utility coordination meetings. Request utility comments, coordinate planned relocations among agencies and verify relocation/adjustment schedule.
3. Conduct field reconnaissance with City to evaluate and identify:
 - a. Design issues.
 - b. Identify existing drainage components in project area (location, size, material, capacity, storm design adequacy and condition).
 - c. Need for drainage improvements.
 - d. Need for full depth pavement repairs.
 - e. Need for sidewalk replacement.
 - f. Location for new sidewalk.
 - g. Need for curb and gutter replacement.
 - h. Need for and limits of driveway replacement.
 - i. Need for which type of ADA ramps.
 - j. Utility locations and conflicts.
 - k. Tree conflicts.
4. Determine and design storm sewer system modifications resulting from roadway configuration changes.
5. Use topographic survey information from 2005 CARS Program, Mission Road (71st Street to 75th Street), and supplement or update with the following information:
 - a. Utility facility information provided by current mapping and field locations provided through the Kansas One-Call service and individual utility agencies.
 - b. Curb returns at all intersections.
 - c. Current property owner information as provided through Johnson County AIMS system.

- d. Field check corridor and topographic survey (2004) to identify new landscaping, driveways, walls and other new amenities within the existing right of way.
- e. Verify and identify location of bench marks and section markers.
6. Prepare preliminary construction plans (60%).
 - a. Project title sheet.
 - b. General site plan showing and identifying surface features such as street right-of-way, edge of pavement, sidewalks, driveways, boring locations, trees, house outline, address, owner name based on latest AIMS coverage data, irrigation systems, known electronic dog fences and any other pertinent surface feature.
 - c. Plan sheets for street improvements showing all utilities, sanitary sewer, water, gas, electric, telephone, traffic signals, and street lights, as well as all conflicts and test pits. Profiles will be provided for streets when a topographic survey is performed.
 - d. Typical sections.
 - e. Cross sections for streets with a detailed topographic survey. Intersection details showing the elevation and drainage pattern information.
 - f. Construction phasing showing temporary traffic control measures per MUTCD for various phases of construction.
 - g. Pavement marking and signing measures per MUTCD.
 - h. Erosion control plan.
 - i. City details drawings and other special details pertinent to the project.
 - j. Street lighting design is NOT included in these scope of services.
7. Submit one set (one full size and one half size) of preliminary (60% completion) construction plans for City review.
8. Present one set (half size) of preliminary plans to appropriate governmental agencies and utility companies requesting comments and verification of potential conflicts.
9. Perform field check with City.
10. Prepare legal descriptions with tract maps for temporary and permanent easement documents. Prepare easement documents and/or rights of entry.
11. Schedule, prepare for and attend one (1) public meeting for the 2016 CARS project. The City will be responsible for sending notifications to the residents and property owners.
12. Present a detailed opinion of probable construction cost of City defined construction pay items with quantities and current unit costs. Add to the total construction cost, a contingency of 15 percent.
13. Attend and prepare minutes for up to six (6) project meetings and disperse the minutes to City representative and all other attendees within five working days.
14. Prepare final documents based of review and comments from City and other review agencies of the preliminary plans.
15. Prepare final project manual for City review.
16. Submit one half size set of final (95%) plans and specifications for City review.
17. Submit one half-size set of final (95%) plans and specifications to other appropriate governmental agencies and utility companies with identification of significant changes to preliminary design plans.

18. Prepare a final opinion of probable construction cost.
19. Prepare bid documents for **one bid package** using the City's standard documents for the 2016 CARS Project.
20. Provide one hard copy and electronic copy of any report or plans. Provide files of the plans in PDF Format.

C. Bidding Services Phase

1. Provide the City a notice of bid for publication.
2. Post advertisement for bid on electronic plan room (Drexel Technologies) and provide bid documents for reproduction.
3. Via electronic plan room provide all bid documents for potential bidders to purchase.
4. Provide all utilities with bid set of plans and request attendance at pre-bid meeting.
5. Conduct a pre-bid meeting. Prepare minutes of pre-bid meeting and disperse to City representative and all other attendees within five working days.
6. Prepare and distribute addenda prior to bid opening. Assist bidders with questions during bidding.
7. Provide to the City an Engineer's Estimate and bid tab sheet prior to the bid opening.
8. Attend bid opening.
9. Check accuracy of bids, evaluate the bidders and make a recommendation of award to the City.
10. Prepare five sets construction documents including bonds for execution by the contractor and the City.
11. Provide one hard copy and electronic copy of any report or drawings. Provide files of the plans or drawings in PDF Format.

D. Construction Services Phase

1. Prepare for and attend preconstruction meeting with City and Contractor. Prepare and distribute meeting notes.
2. Prepare for and attend Public meeting with City and Contractor. Present construction schedule, traffic control and other pertinent information to Public.
3. Provide periodic consultation by telephone or email to assist with construction issues.
 - a. Consultation will be initiated by Client and/or Construction Representative.
 - b. Consultant shall provide documentation on invoice that provides a brief description of the issue and/or activity.
 - c. Any consultation resulting from a design error by the Consultant shall be excluded from this scope of work and shall be provided at the expense of the Consultant.
4. Review shop drawings and submittals.
5. Prepare plan revisions as necessitated by conditions encountered in the field during construction, with the exception of traffic control plans.
6. Attend construction progress meetings as directed/requested by the Client. Six (6) meetings are budgeted.
7. Prepare final record drawings which reflect:
 - a. Minor design changes.

- b. Changes made in the field by City representatives and are marked on the construction plan set.
8. Submit to the City electronic CAD files and TIFF images of the revised sheets.

Article IV Time Schedule

- A. **Timely Progress** The Consultant's services under this Agreement have been agreed to in anticipation of timely, orderly and continuous progress of the Project.
- B. **Authorization to Proceed** If the City fails to give prompt written authorization to proceed with any phase of services after completion of the immediately preceding phase, the Consultant shall be entitled to equitable adjustment of rates and amounts of compensations to reflect reasonable costs incurred by the Consultant as a result of the delay or changes in the various elements that comprise such rates of compensation.
- C. **Default Neither** City nor Consultant shall be considered in default of this Agreement for delays in performance caused by circumstances beyond the reasonable control of the nonperforming party. For purposes of this Agreement, such circumstances include, but are not limited to, abnormal weather conditions; floods; earthquakes; fire; epidemics; war, riots, and other civil disturbances; strikes, lockouts, work slowdowns, and other labor disturbances; sabotage; judicial restraint; and delay in or inability to procure permits, licenses, or authorizations from any local, state, or federal agency for any of the supplies, materials, accesses, or services required to be provided by either City or Consultant under this Agreement. Should such circumstances occur, the consultant shall within a reasonable time of being prevented from performing, give written notice to the City describing the circumstances preventing continued performance and the efforts being made to resume performance of this Agreement.
- D. **Completion Schedule** Recognizing that time is of the essence, the Consultant proposes to complete the scope of services as specified in the Scope of Services:

Concept Phase	Due by September 1, 2015
Design Phase	Due by January 12, 2016
Bid Advertisement Date	February 2, 2016
Letting Date	February 26, 2016

Article V Compensation

- A. **Maximum Compensation** The City agrees to pay the Consultant as maximum compensation as defined in Exhibit B for the scope of services the following fees:

2016 CARS

Concept Phase	<u>\$38,782.00</u>
Design Phase	<u>\$94,890.00</u>
Bidding Services Phase	<u>\$ 8,056.00</u>
Construction Services Phase	<u>\$15,800.00</u>
Total Fee	<u>\$157,528.00</u>

- B. Invoices** The compensation will be invoiced by phase, detailing the position, hours and appropriate hourly rates (which include overhead and profit) for Consultant's personnel classifications and the Direct Non-Salary Costs.
- C. Direct Non-Salary Costs** The term "Direct Non-Salary Costs" shall include the Consultant payments in connection with the Project to other consultants, transportation, and reproduction costs. Payments will be billed to the City at actual cost. Transportation, including use of survey vehicle or automobile will be charged at the IRS rate in effect during the billing period. Reproduction work and materials will be charged at actual cost for copies submitted to the City.
- D. Monthly Invoices** All invoices must be submitted monthly for all services rendered in the previous month. The Consultant will invoice the City on forms approved by the City. All properly prepared invoices shall be accompanied by a documented breakdown of expenses incurred and description of work accomplished.
- E. Fee Change** The maximum fee shall not be changed unless adjusted by Change Order mutually agreed upon by the City and the Consultant prior to incurrence of any expense. The Change Order will be for major changes in scope, time or complexity of Project.

Article VI General Provisions

- A. Opinion of Probable Cost and Schedule:** Since the Consultant has no control over the cost of labor, materials or equipment furnished by Contractors, or over competitive bidding or market conditions, the opinion of probable Project cost, construction cost or project schedules are based on the experience and best judgment of the Consultant, but the Consultant cannot and does not guarantee the costs or that actual schedules will not vary from the Consultant's projected schedules.
- B. Quantity Errors:** Negligent quantity miscalculations or omissions because of the Consultant's error shall be brought immediately to the City's attention. The Consultant shall not charge the City for the time and effort of checking and correcting the errors to the City's satisfaction.
- C. Reuse of Consultant Documents:** All documents including the plans and specifications provided or furnished by the Consultant pursuant to this Agreement are instruments of service in respect of the Project. The Consultant shall retain an ownership and property interest upon payment therefore whether or not the Project is completed. The City may make and retain copies for the use by the City and others; however, such documents are not intended or suitable for reuse by the City or others as an extension of the Project or on any other Project. Any such reuse without written approval or adaptation by the Consultant for the specific purpose intended will be at the City's sole risk and without liability to the Consultant. The City shall indemnify and hold harmless the Consultant from all claims, damages, losses and expenses including attorney's fees arising out of or resulting reuse of the documents.
- D. Reuse of City Documents** In a similar manner, the Consultant is prohibited from reuse or disclosing any information contained in any documents, plans or specifications relative to the Project without the expressed written permission of the City.
- E. Insurance** The Consultant shall procure and maintain, at its expense, the following insurance coverage:
 1. Workers' Compensation -- Statutory Limits, with Employer's Liability limits of \$100,000 each employee, \$500,000 policy limit;
 2. Commercial General Liability for bodily injury and property damage liability claims with limits of not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate;
 3. Commercial Automobile Liability for bodily injury and property damage with limits of not less than \$1,000,000 each accident for all owned, non-owned and hired automobiles;

4. Errors and omissions coverage of not less than \$1,000,000. Deductibles for any of the above coverage shall not exceed \$25,000 unless approved in writing by City.
 5. In addition, Consultant agrees to require all consultants and sub-consultants to obtain and provide insurance in identical type and amounts of coverage together and to require satisfaction of all other insurance requirements provided in this Agreement.
- F. Insurance Carrier Rating** Consultant's insurance shall be from an insurance carrier with an A.M. Best rating of A-IX or better, shall be on the GL 1986 ISO Occurrence form or such other form as may be approved by City, and shall name, by endorsement to be attached to the certificate of insurance, City, and its divisions, departments, officials, officers and employees, and other parties as specified by City as additional insureds as their interest may appear, except that the additional insured requirement shall not apply to Errors and Omissions coverage. Such endorsement shall be ISO CG2010 11/85 or equivalent. "Claims Made" and "Modified Occurrence" forms are not acceptable, except for Errors and Omissions coverage. Each certificate of insurance shall state that such insurance will not be canceled until after thirty (30) days' unqualified written notice of cancellation or reduction has been given to the City, except in the event of nonpayment of premium, in which case there shall be ten (10) days' unqualified written notice. Subrogation against City and City's Agent shall be waived. Consultant's insurance policies shall be endorsed to indicate that Consultant's insurance coverage is primary and any insurance maintained by City or City's Agent is non-contributing as respects the work of Consultant.
- G. Insurance Certificates** Before Consultant performs any portion of the Work, it shall provide City with certificates and endorsements evidencing the insurance required by this Article. Consultant agrees to maintain the insurance required by this Article of a minimum of three (3) years following completion of the Project and, during such entire three (3) year period, to continue to name City, City's agent, and other specified interests as additional insureds thereunder.
- H. Waiver of Subrogation** Coverage shall contain a waiver of subrogation in favor of the City, and its subdivisions, departments, officials, officers and employees.
- I. Consultant Negligent Act** If due to the Consultant's negligent act, error or omission, any required item or component of the project is omitted from the Construction documents produced by the Consultant, the Consultant's liability shall be limited to the difference between the cost of adding the item at the time of discovery of the omission and the cost had the item or component been included in the construction documents. The Consultant will be responsible for any retrofit expense, waste, any intervening increase in the cost of the component, and a presumed premium of 10% of the cost of the component furnished through a change order from a contractor to the extent caused by the negligence or breach of contract of the Consultant or its subconsultants.
- J. Termination** This Agreement may be terminated by either party upon seven days written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party; provided, however, the nonperforming party shall have 14 calendar days from the receipt of the termination notice to cure the failure in a manner acceptable to the other party. In any such case, the Consultant shall be paid the reasonable value of the services rendered up to the time of termination on the basis of the payment provisions of this Agreement. Copies of all completed or partially completed designs, plans and specifications prepared under this Agreement shall be delivered to the City when and if this Agreement is terminated, but it is mutually agreed by the parties that the City will use them solely in connection with this Project, except with the written consent of the Consultant (subject to the above provision regarding Reuse of Documents).
- K. Controlling Law** This Agreement is to be governed by the laws of the State of Kansas.
- L. Indemnity** To the fullest extent permitted by law, with respect to the performance of its obligations in this Agreement or implied by law, and whether performed by Consultant or any sub-consultants hired by Consultant, the Consultant agrees to indemnify City, and its agents, servants, and employees against all claims, damages, and losses, including reasonable attorneys' fees and

defense costs, caused by the negligent acts, errors, or omissions of the Consultant or its sub-consultants, to the extent and in proportion to the comparative degree of fault of the Consultant and its sub-consultants.

- M. Severability** Any provision or part of the Agreement held to be void or unenforceable under any law or regulation shall be deemed stricken and all remaining provisions shall continue to be valid and binding upon the City and the Consultant, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision. The provisions of this Article shall not prevent this entire Agreement from being void should a provision which is of the essence of this Agreement be determined void.
- N. Notices** Any notice required under this Agreement will be in writing, addressed to the appropriate party at the address which appears on the signature page to this Agreement (as modified in writing from item to time by such party) and given personally, by registered or certified mail, return receipt requested, by facsimile or by a nationally recognized overnight courier service. All notices shall be effective upon the date of receipt.
- O. Successors and Assigns** The City and the Consultant each is hereby bound and the partners, successors, executors, administrators, legal representatives and assigns of the City and the Consultant are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators, legal representatives and assigns of such other party in respect of all covenants and obligations of this Agreement.
- P. Written Consent to Assign** Neither the City nor the Consultant may assign, sublet, or transfer any rights under the Agreement without the written consent of the other, which consent shall not be unreasonably withheld; provided, Consultant may assign its rights to payment without Owner's consent, and except to the extent that any assignment, subletting or transfer is mandated by law or the effect of this limitation may be restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Agreement.
- Q. Duty Owed by the Consultant** Nothing in this Agreement shall be construed to create, impose or give rise to any duty owed by the Consultant to any Contractor, subcontractor, supplier, other person or entity or to any surety for or employee of any of them, or give any rights or benefits under this Agreement to anyone other than the City and the Consultant.

IN WITNESS WHEREOF: the parties hereto have executed this Agreement to be effective as of the date first above written.

City:

City of Prairie Village, Kansas

By:

Laura Wassmer, Mayor

Address for giving notices:

City of Prairie Village
Department of Public Works
3535 Somerset Drive
Prairie Village, Kansas 66208

Telephone: 913-385-4640
Email: publicworks@pvkansas.com

ATTEST:

Joyce Hagen Mundy, City Clerk

Consultant:

Affinis Corp

By

Kristen E. Leathers, PE

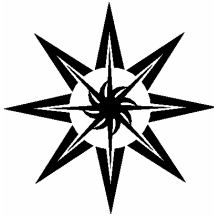
Address for giving notices:

Affinis Corp
8900 Indian Creek Parkway, Suite 450
Overland Park, KS 66210

Telephone: 913-239-1122
Email: kleathers@affinis.us

APPROVED AS TO FORM BY:

Catherine P. Logan, City Attorney



PUBLIC WORKS DEPARTMENT

Council Committee Meeting Date: June 1, 2015

Council Meeting Date: June 1, 2015

CONSIDER CONSTRUCTION CONTRACT FOR THE 2015 PAVING AND CARS PROGRAMS

RECOMMENDATION

Move to authorize the Mayor to sign the construction contract with J.M. Fahey Construction Company for the 2015 Paving and CARS Programs for \$2,335,000.

BACKGROUND

This project includes work on many streets throughout the City. It is funded by the 2015 Paving Program, the 2015 CARS Program, and the Harmon Park Parking Lot Project. These streets will be rehabilitated and will include repair or replacement of the concrete curb/gutter and asphalt pavement.

Street Projects-

- Roe Avenue (75th Street to 83rd Street) CARS
- 66th Street (El Monte to Roe Avenue)
- 70th Street (Nall Avenue to Reeds Road)
- 71st Terrace (Belinder Avenue to Cherokee Drive)
- 77th Street (Norwood Drive to Mission Road)
- 85th Terrace Cul-de-Sac (off of Nall Avenue)
- Ash Street (73rd Street to Tomahawk)
- Maple Street (79th Street to 81st Street)
- Harmon Park Parking Lots

On May 21, 2015, the City Clerk opened bids for the project. Three acceptable bids were received:

JM Fahey Construction Co	\$1,826,989.72
McAnany Construction	\$2,037,600.00
O'Donnell & Sons Construction	\$2,163,938.95
Engineer's Estimate	\$2,404,312.00

The Engineer has reviewed all bids and has recommended award of the low bid.

The contract will be awarded for \$2,335,000. Given the bids we should be able to construct more streets than listed above. Because the scope of work could change on an individual street such as a complete reconstruction versus a mill and overlay the additional streets will be chosen at a later date.

FUNDING SOURCES

Funding is available under the 2015 Paving Project (PAVP2015), 2015 CARS Project (ROAV0003) and the Harmon Park Parking Lot Project (BG300002).

The funding is shown below:

2015 CARS Project (ROAV0003)	\$1,110,000
Harmon Park Parking Lot (BG300002)	\$ 125,000
2015 Paving Program (PAVP2015)	<u>\$1,100,000</u>
Total Contract	\$2,335,000

RELATION TO VILLAGE VISION

- CC1a. Make streetscape improvements to enhance pedestrian safety and attractiveness of the public realm.*
- CFS3a. Ensure streets and sidewalks are in good condition by conducting maintenance and repairs as needed.*
- TR1a. Provide sidewalks in new and existing areas to allow for continuous pedestrian movement around Prairie Village.*
- TR1b. Ensure that infrastructure improvements meet the needs of all transportation users.*

ATTACHMENTS

1. Construction Agreement with JM Fahey Construction Company

PREPARED BY

Melissa Prenger, Senior Project Manager

May 27, 2015

CONSTRUCTION CONTRACT

FOR

PROJECT

PROJECT PAVP2015- 2015 PAVING PROGRAM
PROJECT ROAV0003- 2015 CARS PROJECT

BETWEEN

THE CITY OF PRAIRIE VILLAGE, KANSAS

AND

J.M. FAHEY CONSTRUCTION COMPANY

THIS AGREEMENT, is made and entered into this ____ day of _____, 2015, by and between the City of Prairie Village, Kansas, hereinafter termed the "City", and J.M. Fahey Construction Company, hereinafter termed in this agreement, "Contractor", for the construction and completion of Project 2015 PAVING AND CARS PROGRAM, (the "Project") designated, described and required by the Project Manual and Bid Proposal, to wit:

WITNESSETH:

WHEREAS, the City has caused to be prepared, approved and adopted a Project Manual describing construction materials, labor, equipment and transportation necessary for, and in connection with, the construction of a public improvement, and has caused to be published an advertisement inviting sealed bid, in the manner and for the time required by law;

WHEREAS, the Contractor, in response to the advertisement, has submitted to the City in the manner and at the time specified, a sealed Bid Proposal in accordance with the Bid Documents;

WHEREAS, the City, in the manner prescribed by law, has publicly opened, examined and canvassed the Bid Proposals submitted, and as a result of such canvass has determined and declared the Contractor to be the lowest and best responsible bidder for the construction of said public improvements, and has duly awarded to the said Contractor a contract therefore upon the terms and conditions set forth in this Agreement for the sum or sums set forth herein;

WHEREAS, the Contractor has agreed to furnish at its own cost and expense all labor, tools, equipment, materials and transportation required to construct and complete in good, first class and workmanlike manner, the Work in accordance with the Contract Documents; and

WHEREAS, this Agreement, and other Contract Documents on file with the City Clerk of Prairie Village, Kansas, all of which Contract Documents form the Contract, and are as fully a part thereof as if repeated verbatim herein; all work to be to the entire satisfaction of the City or City's agents, and in accordance with the laws of the City, the State of Kansas and the United States of America;

NOW, THEREFORE, in consideration of the compensation to be paid the Contractor, and of the mutual agreements herein contained, the parties hereto have agreed and hereby agree, the City for itself and its successors, and the Contractor for itself, himself, herself or themselves, its, his/her, hers or their successors and assigns, or its, his/her, hers or their executors and administrators, as follows:

1. DEFINITIONS: Capitalized terms not defined herein shall have the meanings set forth in the General Conditions.

1.1 Following words are given these definitions:

ADVERSE WEATHER shall have the meaning set forth in Section 9.3 hereof.

APPLICATION FOR PAYMENT shall mean a written request for compensation for Work performed on forms approved by the City.

BID shall mean a complete and properly signed proposal to do the Work or designated portion thereof, for the price stipulated therein, submitted in accordance with the Bid Documents.

BID DOCUMENTS shall mean all documents related to submitting a Bid, including, but not limited to, the Advertisement for Bids, Instruction to Bidders, Bid Form, Bid Bond, and the proposed Project Manual, including any Addenda issued prior to receipt of Bids.

BID PROPOSAL shall mean the offer or proposal of the Bidder submitted on the prescribed form set forth the prices for the Work to be performed.

BIDDER shall mean any individual: partnership, corporation, association or other entity submitting a bid for the Work.

BONDS shall mean the bid, maintenance, performance, and statutory or labor and materials payment bonds, together with such other instruments of security as may be required by the Contract Documents.

CERTIFICATE FOR PAYMENT shall mean written certification from the Project Manager stating that to the best of the project manager's knowledge, information and belief, and on the basis of the Project Manager's on-site visits and inspections, the Work described in an Application for Payment has been completed in accordance with the terms and conditions of the Contract Documents and that the amount requested in the Application for Payment is due and payable.

CHANGE ORDER is a written order issued after the Agreement is executed by which the City and the Contractor agree to construct additional items of Work, to adjust the quantities of Work, to modify the Contract Time, or, in lump sum contracts, to change the character and scope of Work shown on the Project Manual.

CITY shall mean the City of Prairie Village, Kansas, acting through a duly appointed representative.

CONTRACT or CONTRACT DOCUMENTS shall consist of (but not necessarily be limited to) the Plans, the Specifications, all addenda issued prior to and all modifications issued after execution of this Agreement, (modifications consisting of written amendments to the Agreement signed by both parties, Change Orders, written orders for minor changes in the Work issued by the Project Manager) this Construction Contract between the City and Contractor (sometimes referred to herein as the "Agreement"), the accepted Bid Proposal, Contractor's Performance Bond, Contractor's Maintenance Bond, Statutory Bond, the Project Manual, the General Conditions, the Special Conditions and any other documents that have bearing the Work prescribed in the Project. It is understood that the Work shall be

carried out and the Project shall be constructed fully in accordance with the Contract Documents.

CONTRACT PRICE shall be the amount identified in the Construction Agreement between the City and the Contractor as the total amount due the Contractor for Total Completion of the Work as per the Contract Documents.

CONTRACT TIME shall be the number of calendar days stated in the Contract Documents for the completion of the Work or shall be a specific date as designated in the Construction Agreement.

CONTRACTOR shall mean the entity entering into the Contract for the performance of the Work covered by this Contract, together with his/her duly authorized agents or legal representatives.

DEFECTIVE WORK shall mean Work, which is unsatisfactorily, faulty or deficient, or not in conformity with the Project Manual.

FIELD ORDER shall mean a written order issued by the Project Manager that orders minor changes in the Work, but which does not involve a change in the Contract Price or Contract Time.

FINAL ACCEPTANCE shall mean the date when the City accepts in writing that the construction of the Work is complete in accordance with the Contract Documents such that the entire Work can be utilized for the purposes for which it is intended and Contractor is entitled to final payment.

GENERAL CONDITIONS shall mean the provisions in the document titled "General Conditions - General Construction Provisions" attached hereto and incorporation herein by reference.

INSPECTOR shall mean the engineering, technical inspector or inspectors duly authorized by the City to monitor the work and compliance tests under the direct supervision of the Project Manager.

NOTICE TO PROCEED shall mean the written notice by the City to the Contractor fixing the date on which the Contract Time is to commence and on which the Contractor shall start to perform its obligations under the Contract Documents. Without the prior express written consent of the City, the Contractor shall do no work until the date set forth in the Notice to Proceed.

PAY ESTIMATE NO. ____ or FINAL PAY ESTIMATE shall mean the form to be used by the Contractor in requesting progress and final payments, including supporting documentation required by the Contract Documents.

PLANS shall mean and include all Shop Drawings which may have been prepared by or for the City as included in the Project Manual or submitted by the Contractor to the City during the progress of the Work, all of which show the character and scope of the work to be performed.

PROJECT shall mean the Project identified in the first paragraph hereof.

PROJECT MANAGER shall mean the person appointed by the Public Works Director for this Contract.

PROJECT MANUAL shall contain the General Conditions, Special Conditions, Specifications, Shop Drawings and Plans for accomplishing the work.

PROJECT SEGMENTS shall have the meaning set forth in Section 7.1 hereof.

PUBLIC WORKS DIRECTOR shall mean the duly appointed Director of Public Works for the City of Prairie Village or designee.

SHOP DRAWINGS shall mean all drawings, diagrams, illustrations, schedules and other data which are specifically prepared by the Contractor, a Subcontractor, manufacturer, fabricator, supplier or distributor to illustrate some portion of the Work, and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams and other information prepared by a manufacturer, fabricator, supplier or distribution and submitted by the Contractor to illustrate material or equipment for some portion of the Work.

SPECIFICATIONS shall mean those portions of the Project Manual consisting of written technical descriptions of materials, equipment, construction methods, standards and workmanship as applied to the Work and certain administrative details applicable thereto. They may include, but not necessarily be limited to: design specifications, e.g. measurements, tolerances, materials, inspection requirements and other information relative to the work; performance specifications, e.g., performance characteristics required, if any; purchase description specifications, e.g. products or equipment required by manufacturer, trade name and/or type; provided, however, equivalent alternatives (including aesthetics, warranty and manufacturer reputation) may be substituted upon written request and written approval thereof by the City.

SPECIAL CONDITIONS shall mean the provisions in the document titled "Special Conditions" attached hereto and incorporation herein by reference.

SUBCONTRACTOR shall mean an individual, firm or corporation having a direct contract with the Contractor or with another subcontractor for the performance of a part of the Work.

SUBSTANTIAL COMPLETION shall be defined as being less than 100 percent of the Work required that will be completed by a specified date as agreed to in writing by both parties.

TOTAL COMPLETION shall mean all elements of a Project Segment or the Total Project Work is complete including all subsidiary items and "punch-list" items.

TOTAL PROJECT WORK shall have the meaning set forth in Section 7.1 hereof.

UNIT PRICE WORK shall mean Work quantities to be paid for based on unit prices. Each unit price shall be deemed to include the Contractor's overhead and profit for each separately identified item. It is understood and agreed that estimated quantities of times for unit price work are not guaranteed and are solely for the purpose of comparison of bids and determining an initial Contract Price. Determinations of actual quantities and classifications of unit price work shall be made by the City.

UNUSUALLY SEVERE WEATHER shall have the meaning set forth in Section 9.4 hereof.

WORK shall mean the work to be done to complete the construction required of the Contractor by the Contract Documents, and includes all construction, labor, materials, tools, equipment and transportation necessary to produce such construction in accordance with the Contract Documents.

WORK SCHEDULE shall have the meaning set forth in Section 7.2 hereof.

- 1.2 Whenever any word or expression defined herein, or pronoun used instead, occurs in these Contract Documents; it shall have and is mutually understood to have the meaning commonly given. Work described in words, which so applied have a well-known technical or trade meaning shall be held to refer to such, recognized standards.
- 1.3 Whenever in these Contract Documents the words "as ordered," "as directed", "as required", "as permitted", "as allowed", or words or phrases of like import are used, it is understood that the order, direction, requirement, permission or allowance of the Project Manager is intended.
- 1.4 Whenever any statement is made in the Contract Documents containing the expression "it is understood and agreed", or an expression of like import, such expression means the mutual understanding and agreement of the parties hereto.
- 1.5 The words "approved", "reasonable", "suitable", "acceptable", "properly", "satisfactorily", or words of like effect in import, unless otherwise particularly specified herein, shall mean approved, reasonable, suitable, acceptable, proper or satisfactory in the judgment of the Project Manager.
- 1.6 When a word, term or phrase is used in the Contract, it shall be interpreted or construed, first, as defined herein; second, if not defined, according to its generally accepted meaning in the construction industry; and, third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage.
- 1.7 All terms used herein shall have the meanings ascribed to them herein unless otherwise specified.

2. ENTIRE AGREEMENT:

The Contract Documents, together with the Contractor's Performance, Maintenance and Statutory bonds for the Work, constitute the entire and exclusive agreement between the City and the Contractor with reference to the Work. Specifically, but without limitation, this Contract supersedes all prior written or oral communications, representations and negotiations, if any, between the City and the Contractor. The Contract may not be amended or modified except by a modification as hereinabove defined. These Contract Documents do not, nor shall they be construed to, create any contractual relationship of any kind between the City and any Subcontractor or remote tier Subcontractor.

3. INTENT AND INTERPRETATION

- 3.1 The intent of the Contract is to require complete, correct and timely execution of the Work. Any Work that may be required, including construction, labor, materials, tools, equipment and transportation, implied or inferred by the Contract Documents, or any one or more of them, as necessary to produce the intended result, shall be provided by the Contractor for the Contract Price.

- 3.2 All time limits stated in the Contract Documents are of the essence of the Contract.
- 3.3 The Contract is intended to be an integral whole and shall be interpreted as internally consistent. What is required by any one Contract Document shall be considered as required by the Contract.
- 3.4 The specification herein of any act, failure, refusal, omission, event, occurrence or condition as constituting a material breach of this Contract shall not imply that any other, non-specified act, failure, refusal, omission, event, occurrence or condition shall be deemed not to constitute a material breach of this Contract.
- 3.5 The Contractor shall have a continuing duty to read, carefully study and compare each of the Contract Documents and shall give written notice to the Project Manager of any inconsistency, ambiguity, error or omission, which the Contractor may discover, or should have discovered, with respect to these documents before proceeding with the affected Work. The review, issuance, or the express or implied approval by the City or the Project Manager of the Contract Documents shall not relieve the Contractor of the continuing duties imposed hereby, nor shall any such review be evidence of the Contractor's compliance with this Contract.
- 3.6 The City has prepared or caused to have prepared the Project Manual. HOWEVER, THE CITY MAKES NO REPRESENTATION OR WARRANTY AS TO ACCURACY OR FITNESS FOR PARTICULAR PURPOSE INTENDED OR ANY OTHER WARRANTY OF ANY NATURE WHATSOEVER TO THE CONTRACTOR CONCERNING SUCH DOCUMENTS. By the execution hereof, the Contractor acknowledges and represents that it has received, reviewed and carefully examined such documents, has found them to be complete, accurate, adequate, consistent, coordinated and sufficient for construction, and that the Contractor has not, does not, and will not rely upon any representation or warranties by the City concerning such documents as no such representation or warranties have been made or are hereby made.
- 3.7 As between numbers and scaled measurements in the Project Manual, the numbers shall govern; as between larger scale and smaller scale drawings, (e.g. 10:1 is larger than 100:1) the larger scale shall govern.
- 3.8 The organization of the Project Manual into divisions, sections, paragraphs, articles (or other categories), shall not control the Contractor in dividing the Work or in establishing the extent or scope of the Work to be performed by Subcontractors.
- 3.9 The Contract Documents supersedes all previous agreements and understandings between the parties, and renders all previous agreements and understandings void relative to these Contract Documents.
- 3.10 Should anything be omitted from the Project Manual, which is necessary to a clear understanding of the Work, or should it appear various instructions are in conflict, the Contractor shall secure written instructions from the Project Manager before proceeding with the construction affected by such omissions or discrepancies.
- 3.11 It is understood and agreed that the Work shall be performed and completed according to the true spirit, meaning, and intent of the Contract Documents.

- 3.12 The Contractor's responsibility for construction covered by conflicting requirements, not provided for by addendum prior to the time of opening Bids for the Work represented thereby, shall not extend beyond the construction in conformity with the less expensive of the said conflicting requirements. Any increase in cost of Work required to be done in excess of the less expensive work of the conflicting requirements will be paid for as extra work as provided for herein.
- 3.13 The apparent silence of the Project Manual as to any detail, or the apparent omission from them of a detailed description concerning any point, shall be regarded as meaning that only the best general practice is to be used. All interpretations of the Project Manual shall be made on the basis above stated.
- 3.14 The conditions set forth herein are general in scope and are intended to contain requirements and conditions generally required in the Work, but may contain conditions or requirements which will not be required in the performance of the Work under contract and which therefore are not applicable thereto. Where any stipulation or requirement set forth herein applies to any such non-existing condition, and is not applicable to the Work under contract, such stipulation or requirement will have no meaning relative to the performance of said Work.
- 3.15 KSA 16-113 requires that non-resident contractors appoint an agent for the service of process in Kansas. The executed appointment must then be filed with the Secretary of State, Topeka, Kansas. Failure to comply with this requirement shall disqualify the Contractor for the awarding of this Contract.

4. CONTRACT COST

The City shall pay the Contractor for the performance of the Work embraced in this Contract, and the Contractor will accept in full compensation therefore the sum (subject to adjustment as provided by the Contract) of Two Million Three Hundred Thirty Five Thousand DOLLARS (\$ 2,335,000.00) for all Work covered by and included in the Contract; payment thereof to be made in cash or its equivalent and in a manner provided in the Contract Documents.

5. WORK SUPERINTENDENT

- 5.1 The Contractor shall provide and maintain, continually on the site of Work during its progress, an adequate and competent superintendent of all operations for and in connection with the Work being performed under this Contract, either personally or by a duly authorized superintendent or other representative. This representative shall be designated in writing at the preconstruction meeting.
- 5.2 The superintendent, or other representative of the Contractor on the Work, who has charge thereof, shall be fully authorized to act for the Contractor, and to receive whatever orders as may be given for the proper prosecution of the Work, or notices in connection therewith. Use of Subcontractors on portions of the Work shall not relieve the Contractor of the obligation to have a competent superintendent on the Work at all times.
- 5.3 The City shall have the right to approve the person who will be the Superintendent based on skill, knowledge, experience and work performance. The City shall also have the right to request replacement of any superintendent.

- 5.4 The duly authorized representative shall be official liaison between the City and the Contractor regarding the signing of pay estimates, change orders, workday reports and other forms necessary for communication and Work status inquiries. Upon Work commencement, the City shall be notified, in writing, within five (5) working days of any changes in the Contractor's representative. In the absence of the Contractor or representative, suitable communication equipment, which will assure receipt of messages within one (1) hour during the course of the workday, will also be required.
- 5.5 The Contractor will be required to contact the Project Manager daily to advise whether and/or where the Contractor and/or the Subcontractor's crews will be working that day, in order that the Project Manager's representative is able to monitor properly the Work.
6. PROJECT MANAGER
- 6.1 It is mutually agreed by and between the parties to this Agreement that the Project Manager shall act as the representative of the City and shall observe and inspect, as required, the Work included herein.
- 6.2 In order to prevent delays and disputes and to discourage litigation, it is further agreed by and between the parties to this Agreement that the Project Manager shall, in good faith and to the best of its ability, determine the amount and quantities of the several kinds of work which are to be paid for under this Contract; that the Project Manager shall determine, where applicable, questions in relation to said Work and the construction thereof; that Project Manager shall, where applicable decide questions which may arise relative to the execution of this Contract on the part of said Contractor; that the Project Manager's decisions and findings shall be the conditions precedent to the rights of the parties hereto, to any action on the Contract, and to any rights of the Contractor to receive any money under this Contract provided, however, that should the Project Manager render any decision or give any direction which, in the opinion of either party hereto, is not in accordance with the meaning and intent of this Contract, either party may file with the Project Manager and with the other party, within thirty (30) days a written objection to the decision or direction so rendered and, by such action, may reserve the right to submit the question to determination in the future.
- 6.3 The Project Manager, unless otherwise directed or agreed to by the City in writing, will perform those duties and discharge those responsibilities allocated to the Project Manager as set forth in this Contract. The Project Manager shall be the City's representative from the effective date of this Contract until final payment has been made. The Project Manager shall be authorized to act on behalf of the City only to the extent provided in this Contract. The City and Project Manager may, from time to time, designate Inspectors to perform such functions.
- 6.4 The City and the Contractor shall communicate with each other in the first instance through the Project Manager.
- 6.5 The Project Manager shall be the initial interpreter of the requirements of the Project Manual and the judge of the performance by the Contractor. The Project Manager shall render written graphic interpretations necessary for the proper execution or progress of the Work with reasonable promptness on request of the Contractor.
- 6.6 The Project Manager will review the Contractor's Applications for Payment and will certify to the City for payment to the Contractor those amounts then due the Contractor as provided

in this Contract. The Project Manager's recommendation of any payment requested in an Application for Payment will constitute a representation by Project Manager to City, based on Project Manager's on-site observations of the Work in progress as an experienced and qualified design professional and on Project Manager's review of the Application for Payment and the accompanying data and schedules that the Work has progressed to the point indicated; that, to the best of the Project Manager's knowledge, information and belief, the quality of the Work is in accordance with the Project Manual (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Project Manual, to a final determination of quantities and classifications for Unit Price Work if such is called for herein, and to any other qualifications stated in the recommendation); and that Contractor is entitled to payment of the amount recommended. However, by recommending any such payment Project Manager will not thereby be deemed to have represented that exhaustive or continuous on-site inspections have been made to check the quality or the quantity of the Work beyond the responsibilities specifically assigned to Project Manager in the Project Manual or that there may not be other matters or issues between the parties that might entitle Contractor to be paid additionally by the City or the City to withhold payment to Contractor.

- 6.7 The Project Manager may refuse to recommend the whole or any part of any payment if, in Project Manager's opinion, it would be incorrect to make such representations to City. Project Manager may also refuse to recommend any such payment, or, because of subsequently discovered evidence or the results of subsequent inspections or tests, nullify any such payment previously recommended, to such extent as may be necessary in the Project Manager's opinion to protect the City from loss because:
- The Work is defective, or completed Work has been damaged requiring correction or replacement,
 - The Contract Price has been reduced by Written Amendment or Change Order,
 - The City has been required to correct Defective Work or complete Work in accordance with the Project Manual.
- 6.8 The City may refuse to make payment of the full amount recommended by the Project Manager because claims have been made against City on account of Contractor's performance or furnishing of the Work or liens have been filed in connection with the Work or there are other items entitling City to a set-off against the amount recommended, but City must give Contractor written notice (with a copy to Project Manager) stating the reasons for such action.
- 6.9 The Project Manager will have the authority to reject Work which is defective or does not conform to the requirements of this Contract. If the Project Manager deems it necessary or advisable, the Project Manager shall have authority to require additional inspection or testing of the Work for compliance with Contract requirements.
- 6.10 The Project Manager will review, or take other appropriate action as necessary, concerning the Contractor's submittals, including Shop Drawings, Product Data and Samples. Such review, or other action, shall be for the sole purpose of determining general conformance with the design concept and information given through the Project Manual.

- 6.11 The Project Manager shall have authority to order minor changes in the Work not involving a change in the Contract Price or in Contract Time and consistent with the intent of the Contract. Such changes shall be effected by verbal direction and then recorded on a Field Order and shall be binding upon the Contractor. The Contractor shall carry out such Field Orders promptly.
- 6.12 The Project Manager, upon written request from the Contractor shall conduct observations to determine the dates of Substantial Completion, Total Completion and the date of Final Acceptance. The Project Manager will receive and forward to the City for the City's review and records, written warranties and related documents from the Contractor required by this Contract and will issue a final Certificate for Payment to the City upon compliance with the requirements of this Contract.
- 6.13 The Project Manager's decisions in matters relating to aesthetic effect shall be final if consistent with the intent of this Contract.
- 6.14 The Project Manager will NOT be responsible for Contractor's means, methods, techniques, sequences, or procedures or construction, or the safety precautions and programs incident thereto and will not be responsible for Contractor's failure to perform the Work in accordance with the Project Manual. The Project Manager will not be responsible for the acts or omissions of the Contractor or any Subcontractor or any of its or their agents or employees, or any other person at the site or otherwise performing any of the Work except as may otherwise be provided.
- 6.15 Any plan or method of work suggested by the Project Manager, or other representatives of the City, to the Contractor, but not specified or required, if adopted or followed by the Contractor in whole or in part, shall be used at the risk and responsibility of the Contractor, and the Project Manager and the City will assume no responsibility therefore.
- 6.16 It is agreed by the Contractor that the City shall be and is hereby authorized to appoint or employ, either directly or through the Project Manager, such City representatives or observers as the City may deem proper, to observe the materials furnished and the work performed under the Project Manual, and to see that the said materials are furnished, and the said work performed, in accordance with the Project Manual therefore. The Contractor shall furnish all reasonable aid and assistance required by the Project Manager, or by the resident representatives for proper observation and examination of the Work and all parts thereof.
- 6.17 The Contractor shall comply with any interpretation of the Project Manual by the Project Manager, or any resident representative or observer so appointed, when the same are consistent with the obligations of the Project Manual. However, should the Contractor object to any interpretation given by any subordinate Project Manager, resident representative or observer, the Contractor may appeal in writing to the City Director of Public Works for a decision.
- 6.18 Resident representatives, observers, and other properly authorized representatives of the City or Project Manager shall be free at all times to perform their duties, and intimidation or attempted intimidation of any one of them by the Contractor or by any of its employees, shall be sufficient reason, if the City so decides, to annul the Contract.
- 6.19 Such observation shall not relieve the Contractor from any obligation to perform said Work strictly in accordance with the Project Manual.

7. WORK SCHEDULE:
- 7.1 The Work is comprised of one large project (sometimes referred to as "Total Project Work") and, in some cases, is partitioned into smaller subprojects referred to in this Agreement as "Project Segments." A Contract Time shall be stated in the Contract Documents for both the Total Project Work and, when applicable, the Project Segments.
- 7.2 At the time of execution of this Contract, the Contractor shall furnish the Project Manager with a schedule ("Work Schedule") setting forth in detail (in the critical path method) the sequences proposed to be followed, and giving the dates on which it is expected that Project Segments will be started and completed within the Contract Time. The Work Schedule is subject to approval by the City.
- 7.3 Monthly Work Schedule reports shall accompany the Contractor's pay request for Work completed. Where the Contractor is shown to be behind schedule, it shall provide an accompanying written summary, cause, and explanation of planned remedial action. Payments or portions of payments may be withheld by the City upon failure to maintain scheduled progress of the Work as shown on the approved Work Schedule.
- 7.4 At a minimum the Contractor shall update and submit the Work Schedule for review weekly, unless otherwise agreed upon by the City.
- 7.5 The Contractor, within ten (10) calendar days after being instructed to do so in a written notice from the City, shall commence the Work to be done under this Contract.
- 7.6 If at any time, in the opinion of the Project Manager or City, proper progress is not being maintained; changes shall be proposed in the Work Schedule and resubmitted for consideration and approval.
- 7.7 If the Contractor has not completed Project Segments and is within a non-performance penalty period, it shall not be allowed to undertake a new Project Segment until the Project Segment in dispute is completed, unless expressly permitted by the City.
- 7.8 The operation of any tool, equipment, vehicle, instrument, or other noise-producing device is prohibited to start before or continue after the hours of 7 AM and 10 PM, Monday through Friday (except Fridays which shall be until Midnight) and 8 AM and midnight on Weekends (except Sunday which shall be 10 PM). Violation of this requirement is Prima Facia Violation of City Municipal Code 11-202.
- 7.9 No work shall be undertaken on Saturdays, Sundays and Holidays (Christmas, New Years, Martin Luther King's Birthday, President's Day, Memorial Day, Independence Day, Labor Day and Thanksgiving) without the express written approval of the City Project Manager. If it is necessary to perform proper care, maintenance, or protection of work already completed or of equipment used, or in the case of an emergency verbal permission may be obtained through the Project Manager.
- 7.10 Night work may be established by the Contractor, as a regular procedure, with the written permission of the City; such permission, however, may be revoked at any time by the City if the Contractor fails to maintain adequate equipment for the proper prosecution and control of all operations performed as part of the Work.

- 7.11 The Contractor shall provide 24 hours notice prior to commencing any work to the City Project Manager. The Contractor shall communicate immediately any changes in the Work Schedule to the Project Manager for approval by the City.
8. DELAYS AND EXTENSIONS OF TIME
- 8.1 In executing the Contract, the Contractor expressly covenants and agrees that, in undertaking the completion of the Work within the Contract Time, it has taken into consideration and made allowances for all of the ordinary delays and hindrances incident to such Work, whether growing out of delays in securing materials, workers, weather conditions or otherwise. No charge shall be made by the Contractor for hindrances or delays from any cause during the progress of the Work, or any portion thereof, included in this Contract.
- 8.2 Should the Contractor, however, be delayed in the prosecution and completion of the Work by reason of delayed shipment orders, or by any changes, additions, or omissions therein ordered in writing by the City, or by strikes or the abandonment of the Work by the persons engaged thereon through no fault of the Contractor, or by any act taken by the U.S. Government such as the commandeering of labor or materials, embargoes, etc., which would affect the fabrication or delivery of materials and/or equipment to the Work; or by neglect, delay or default of any other contractor of the City, or delays caused by court proceedings; the Contractor shall have no claims for damages or additional compensation or costs for any such cause or delay; but it shall in such cases be entitled to such extension of the time specified for the completion of the Work as the City and the Project Manager shall award in writing on account of such delays, provided, however, that claim for such extension of time is made by the Contractor to the City and the Project Manager in writing within one (1) week from the time when any such alleged cause for delay shall occur.
9. ADVERSE WEATHER:
- 9.1 Extensions of time for Adverse Weather shall be granted only under the conditions as hereinafter provided.
- 9.2 For conditions of weather or conditions at the site, so unusual as not to be reasonably anticipated, as determined by the Project Manager, an average or usual number of inclement days when work cannot proceed are to be anticipated during the construction period and are not to be considered as warranting extension of time.
- 9.3 "Adverse Weather" is defined as atmospheric conditions or the impact thereof at a definite time and place, which are unfavorable to construction activities such that they prevent work on critical activities for 50 percent or more of the Contractor's scheduled workday.
- 9.4 "Unusually Severe Weather" is defined as weather, which is more severe than the adverse weather anticipated for the season, location, or activity involved.
- 9.5 Time Extensions for Unusually Severe Weather: In order for any request for time extension due to Unusually Severe Weather to be valid, the Contractor must document all of the following conditions:
- The weather experienced at the Work site during the Contract period is more severe than the Adverse Weather anticipated for the Work location during any given month.

- The Unusually Severe Weather actually caused a delay to the completion of the Work.
- The delay must be beyond the control and without fault or negligence by the Contractor.

9.6 The following schedule of monthly-anticipated Adverse Weather delays will constitute the baseline for monthly weather time evaluations. The Contractor's Work Schedule must reflect these anticipated adverse weather delays in all weather affected activities:

MONTHLY ANTICIPATED ADVERSE WEATHER DELAY
WORK DAYS BASED ON FIVE (5) DAY WORK WEEK

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10	8	7	6	7	7	5	5	5	4	5	9

- 9.7 Upon receipt of the Notice to Proceed, and continuing throughout the Contract, the Contractor shall record on its daily construction report, the occurrence of Adverse Weather and resultant impact to the Work Schedule.
- 9.8 The number of actual Adverse Weather delay days shall include days affected by actual Adverse Weather (even if Adverse Weather occurred in the previous month), and shall be calculated chronologically from the first to the last day of each month, and be recorded as full workdays.
- 9.9 If the number of actual Adverse Weather delay days in a given month exceeds the number of days anticipated above, the difference shall be multiplied by 7/5 to convert any qualifying workday delays to calendar days. The resulting number of qualifying lost days shall be added to the Contract Time.
- 9.10 The determination that Unusually Severe Weather occurred does not automatically mean an extension of time will be granted. The Contractor must substantiate the Unusually Severe Weather delayed work activities on the critical path of the Work Schedule.
- 9.11 Full consideration for equivalent fair weather workdays shall be given. If the number of actual Adverse Weather delays in a given month is less than the number of days anticipated as indicated above, the difference shall be multiplied by 7/5 to convert any workday increases to calendar days. The resulting number of qualifying extra days will be accumulated and subtracted from any future month's days lost due to unusually severe weather.
- 9.12 The net cumulative total of extra days/lost days shall not result in a reduction of Contract Time and the date of Substantial Completion shall not be changed because of unusually favorable weather.
- 9.13 In converting workdays to calendar days, fractions 0.5 and greater shall be rounded up to the next whole number. Fractions less than 0.5 shall be dropped.
- 9.14 The Contractor shall summarize and report all actual Adverse Weather delay days for each month to the Project Manager by the tenth (10th) day of the following month. A narrative indicating the impact of Adverse Weather conditions on the Work Schedule shall be included.

- 9.15 Any claim for extension of time due to Unusually Severe Weather shall be submitted to the Project Manager within 7 days of the last day of the commencement of the event giving rise to the delay occurred. Resolution of any claim shall follow the procedures described above.
- 9.16 The Contractor shall include and indicate the monthly-anticipated Adverse Weather days, listed above, in the Work Schedule. (Reference Section 7.1 for Work Schedule requirements)
- 9.17 The Contractor shall indicate the approved Adverse Weather days (whether less or more than the anticipated days) in its Work Schedule updates.
10. LIQUIDATED DAMAGES
- 10.1 Contractor agrees that time is of the essence and any term pertaining to Contractor timely performing so as to achieve Total Completion within the Contract Time is a material provision of this Contract. Further, the parties acknowledge that City's damages in the event of delay are difficult to ascertain and consequently agree that, in the event and to the extent that actual date of Total Completion is delayed beyond the Contract Time for the Total Project Work or Project Segments attributable solely or concurrently to (i) an act or omission of Contractor or any of its subcontractors or suppliers, or (ii) in whole or in part, to any other event or condition within the Contractor's reasonable control (and not for reasons solely attributable to City), the Contractor shall be assessed a liquidated damage, and not as a penalty, in the amount set forth in the Special Conditions for each calendar day beyond the applicable Contract Time. Such amount shall be deducted from any amounts due Contractor under this Agreement.
- 10.2 Further, the Contractor agrees that, in the event Contractor does not carry out such Work at such rates of progress as required by the Work Schedule approved by the City, the City may, at its option and without Contractor receiving any additional compensation therefore, require Contractor to increase the number of qualified supervisory personnel and/or workers and the amount of equipment employed in the performance of the Work to such extent as City may deem necessary or desirable. In addition, City, at its option, may supplement Contractor's manpower by entering into contracts with other contractors to perform the Work. All costs that are incurred by City, in this regard, including reasonable attorney's fees, shall be deducted from any sums due Contractor or City may make demand on Contractor for reimbursement of such costs.
11. PAYMENT PROCEDURE
- 11.1 Based upon Applications for Payment submitted to the Project Manager by the Contractor and Certificates for Payment issued by the Project Manager, the City shall make progress payments on account of the contract sum to the Contractor as provided below and elsewhere in the Contract Documents.
- 11.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month or on a mutually agreed date by City and Contractor.
- 11.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the City no later than the time of payment. The Contractor further warrants that upon submittal on the first day of each month of an Application for Payment, all Work for which payments have been received from the City shall be free and clear of liens, claims,

- security interest or other encumbrances in favor of the Contractor or any other person or entity whatsoever.
- 11.4 Each application for payment must be submitted with Contractor's waiver for period of construction covered by application. Each Application for Payment will be submitted with executed waivers from the subcontractors or sub-contractors and suppliers for the previous period of construction covered by the previous application. The final payment application must be submitted together with or preceded by final or complete waivers from every entity involved with performance of the Work covered by the payment request.
- 11.5 The Contractor will submit waivers on forms, and executed in a manner, acceptable to City.
- 11.6 The Contractor shall promptly pay each Subcontractor out of the amount paid to the Contractor because of such Subcontractor's Work the amount to which such Subcontractor is entitled. In the event the City becomes informed that the Contractor has not paid a Subcontractor as herein provided, the City shall have the right, but not the duty, to issue future checks in payment to the Contractor of amounts otherwise due hereunder naming the Contractor and such Subcontractor as joint payees. Such joint check procedure, if employed by the City, shall be deemed payment to the Contractor but shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit the City to repeat the procedure in the future.
- 11.7 The Project Manager will, upon receipt of a written Application for Payment from the Contractor, review the amount of Work performed during the preceding period and the value thereof at the unit prices contracted. From the amounts so ascertained, there shall be deducted ten percent (10%) to be retained until after final completion of the entire Work to the satisfaction of the City. The Project Manager will submit an estimate each month to the City for payment to the Contractor, except that no amount less than \$500.00 will be submitted unless the total amount of the Contract remaining unpaid is less than \$500.00.
- 11.8 Deductions will be made from progress payments if the Contract includes a provision for a lump sum or a percentage deduction. Lump sum deductions will be that portion of the stated lump sum computed as the ratio that the amount earned bears to the Contract Price. Percentage deductions will be computed at the stated percentage of the amount earned.
- 11.9 No progress payment, nor any use or occupancy of the Work by the City, shall be interpreted to constitute an acceptance of any Work not in strict accordance with this Contract.
- 11.10 The City may decline to make payment, may withhold funds, and, if necessary, may demand the return of some or all of the amounts previously paid to the Contractor, to protect the City from loss because of:
- Defective Work not remedied by the Contractor;
 - Claims of third parties against the City or the City's property;
 - Failure by the Contractor to pay Subcontractors or others in a prompt and proper fashion;
 - Evidence that the balance of the Work cannot be completed in accordance with the Contract for the unpaid balance of the Contract Price;

- Evidence that the Work will not be completed in the time required for substantial or final completion;
 - Persistent failure to carry out the Work in accordance with the Contract;
 - Damage to the City or a third party to whom the City is, or may be, liable;
 - Evidence that the Work is not progressing according to agreed upon schedule by both parties.
- 11.11 In the event that the City makes written demand upon the Contractor for amounts previously paid by the City as contemplated in this subparagraph, the Contractor shall promptly comply with such demand and refund such monies to the City.
- 11.12 Neither the observation by the City or any of the City's officials, employees, or agents, nor any order by the City for payment of money, nor any payment for, or acceptance of, the whole or any part of the Work by the City or Project Manager, nor any extension of time, nor any possession taken by the City or its employees, shall operate as a waiver of any provision of this Contract, or of any power herein reserved to the City, or any right to damages herein provided, nor shall any waiver of any breach in this Contract be held to be a waiver of any other or subsequent breach.
12. COMPLETION AND FINAL PAYMENT
- 12.1 Upon Total Completion, when the Contractor is ready for a final inspection of the Total Project Work, it shall notify the City and the Project Manager thereof in writing. Thereupon, the Project Manager will make final inspection of the Work and, if the Work is complete in accordance with this Contract, the Project Manager will promptly issue a final Certificate for Payment certifying to the City that the Work is complete and the Contractor is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Contract. If the Project Manager is unable to issue its final Certificate for Payment and is required to repeat its final inspection of the Work, the Contractor shall bear the cost of such repeat final inspection(s), which cost may be deducted by the City from the Contractor's full payment.
- 12.2 The Contractor shall not be entitled to any payment unless and until it submits to the Project Manager its affidavit that all payrolls, invoices for materials and equipment, and other liabilities connected with the Work for which the City, or the City's property might be responsible, have been fully paid or otherwise satisfied; releases and waivers of lien from all Subcontractors and Suppliers of the Contractor and of any and all other parties required by the City; and consent of Surety, if any, to final payment. If any third party fails or refuses to provide a release of claim or waiver of lien as required by the City, the Contractor shall furnish a bond satisfactory to the City to discharge any such lien or indemnify the City from liability.
- 12.3 The City shall make final payment of all sums due the Contractor within thirty days of the Project Manager's execution of a final Certificate for Payment.
- 12.4 Acceptance of final payment shall constitute a waiver of all claims against the City by the Contractor except for those claims previously made in writing against the City by the Contractor, pending at the time of final payment, and identified in writing by the Contractor as unsettled at the time of its request for final inspection.

13. CLAIMS BY THE CONTRACTOR

- 13.1 All Contractor claims shall be initiated by written notice and claim to the Project Manager. Such written notice and claim must be furnished within seven calendar days after occurrence of the event, or the first appearance of the condition, giving rise to the claim.
- 13.2 The Contractor shall diligently proceed with performance of this Contract whether or not there be such a claim pending and the City shall continue to make payments to the Contractor in accordance with this Contract. The resolution of any claim shall be reflected by a Change Order executed by the City, the Project Manager and the Contractor.
- 13.3 Should concealed and unknown conditions which could not, with reasonable diligence, have been discovered in the performance of the Work (a) below the surface of the ground or (b) in an existing structure differ materially with the conditions indicated by this Contract, or should unknown conditions of an unusual nature differing materially from those ordinarily encountered in the area and generally recognized as inherent in Work of the character provided by this Contract, be encountered, the Contract Price shall be equitably adjusted by the Change Order upon the written notice and claim by either party made within seven (7) days after the first observance of the condition. As a condition precedent to the City having any liability to the Contractor for concealed or unknown conditions, the Contractor must give the City written notice of, and an opportunity to observe, the condition prior to disturbing it. The failure by the Contractor to make the written notice and claim as provided in this Subparagraph shall constitute a waiver by the Contractor of any claim arising out of or relating to such concealed or unknown condition.
- 13.4 If the Contractor wishes to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the City therefore, the Contractor shall give the City written notice of such claim within seven (7) days after the occurrence of the event, or the first appearance of the condition, giving rise to such claim. Such notice shall be given by the Contractor before proceeding to execute any additional or changed Work. The failure by the Contractor to give such notice and to give such notice prior to executing the Work shall constitute a waiver of any claim for additional compensation.
- 13.5 The City reserves the right to increase or decrease quantities, and alter the details of construction including grade and alignment as the Project Manager may consider necessary or desirable, by approved Change Order. Such modifications shall not invalidate the Contract nor release the surety. Unless such alterations and increases or decreases change the total cost of the Work, based on the originally estimated quantities and the unit prices bid, by more than 25 percent, or change the total cost of any major item, based on the originally estimated quantities and the unit price bid, by more than 25 percent, the Contractor shall perform the work altered, increased or decreased, at a negotiated price or prices. (A major item shall mean any bid item, the total cost of which exceeds 12-1/2 percent of the total Contract Price based on the proposed quantity and the contract unit price).
- 13.6 When the alterations cause an increase or decrease in excess of the 25 percent indicated above, either the Contractor or the Project Manager may request an adjustment of the unit price to be paid for the item or items.

- 13.7 If a mutually agreeable adjustment cannot be obtained, the City reserves the right to terminate the Contract as it applies to the items in question and make such arrangements as may be deemed necessary to complete the Work.
- 13.8 In connection with any claim by the Contractor against the City for compensation in excess of the Contract Price, any liability of the City for the Contractor's costs shall be strictly limited to direct costs incurred by the Contractor and shall not include standby costs, indirect costs or consequential damages of the Contractor. The City shall not be liable to the Contractor for claims of third parties.
- 13.9 If the Contractor is delayed in progressing any task which at the time of the delay is then critical or which during the delay becomes critical, as the sole result of any act or neglect to act by the City or someone acting in the City's behalf, or by changes ordered in the Work, unusual delay in transportation, unusually adverse weather conditions not reasonably anticipated, fire or any causes beyond the Contractor's control, then the date for achieving Final Acceptance of the Work shall be extended upon the written notice and claim of the Contractor to the City, for such reasonable time as the City may determine. Any notice and claim for an extension of time by the Contractor shall be made not more than seven calendar days after the occurrence of the event or the first appearance of the condition-giving rise to the claim and shall set forth in detail the Contractor's basis for requiring additional time in which to complete the Work. In the event the delay to the Contractor is a continuing one, only one notice and claim for additional time shall be necessary. If the Contractor fails to make such claim as required in this subparagraph, any claim for an extension of time shall be waived.
- 13.10 The Contractor shall delay or suspend the progress of the work or any part thereof, whenever so required by written order of the City, and for such periods of time as required; provided, that in the event of such delay or delays or of such suspension or suspensions of the progress of the work, or any part thereof, the time for completion of work so suspended or of work so delayed by such suspension or suspensions shall be extended for a period equivalent to the time lost by reason of such suspension or suspensions; but such order of the City or Project Manager shall not otherwise modify or invalidate in any way, any of the provisions of this Contract. In the event that the work shall be stopped by written order of the City, any expense, which, in the sole opinion and judgment of the City, is caused by the City, shall be paid by the City to the Contractor.
- 13.11 In executing the Contract Documents, the Contractor expressly covenants and agrees that, in undertaking to complete the Work within the time herein fixed, it has taken into consideration and made allowances for all hindrances and delays incident to such work, whether growing out of delays in securing materials or workers or otherwise. No charge shall be made by the Contractor for hindrances or delays from any cause during the progress of the work, or any portion thereof, included in this Contract, except as provided herein.
- 13.12 In addition to the Project Manual particular to Mobilization found elsewhere in this document, additional mobilization shall not be compensable for work outside of the designated areas for work deemed essential by the City. A quantity of work equal to as much as 10% of the total Contract may be required to be performed beyond the boundaries of the designated work areas

14. CHANGES IN THE WORK
- 14.1 Changes in the Work within the general scope of this Contract, consisting of additions, deletions, revisions, or any combination thereof, may be ordered without invalidating this Contract, by Change Order or by Field Order.
- 14.2 The Project Manager shall have authority to order minor changes in the Work not involving a change in the Contract Price or in Contract Time and consistent with the intent of the Contract. Such changes shall be effected by verbal direction and then recorded on a Field Order and shall be binding upon the Contractor. The Contractor shall carry out such Field Orders promptly.
- 14.3 Any change in the Contract Price resulting from a Change Order shall be by mutual agreement between the City and the Contractor as evidenced by the change in the Contract Price being set forth in the Change Order, and, together with any conditions or requirements related thereto, being initialed by both parties.
- 14.4 If no mutual agreement occurs between the City and the Contractor relative to a change in the Work, the Contractor shall proceed with the Work that is the subject of the Change Order, and the change in the Contract Price, if any, shall then be determined by the Project Manager on the basis of the reasonable expenditures or savings of those performing, deleting or revising the Work attributable to the change, including, in the case of an increase or decrease in the Contract Price, a reasonable allowance for direct job site overhead and profit. In such case, the Contractor shall present, in such form and with such content to the City, as the Project Manager requires, an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order. Reasonable expenditures or savings shall be limited to the following: reasonable costs of materials, supplies or equipment, including delivery costs, reasonable costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and worker's compensation insurance, reasonable rental costs of machinery and equipment exclusive of hand tools, whether rented from the Contractor or others, permit fees, and sales, use or other taxes related to the Work, and reasonable cost of direct supervision and job site field office overhead directly attributable to the change. In no event shall any standby time or any expenditure or savings associated with the Contractor's home office or other non-job site overhead expense be included in any change in the Contract Price. Further, in no event shall the Contractor's overhead expense exceed ten (10%) percent of the reasonable expenditures. Pending final determination of reasonable expenditures or savings to the City, payments on account shall be made to the Contractor on the Project Manager's Certificate for Payment.
- 14.5 If unit prices are provided in the Contract, and if the quantities contemplated are so changed in a proposed Change Order that the application of such unit prices to the quantities of Work proposed would cause substantial inequity to the City or to the Contractor, the applicable unit prices shall be equitably adjusted.
- 14.6 The execution of a Change Order by the Contractor shall constitute conclusive evidence of the Contractor's agreement to the ordered changes in the Work, this Contract as thus amended, the Contract Price and the Contract Time. The Contractor, by executing the Change Order, waives and forever releases any claim including impact against the City for additional time or compensation for matters relating to or arising out of or resulting from the Work included within or affected by the executed Change Order.

15. INSURANCE AND BONDS.

15.1 The Contractor shall secure and maintain, throughout the duration of the agreement, insurance (on an occurrence basis unless otherwise agreed to) of such types and in at least such amounts as required herein. Contractor shall provide certificates of insurance and renewals thereof on forms acceptable to the City. The City shall be notified by receipt of written notice from the insurer or the Contractor at least thirty (30) days prior to material modification or cancellation of any policy listed on the Certificate.

15.2 The Contractor, upon receipt of notice of any claim in connection with this Agreement, shall promptly notify the City, providing full details thereof, including an estimate of the amount of loss or liability. The Contractor shall monitor and promptly notify the City of any reduction in limits of protection afforded under any policy listed in the Certificate (or otherwise required by the Contract Documents) if the Contractor's limits of protection shall have been impaired or reduced to such extent that the limits fall below the minimum amounts required herein. The Contractor shall promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to the City.

15.3 Minimum Requirements Commercial General Liability Policy Limits -

General Aggregate:	\$2,000,000
Products / Completed Operations Aggregate:	\$2,000,000
Personal & Advertising Injury:	\$1,000,000
Each Occurrence:	\$1,000,000

Policy MUST include the following conditions:

- A. Pollution Liability (Applicable only to contracts involving pollutants such as asbestos & lead abatement, sludge or other waste abatement, etc.)
- B. NAME CITY OF PRAIRIE VILLAGE AS "ADDITIONAL INSURED"

15.4 Automobile Liability Policy shall protect the Contractor against claims for bodily injury and/or property damage arising from the ownership or use of any owned, hired and/or non-owned vehicle.

Limits (Same as Commercial General Liability) -

Combined Single Limits, Bodily Injury and Property Damage - Each Accident:

Policy MUST include the following condition:

NAME CITY OF PRAIRIE VILLAGE AS "ADDITIONAL INSURED"

15.5 Umbrella Liability. The Umbrella / Excess Liability must be at least as broad as the underlying general liability and automobile liability policies.

Limits -

Each Occurrence	\$1,000,000
General Aggregate	\$1,000,000

15.6 Workers' Compensation. This insurance shall protect the Contractor against all claims under applicable state workers' compensation laws. The Contractor shall also be protected

against claims for injury, disease or death of employees which, for any reason, may not fall within the provisions of workers' compensation law. The policy limits shall not be less than the following:

Workers' Compensation:	Statutory
Employer's Liability:	
Bodily Injury by Accident	\$100,000 each accident
Bodily Injury by Disease	\$500,000 policy limit
Bodily Injury by Disease	\$100,000 each employee

15.7 The City will only accept coverage from an insurance carrier who offers proof that it:

Is authorized to do business in the State of Kansas;
Carries a Best's policy holder rating of A- or better; and
Carries at least a Class VIII financial rating, or
Is a company mutually agreed upon by the City and Contractor.

15.8 Subcontractor's Insurance. If a part of the Agreement is to be sublet, the Contractor shall either:

- A. Cover all subcontractor's in its insurance policies, or
- B. Require each subcontractor not so covered to secure insurance which will protect subcontractor against all applicable hazards or risks of loss as and in the minimum amounts designated.

Whichever option is chosen, Contractor shall indemnify and hold harmless the City as to any and all damages, claims or losses, including attorney's fees, arising out of the acts or omissions of its Subcontractors.

15.9 Prior to commencing any work, Contractor shall provide City with certificates evidencing that (1) all Contractor's insurance obligations required by the contract documents are in full force and in effect and will remain in effect until Contractor has completed all of the work and has received final payment from City and (2) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to City. Contractor's property insurance shall not lapse or be canceled if City occupies a portion of the work. Contractor shall provide City with the necessary endorsements from the insurance company prior to occupying a portion of the work.

15.10 Waiver of Subrogation. All insurance coverage required herein shall contain a waiver of subrogation in favor of the City. Contractor's insurance policies shall be endorsed to indicate that Contractor's insurance coverage is primary and any other insurance maintained by City is non-contributing as respects the work of Contractor.

15.11 Additional Insurance. Excess Liability coverage or additional insurance covering special hazards may be required on certain projects. Such additional insurance requirements shall be as specified in Special Conditions.

15.12 Bonds and Other Performance Security. Contractor shall provide a Performance Bond, Maintenance Bond and a Statutory Bond in the amount of one hundred percent (100%) of the Contract Price to cover the entire scope of Work and any other specific performance

security that may be indicated in this Contract. With each bond there shall be filed with the City one copy of "Power of Attorney" certified to include the date of the bonds.

16. INDEMNITY

16.1 For purposes of indemnification requirements as set forth throughout the Contract, the following terms shall have the meaning set forth below:

"The Contractor" means and includes Contractor, all of his/her affiliates and subsidiaries, his/her Subcontractors and material men and their respective servants, agents and employees; and "Loss" means any and all loss, damage, liability or expense, of any nature whatsoever, whether incurred as a judgment, settlement, penalty, fine or otherwise (including attorney's fees and the cost of defense), in connection with any action, proceeding, demand or claim, whether real or spurious, for injury, including death, to any person or persons or damages to or loss of, or loss of the use of, property of any person, firm or corporation, including the parties hereto, which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of this Contract whether arising before or after the completion of the work required hereunder.

16.2 For purposes of this Contract, and without in any way limiting indemnification obligations that may be set forth elsewhere in the Contract, the Contractor hereby agrees to indemnify, defend and hold harmless the City from any and all Loss where Loss is caused or incurred or alleged to be caused or incurred in whole or in part as a result of the negligence or other actionable fault of the Contractor, his/her employees, agents, Subcontractors and suppliers.

16.3 It is agreed as a specific element of consideration of this Contract that this indemnity shall apply notwithstanding the joint, concurring or contributory or comparative fault or negligence of the City or any third party and, further, notwithstanding any theory of law including, but not limited to, a characterization of the City's or any third party's joint, concurring or contributory or comparative fault or negligence as either passive or active in nature.

16.4 Nothing in this section shall be deemed to impose liability on the Contractor to indemnify the City for Loss when the negligence or other actionable fault the City is the sole cause of Loss.

16.5 With respect to the City's rights as set forth herein, the Contractor expressly waives all statutory defenses, including, but not limited to, those under workers compensation, contribution, comparative fault or similar statutes to the extent said defenses are inconsistent with or would defeat the purpose of this section.

17. SUCCESSORS AND ASSIGNS

17.1 The City and Contractor bind themselves, their successors, assigns and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in this Contract.

17.2 The Contractor shall not assign or sublet the work, or any part thereof, without the previous written consent of the City, nor shall it assign, by power of attorney or otherwise, any of the money payable under this Contract unless by and with the like written consent of the City. In case the Contractor assigns all, or any part of any moneys due or to become due under

- this Contract, the instrument of assignment shall contain a clause substantially to the affect that it is agreed that the right of the assignee in and to any moneys due or to become due to the Contractor shall be subject to all prior liens of all persons, firms and corporations for services rendered or materials supplied for the performance of the Work called for in this Contract.
- 17.3 Should any Subcontractor fail to perform in a satisfactory manner, the work undertaken, its subcontract shall be immediately terminated by the Contractor upon notice from the City. Performing in an unsatisfactory manner is defined as consistently having more than 10% of work unacceptable. The Contractor shall be as fully responsible to the City for the acts and omissions of the subcontractors, and of persons either directly or indirectly employed by them, as Contractor is for the acts and omissions of persons directly employed. Nothing contained in this Contract shall create any contractual relations between any Subcontractor and the City, nor shall anything contained in the Contract Documents create any obligation on the part of the City to pay or to see to the payment of any sums due any Subcontractor.
- 17.4 The Contractor shall not award subcontracts which total more than forty-five (45%) of the Contract Price and shall perform within its own organization work amounting to not less than fifty-five percent (55%) of the total Contract Price. Approval by the City of any Subcontractor shall not constitute a waiver of any right of the City to reject Defective Work, material or equipment not in compliance with the requirements of the Contract Documents. The Contractor shall not make any substitution for any Subcontractor accepted by the City unless the City so agrees in writing.
- 17.5 The Contractor shall not subcontract, sell, transfer, assign or otherwise dispose of the Contract or any portion thereof without previous written consent from the City. In case such consent is given, the Contractor, shall be permitted to subcontract a portion thereof, but shall perform with his/her own organization work amounting to not less than fifty five (55%) of the total Contract Price. No subcontracts, or other transfer of Contract, shall release the Contractor of its liability under the Contract and bonds applicable thereto.
- 17.6 The Contractor shall cause appropriate provisions to be inserted in all subcontracts relative to the Work to bind Subcontractors to the Contractor by the terms of the Contract Documents insofar as applicable to the work of the Subcontractor and to give the Contractor the same power to terminate any Subcontract as the City has to terminate the Contractor under any provisions of the Contract Documents.
- 17.7 Prior to the City's approval of the Contract bid, the successful bidder shall submit to the City for acceptance, a list of names of all Subcontractors proposed for portions of the work and shall designate which work each is to perform.
- 17.8 The City shall, prior to the City's approval of the Contract bid, notify the successful bidder, in writing, if the City, after due investigation, has reasonable objection to any Subcontractor on such list, and the Contractor shall substitute a Subcontractor acceptable to the City at no additional cost to the City or shall be allowed to withdraw his/her Bid, and the City shall either re-bid the Work or accept the next best lowest and responsible bidder. The failure of the City to make objection to a Subcontractor shall constitute an acceptance of such Subcontractor but shall not constitute a waiver of any right of the City to reject Defective Work, material or equipment not in conformance with the requirements of the Project Manual.

18. NON-DISCRIMINATION LAWS

18.1 The Contractor agrees that:

- A. The Contractor shall observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and shall not discriminate against any person in the performance of Work under the present contract because of race, religion, color, sex, disability, national origin, ancestry or age;
- B. In all solicitations or advertisements for employees, the Contractor shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission (Commission);
- C. If the Contractor fails to comply with the manner in which the Contractor reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Contractor shall be deemed to have breached the present contract and it may be cancelled, terminated or suspended, in whole or in part, by the contracting agency;
- D. If the Contractor is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the Commission which has become final, the Contractor shall be deemed to have breached the present contract and it may be cancelled, terminated or suspended, in whole or in part, by the contracting agency; and
- E. The Contractor shall include the provisions of Subsections A through D in every subcontract or purchase order so that such provisions will be binding upon such Subcontractor or vendor.
- F. The provisions of this Section shall not apply to a contract entered into by a Contractor: (1) Who employs fewer than four employees during the term of such contract; or (2) Whose contracts with the City cumulatively total \$5,000 or less during the fiscal year of the City.

18.2 The Contractor further agrees that it shall abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 et seq.) and the applicable provision of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) as well as all other federal, state and local laws.

19. FEDERAL LOBBYING ACTIVITIES [THIS PROVISION ONLY APPLIES IF THE CITY IS RECEIVING FEDERAL FUNDS]

19.1 31 USCS Section 1352 requires all subgrantees, Contractors, Subcontractors, and consultants/Architects who receive federal funds via the City to certify that they will not use federal funds to pay any person for influencing or attempting to influence a federal agency or Congress in connection with the award of any federal contract, grant, loan, or cooperative agreements.

19.2 In addition, contract applicants, recipients, and subrecipients must file a form disclosing any expenditure they make for lobbying out of non-federal funds during the contract period.

- 19.3 Necessary forms are available from the City and must be returned to the City with other Contract Documents. It is the responsibility of the general contractor to obtain executed forms from any Subcontractors who fall within the provisions of the Code and to provide the City with the same.
20. RELATIONS WITH OTHER CONTRACTORS:
- 20.1 The Contractor shall cooperate with all other contractors who may be performing work on behalf of the City, and workers who may be employed by the City, or any other entity on any work in the vicinity of the Work to be done under this Contract, and the Contractor shall so conduct his/her operations as to interfere to the least possible extent with the work of such contractors or workers. The Contractor shall be responsible for any injury or damage, that may be sustained by other contractors, workers, their work or employees of the City, because of any fault or negligence on the Contractor's part, and shall, at his/her own expense, repair or pay for such injury or damage. If the work of the Contractor is delayed because of any acts or omissions of any other Contractor or Contractors, the Contractor shall have no claim against the City on that account other than for an extension of time.
- 20.2 When two or more Contracts are being executed at one time in such manner that work on one Contract may interfere with that on another, the City shall decide which Contractor shall progress at which time.
- 20.3 Other projects the Contractor may have to coordinate shall be listed in the Special Conditions.
- 20.4 When the territory of one Contract is the necessary or convenient means of access for the transportation or movement of workers, materials, or appliances required for the execution of another Contract, such privileges of access or any other responsible privilege may be granted by the City to the Contractor so desiring, to the extent such may be reasonably necessary.
- 20.5 Upon execution of the Contract, the Contractor shall furnish the City, in writing, the names of persons or entities proposed by the Contractor to act as a Subcontractor on the Work. The City shall promptly reply to the Contractor, in writing, stating any objections the City may have to such proposed Subcontractor. The Contractor shall not enter into a Subcontract with a proposed Subcontractor with reference to whom the City has made timely objection. The Contractor shall not be required to Subcontract with any party to whom the Contractor has objection.
21. RIGHT OF CITY TO TERMINATE
- 21.1 If the Contractor persistently or repeatedly refuses or fails to prosecute the Work in a timely manner, or supply enough properly skilled workers, supervisory personnel or proper equipment or materials, or if it fails to make prompt payment to Subcontractors or for materials or labor, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or if this Contract is assigned by Contractor without authorization or if Contractor is adjudged as bankrupt, or if a general assignment of assets be made for the benefit of creditors; or if a receiver is appointed, or otherwise is guilty of a substantial violation of a provision of this Contract, then the City may by written notice to the Contractor, without prejudice to any right or remedy, terminate the employment of the Contractor and take possession of the site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Contractor and may finish the

Work by whatever methods it may deem expedient. In such case, the Contractor and its surety shall be liable to the City for all excess cost sustained by the City because of such prosecution and completion including any additional legal, Project Manager or bid-letting costs therefore. In such case, the Contractor shall not be entitled to receive further payment. In the event the Contractor is found in a court of law to have been wrongfully terminated for cause, then such termination shall be deemed a termination for convenience and the Contractor shall be compensated as provided herein. Any termination of the Agreement for alleged default by Contractor that is ultimately determined to be unjustified shall automatically be deemed a termination for convenience of the City.

21.2 The City, within its sole discretion, may elect to terminate the Contract with the Contractor for convenience upon three (3) days written Notice to Contractor. In the event of such termination, Contractor shall cease immediately all operations and shall be compensated for all work performed as of the date of termination in accordance with the terms of payment in this contract. Contractor shall not be entitled to any anticipatory profits, consequential damages or other costs other than direct costs of demobilization.

22. MISCELLANEOUS:

22.1 The Contractor warrants to the City that all labor furnished to progress the Work under the Contract will be competent to perform the tasks undertaken, that the product of such labor will yield only first-class results, that materials and equipment furnished will be of good quality and new unless otherwise permitted by this Contract, and that the Work will be of good quality, free from faults and defects and in strict conformance with the Project Manual. All Work not conforming to these requirements may be considered defective.

22.2 The Contractor shall obtain and pay for all permits, fees and licenses necessary or ordinary for the Work. The Contractor shall comply with all lawful requirements, including federal and state laws, City and County laws and ordinances and building codes, applicable to the Work and shall give and maintain copies of all notices required by applicable law pertaining to the Work.

22.3 Provision for Emergencies. Whenever, in the opinion of the City, the Contractor has not taken sufficient precaution for the safety of the public or the protection of the Work to be constructed under this Contract, or of adjacent structures or property which may be injured by process of construction, and whenever, in the opinion of the City, an emergency shall arise and immediate action shall be considered necessary in order to protect property interests and to avoid personal injury and/or death, then the City, with or without notice to the Contractor, shall provide suitable protection to the said interests by causing such Work to be done and materials to be furnished at places as the City may consider necessary and adequate. The cost and expense of such Work and material so furnished shall be borne by the Contractor and, if the same shall not be paid on presentation of the bills therefore, such costs shall be deducted from any amounts due or to become due the Contractor. The performance of such emergency Work shall in no way relieve the Contractor of responsibility for damages which may occur during or after such precaution has been duly taken.

22.4 Both the business address of the Contractor given in the Bid or proposal upon which this Contract is founded, and the Contractor's Office near the Work, is hereby designated as the places to which all notices, letters, and other communications to the Contractor may be mailed or delivered. The delivering at either of the above named addresses, or depositing

in any mailbox regularly maintained by the Post Office, of any notice, letter or other communication so addressed to the Contractor, and the date of said service shall be the date of such delivery or mailing. Such addresses may be changed at any time by an instrument in writing, executed by the Contractor, presented, and delivered to the Project Manager and to the City. Nothing herein contained shall be deemed to preclude or render inoperative the service of any notice, letter, or communication upon the Contractor personally.

- 22.5 It is mutually agreed by and between the parties to this Contract that all royalties and fees for and in connection with patents, or patent infringement, claims for materials, articles, apparatus, devices or equipment (as distinguished from processes) used in or furnished for the work shall be included in the Contract Price and the Contractor shall satisfy all demands that may be made at any time for such, and the Contractor shall at its cost and expense, defend any and all suits or proceedings that may be instituted at any time against the City for infringement or alleged infringement of any such patents involved in the work, and Contractor shall pay any award of damages.
- 22.6 The right of general administration of the City shall not make the Contractor an agent of the City, and the liability of the Contractor for all damages to persons, firms, and corporations, arising from the Contractor's execution of the Work, shall not be lessened because of such general administration, but as to all such persons, firms, and corporations, and the damages, if any, to them or their property. The Contractor herein is an independent Contractor in respect to the work.
- 22.7 For a period of time, from the inception of the Contract to three (3) years from the date of final payment under the Contract, the Contractor and subcontractors shall maintain books, accounts, ledgers, invoices, drafts, pages and other records pertaining to the performance of this Contract. At all reasonable times during this period these records shall be available within the State of Kansas at a field or permanent business office for inspection by authorized representatives of the City or of any other agency, which has contributed funds in connection with the Contract or to which the City is obligated to make such inspections available. In addition, this requirement shall be included in all subcontracts entered into in connection with this Contract.
- 22.8 Titles, subheadings used herein, and other Contract Documents are provided only as a matter of convenience and shall have no legal bearing on the interpretation of any provision of the Contract Documents.
- 22.9 No waiver of any breach of this Contract shall be construed to be a waiver of any other subsequent breach.
- 22.10 Should any provision of this Agreement or other Contract Documents be determined to be void, invalid, unenforceable or illegal for whatever reason, such provision(s) shall be null and void; provided, however, that the remaining provisions of this Agreement and/or the other Contract Documents shall be unaffected thereby and shall continue to be valid and enforceable.
- 22.11 Without in any manner limiting Contractor's responsibilities as provided elsewhere in the Contract Documents, the Contractor shall assume full responsibility for the protection of all public and private property, structures, sewers, and utilities, for both above ground and underground facilities, along, beneath, above, across or near the site or sites of the Work

being performed under this Agreement, or which are in any manner affected by the prosecution of the Work or the transportation of men/women or materials in connection therewith. Barriers shall be kept in place at all times to protect persons other than those engaged on or about the Work from accident, and the Contractor will be held responsible for all accidents to persons or property resulting from the acts of Contractor or its employees.

- 22.12 The Contractor shall keep fully informed of all existing and current regulations of the City, county, state, and federal laws, which in any way limit or control the actions or operations of those engaged upon the work, or affecting materials supplied, to or by them. The Contractor shall at all times observe and comply with all ordinances, laws, and regulations, and shall protect and indemnify the City and the City's officers and agents against any claims or liability arising from or based on any violation of the same.
- 22.13 Nothing contained in the Contract Documents shall create, or be interpreted to create, privity or any other contractual agreement between the City and any person or entity other than the Contractor.
- 22.14 Duties and obligations imposed by the Contract Documents, rights, and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.
- 22.15 No action or failure to act by the City, Project Manager or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval or acquiescence in a breach hereunder, except as may be specifically agreed in writing.
- 22.16 Contractor specifically acknowledges and confirms that: (i) it has visited the site, made all inspections it deems appropriate and has read and fully understands the Contract Documents, including all obligations and responsibilities undertaken by it as specified herein and in other Contract Documents and knowingly accepts the same; (ii) it has furnished copies of all Contract Documents to its insurance carrier(s) and its surety(ies); and (iii) its insurance carrier(s) and surety(ies) agree to be bound as specified herein, in the Contract Documents and in the insurance policy(ies) and bonds as to liability and surety coverage.
- 22.17 It is specifically agreed between the parties executing this Agreement that the Contract Documents are not intended to create any third party beneficiary relationship nor authorize anyone not a party to this Agreement to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this Agreement. The duties, obligations and responsibilities of the parties to this Agreement with respect to third parties shall remain as imposed by law.
- 22.18 This Agreement is entered into, under and pursuant to, and is to be construed and enforceable in accordance with the laws of the State of Kansas. Venue of any litigation arising in connection with this Agreement shall be the State courts of Johnson County, Kansas.

IN WITNESS WHEREOF, the City has caused this Agreement to be executed in its behalf, thereunto duly authorized, and the said Contractor has executed five (5) counterparts of this Contract in the prescribed form and manner, the day and year first above written.

CITY OF PRAIRIE VILLAGE

(typed company name)

By: _____
(signed)

By: _____
(signed)

Laura Wassmer _____

(typed name)

Mayor _____

(typed title)

City of Prairie Village _____

(typed company name)

7700 Mission Road _____

(typed address)

Prairie Village, Kansas 66208 _____

(typed city, state, zip)

(typed telephone number)

(date of execution)

(date of execution)

SEAL

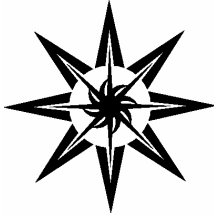
ATTEST:

APPROVED BY:

City Clerk, Joyce Hagen-Mundy

City Attorney, Catherine Logan

(If the Contract is not executed by the President of the Corporation, general partner of the Partnership, or manager of a limited liability company, please provide documentation, which authorizes the signatory to bind the corporation, partnership or limited liability company. If a corporation, the Contractor shall furnish the City a current certificate of good standing, dated within ten (10) days of the date of this Contract.)



ADMINISTRATION

City Council Meeting Date: June 1, 2015

Consider approval of an extension to the Special Use Permit for Mission Chateau project

RECOMMENDED MOTION:

Move that the City Council approve the attached Resolution to extend the deadline to begin construction set forth in Special Use Permit (SUP) for the Mission Chateau project (Ordinance 2301) relating to the deadline included in Condition #4.

BACKGROUND:

City Council has reviewed the request for an extension to the SUP for the Mission Chateau project. City Council has approved two- one month extensions and the current date to begin construction is March 6, 2016.

MVS, LLC and the neighbors have negotiated a Settlement Agreement in anticipation of a third SUP application for the Mission Valley site. The City is not party to the Settlement Agreement.

The following is an excerpt of the Settlement Agreement. Representatives of both parties requested that this part of the agreement be shared with the Governing Body.

Extension of Special Use Permit No. 2301. This Settlement Agreement shall automatically terminate in the event that at the City Council meeting to be held on June 1, 2015, the City Council fails to grant MVS's request for the following extension of time in which to commence construction under Special Use Permit No. 2301 (the "Extension"):

- (a) Subject to MVS filing the Third SUP Application (as hereinafter defined) on or before September 4, 2015, the deadline to begin construction under Special Use Permit No. 2301 shall be initially extended from the current date of March 6, 2016 until October 6, 2016; provided, however, if MVS fails to timely file the Third SUP Application by September 4, 2015 or the City's Planning Commission does not commence a "Public Hearing" (as prescribed by the City's Ordinances) reviewing the Third SUP Application on or before November 3, 2015, the foregoing extension through October 6, 2016 shall be automatically deemed null and void; and
- (b) Provided that MVS files the Third SUP Application on or before September 4, 2015, the deadline to begin construction under Special Use Permit No. 2301 shall be automatically extended to that date which is thirteen (13) months from that date upon which the City Council votes to deny the approval of the Third

SUP Application^[1]; provided, however, that if any lawsuit is filed challenging the approval or issuance of the New Special Use Permit (as hereinafter defined) approved by the City Council, the deadline to begin construction under Special Use Permit No. 2301 shall be automatically extended to that date which is thirteen (13) months from that date upon which any judgment, journal entry, order or memorandum decision entered by a court of competent jurisdiction that invalidates the New Special Permit becomes a final non-appealable judgment, journal entry, order or memorandum decision.^[2]

Counsel for the Neighbors shall appear and support the granting of the Extension by the City Council at the City Council meeting on June 1, 2015. In the event that this Settlement Agreement is terminated as a result of the City Council's failure to grant MVS the Extension, no Party shall have any further obligations hereunder and each Party hereto shall be entitled to pursue any and all legal and/or equitable rights as such Party may be entitled.

FOOTNOTES

[1] By way of example only, should the City Council deny the approval of the Third SUP Application on December 7, 2015, then MVS would have until January 7, 2017 in which to begin construction under Special Use Permit 2301.

[2] By way of further example only, should the City Council approve the Third SUP Application and a court of competent jurisdiction were to enter an Order determining that the New Special Use Permit was invalidly issued and such Order became final and non-appealable on June 1, 2016, then MVS would have until July 1, 2017 in which to begin construction under Special Use Permit 2301.

ATTACHMENTS:

- Resolution
- Agenda form from Planning Commission meeting, Dec. 2, 2014 – recommending a 14 month extension
- Letter requesting extension from MVS, LLC – Polsinelli law firm
- Memo from the City Attorney on the request for an extension
- Related Planning Commission minutes – Dec. 2, 2014
- Letter dated Dec. 10, 2014 in response to Memo from City Attorney

PREPARED BY:

Quinn Bennion, City Administrator

Date: May 28, 2015

RESOLUTION NO. _____

**A RESOLUTION OF THE CITY OF PRAIRIE VILLAGE, KANSAS,
CONDITIONALLY APPROVE AN EXTENSION TO THE PERIOD TO
COMMENCE CONSTRUCTION UNDER ORDINANCE NO. 2301**

WHEREAS, MVS, LLC is the owner of certain real property located at 8500 Mission Road, Prairie Village, Johnson County, Kansas 66206 (the “MVS Property”).

WHEREAS, a lawsuit is also pending in the District Court of Johnson County, Kansas relating to a Special Use Permit for the MVS Property denied by the City on September 3, 2013.

WHEREAS, on October 4, 2013, MVS filed a Second Special Use Permit Application, No. PC 2013-11 (the “Second SUP Application”), with the City seeking permission to construct a senior retirement community upon a portion of the MVS Property.

WHEREAS, on December 11, 2013, certain property owners adjoining the MVS Property (the “Neighbors”) filed a Petition styled: Gary W. Marsh, et al., Plaintiffs, vs. City of Prairie Village, Kansas, Defendant. Case No. 13-CV-08544 in the District Court of Johnson County seeking to enjoin the City from considering the SUP Application.

WHEREAS, on January 6, 2014, the City adopted and published Ordinance 2301 (“Special Use Permit No. 2301”) which granted MVS the right to construct a senior retirement community upon a portion of the MVS Property, subject to certain conditions including that construction commence within two years of January 6, 2014.

WHEREAS, on February 3, 2014, the Neighbors filed a First Amended Petition in the Second Lawsuit claiming that Special Use Permit No. 2301 was invalidly issued and is null and void.

WHEREAS, MVS filed a Motion to Intervene in the Second Lawsuit, which motion was thereafter granted by the District Court.

WHEREAS, on September 12, 2014, the District Court entered its Memorandum Decision granting summary judgment ruling that the City had legally granted Special Use Permit No. 2301 and that the Neighbors’ claims in the Second Lawsuit were without merit.

WHEREAS, on October 30, 2014, the Neighbors filed a Notice of Appeal, Case No. 14-112706-A (the “Appeal”), appealing the District Court’s Memorandum Decision to the Kansas Court of Appeals, which Appeal was thereafter transferred to the Kansas Supreme Court where it is currently pending.

WHEREAS, MVS and the Neighbors have advised the City that they have entered into a Settlement Agreement dated as of May 28, 2015 (the “Settlement Agreement”), and as a condition to the effectiveness of the Settlement Agreement, have requested the Governing Body

of the City to extend the date of commencement of construction from the current extended date of March 6, 2016.

BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF PRAIRIE VILLAGE, KANSAS, AS FOLLOWS:

1. Subject to MVS filing the Third SUP Application (as hereinafter defined) on or before September 4, 2015, the deadline to begin construction under Special Use Permit No. 2301 shall be initially extended from the current date of March 6, 2016 until October 6, 2016; provided, however, if MVS fails to timely file the Third SUP Application by September 4, 2015 or the City's Planning Commission does not commence a "Public Hearing" (as prescribed by the City's Ordinances) reviewing the Third SUP Application on or before November 3, 2015, the foregoing extension through October 6, 2016 shall be automatically deemed null and void; and

2. Provided that if MVS files the Third SUP Application on or before September 4, 2015, the deadline to begin construction under Special Use Permit No. 2301 shall be automatically extended to that date which is thirteen (13) months from that date upon which the City Council votes to deny the approval of the Third SUP Application¹; provided, however, that if any lawsuit is filed challenging the approval or issuance of the New Special Use Permit (as hereinafter defined) approved by the City Council, the deadline to begin construction under Special Use Permit No. 2301 shall be automatically extended to that date which is thirteen (13) months from that date upon which any judgment, journal entry, order or memorandum decision entered by a court of competent jurisdiction that invalidates the New Special Permit becomes a final non-appealable judgment, journal entry, order or memorandum decision.²

3. The term "Third SUP Application" means a new Special Use Permit Application seeking the issuance of a special use permit (the "New Special Use Permit") to construct a senior retirement community consisting of an assisted living facility, an independent living facility and eleven (11) villas upon the MVS Property in accordance with the terms of the Settlement Agreement.

PASSED, ADOPTED AND APPROVED by the Governing Body of the City of Prairie Village, Kansas this 1st day of June, 2015.

¹ By way of example only, should the City Council deny the approval of the Third SUP Application on December 7, 2015, then MVS would have until January 7, 2017 in which to begin construction under Special Use Permit 2301.

² By way of further example only, should the City Council approve the Third SUP Application and a court of competent jurisdiction were to enter an Order determining that the New Special Use Permit was invalidly issued and such Order became final and non-appealable on June 1, 2016, then MVS would have until July 1, 2017 in which to begin construction under Special Use Permit 2301.

CITY OF PRAIRIE VILLAGE, KANSAS

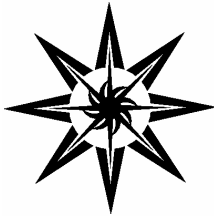
By: _____
Laura Wassmer, Mayor

Attest:

Joyce Hagen Mundy, City Clerk

Approved as to form:

Catherine P. Logan, City Attorney



PLANNING COMMISSION

Council Meeting Date: December 15, 2014

PC2013-11 Request for extension to SUP for Mission Chateau

RECOMMENDATION OF PLANNING COMMISSION

The Governing Body accept the recommendation of the Planning Commission that the 24 month deadline in the SUP shall be extended to 14 months after the termination of the pending litigation involving Mission Valley Chateau project. Termination means dismissal with prejudice or the issuance of a final judgment and all appeal and/or motion to reconsider deadlines/rights expire. Applicant shall notify the City of PV within three business days of the termination as defined herein that the termination has occurred and the 14 months have commenced.

BACKGROUND

On January 6, 2014 the City granted a Special Use Permit for Mission Chateau subject to 14 conditions. Condition #4 provides that "if construction has not begun within twenty-four (24) months of the approval of the Special Use Permit by the Governing Body, the permit shall expire unless the applicant shall reappear to the Planning Commission and Governing Body to receive an extension of time prior to expiration."

On November 14, 2014, the City Clerk received a letter from MVS, LLC requesting the Planning Commission consider an Extension of the Special Use Permit granted by Ordinance 2301 for the operation of a Senior Living Community at 8500 Mission Road.

The Planning Commission considered this request at their December 2, 2014 meeting recommending the Governing Body extend the 24 month deadline to commence construction found in condition #4 of the Special Use Permit to 14 months after the termination of the pending litigation involving the Special Use Permit for Mission Chateau (see recommendation). The minutes of the December 2nd meeting relative to this item are attached.

To assist the Commission in their consideration, they received a memorandum from the City Attorney dated November 26, 2014 applicant's request for an extension. This memo is also attached.

The Governing Body (which includes the Mayor and City Council) has the following options:

- A. Adopt the recommendation of the Planning Commission and approve the extension;
- B. Deny the requested extension;
- C. Change the recommendation of the Planning Commission

Any of these actions require a simple majority vote.

ATTACHMENTS

Letter Requesting Extension

Memo from the City Attorney on the request for an extension

Related Planning Commission Minutes December 2, 2014 (Draft)

Letter dated December 10, 2014 in response to Memo from City Attorney

PREPARED BY

Joyce Hagen Mundy

City Clerk

DATE: December 11, 2014



6201 College Boulevard, Suite 500, Overland Park, KS 66211-2435 • 913.451.8788

November 14, 2014

Timothy J. Sear
(913) 234-7402
(913) 451-6205 Fax
tsear@polsinelli.com

BY HAND DELIVERY AND E-MAIL TO jhmundy@pvkansas.com

Joyce Hagen Mundy
City Clerk
City of Prairie Village, Kansas
7700 Mission Road
Prairie Village, KS 66208

**Re: MVS LLC Special Use Permit/Prairie Village Ordinance 2301
Request to City Planning Commission for Extension of Special Use Permit**

Dear Madam Clerk:

As you are aware, on January 6, 2014, a Special Use Permit was approved by enactment of Prairie Village Ordinance 2301, pursuant to which MVS LLC ("MVS") intends to build an approximate \$55 million senior living facility to be known as Mission Chateau in compliance with the Special Use Permit.

However, within 30 days of enactment of Ordinance 2301, a group of Plaintiffs filed suit in the District Court of Johnson County, Kansas challenging the legality of the grant of the Special Use Permit (Marsh, et al v. City of Prairie Village, Kansas and MVS LLC, Case No. 13CV-08544). Although the District Court on October 30, 2014 affirmed the legality of the grant of the Special Use Permit, the Plaintiffs have appealed that decision to the Kansas Court of Appeals.

Ordinance 2301 states, in part:

4. That the Special Use Permit not have a termination or expiration time established for it; however, if construction has not begun within twenty-four (24) months from the approval of the Special Use Permit by the Governing Body, the permit shall expire unless the applicant shall reappear to the Planning Commission and Governing Body to receive an extension of time prior to the expiration.

There is no reasonable likelihood that the appeal of the District Court judgment will be fully and finally resolved (i.e. a ruling by the Kansas Court of Appeals, which will likely be followed by the filing of a Petition for Transfer to Kansas Supreme Court) prior to January 6, 2016, which is the twenty-four (24) month anniversary of the approval of the Special Use Permit.

polsinelli.com

Chattanooga Chicago Dallas Denver Edwardsville Jefferson City Kansas City Los Angeles New York Overland Park
Phoenix St. Joseph St. Louis Springfield Topeka Washington, D.C. Wilmington

Polsinelli PC, Polsinelli LLP in California

072868/449966-TJSEA-49157833.4

When faced with similar circumstances, numerous state courts have unanimously held that where the validity of a permit for construction was the subject of pending litigation, the local ordinance providing for the expiration of such permit was stayed or tolled by operation of law until the pending litigation had been fully and finally resolved.

For example, in *Belfer v. Building Commissioner of Boston*, 294 N.E.2d 857, 363 Mass. 439 (1973), there was an appeal from the grant of zoning variances to allow the building of a 33-story building. The ordinance required construction to begin within two years or the variances would expire. The Massachusetts Supreme Court stayed the expiration of the variances pending the conclusion of the appeal, stating: **“We conclude that the relief from time limitations... where a legal impediment exists to the use of a benefit, should also be given where an appeal from the granting of the variance creates equally real practical impediments to the use of a benefit. Otherwise a variance which was lawfully awarded can be frustrated by the delay inherent in an appeal. Unless an appeal tolls the time period, many variances would be meaningless.”** 294 N.E.2d at 859 (emphasis added).

In *Tantimonaco v. Zoning Board of Review of Town of Johnston*, 232 A.2d 385, 102 R.I. 594 (R.I. 1967), there was an appeal challenging the legality of the grant of a building permit for a gasoline service station. The ordinance required that construction start within six months or the permit would expire. The Supreme Court of Rhode Island stayed the expiration of the permit pending the conclusion of the appeal, stating: **“As heretofore noted, petitioners challenged the validity of that permit by seeking a review of the board’s decision . . . Although the filing of such a petition does not act as a stay . . . common prudence understandably acts as a brake against incurring obligations, the benefits of which would be cancelled by an adverse decision of this court. Apart from the question as it may be affected by a change in the zoning regulations, we think it clear that the requirement of activating a permit set forth in an ordinance does not apply during such time as the legality of a permit is open to question by reason of litigation amounting to an appeal from the issuance thereof.”** 232 A.2d at 388 (emphasis added).

In *Gala Homes v. Board of Adjustment of City of Killeen*, 405 S.W.2d 165 (Tex.Civ.App. 1966), there was an appeal challenging the legality of building permits to construct apartments. The ordinance required construction to start within 90 days or the permits would expire. The Texas Court of Civil Appeals stayed the expiration of the permits pending the conclusion of the appeal, stating: **“Further, we hold that the two year period within which the city ordinance requires that construction be completed should be tolled, commencing with the filing of intervenor’s appeal with the Board and continuing until final judgment herein.”** 405 S.W.2d at 167.

In *Homeowners Organized to Protect the Environment v. First National Bank of Barrington*, 521 N.E.2d 1202 (Ill.App. 2 Dist. 1988) there was an appeal challenging the validity of the grant of a special use permit. The ordinance required commencement of substantial

construction within one year or the permit would lapse. The Illinois Court of Appeals stayed the expiration of the permit pending the conclusion of the appeal, stating: **“However, to allow plaintiffs here or in any other case to exhaust an ordinance’s time limitation by simply litigating the ordinance would be, as the trial court observed, inequitable. We believe judicial review should be afforded parties to resolve legitimate legal questions and not as a bar to the full enjoyment of the zoning relief granted.”** 521 N.E.2d at 1207.

In *National Waste Managers, Inc. v. Anne Arundel County*, 763 A.2d 264 (Ct. Special Appeals Md. 2000) there was a claim that the special exception and variance to operate a rubble landfill had expired while various legal challenges to the landfill proceeded. The ordinance required that action to implement the use must begin within two years of the grant of the special exception. The Maryland Court of Special Appeals rejected a claim that the special exception and variance had expired, stating: **“To be sure, we do not fault the parties for exercising their legal rights. At the same time, we cannot disregard that delay is an inherent consequence of litigation, and the County’s repeated attempt to litigate National’s right to proceed with the Landfill ultimately made it impossible for National to comply with [the regulation]. If the County were correct in its analysis as to tolling, it would mean that a developer facing a time-related condition could almost always be thwarted in its efforts by the inevitable delay resulting from litigation, regardless of the merits; the right to proceed would necessarily expire before a court could rule otherwise. We cannot accept that logic, which elevates legal gamesmanship to new heights. Here, National did not comply with [the regulation] because the County’s exercise of its rights made it impossible for National to do so. We have not uncovered any Maryland cases discussing the concept of tolling in the context of this case. Nor have we been referred to any applicable Maryland cases. Nevertheless, other authorities suggest, by analogy, that the tolling principle ought to apply to the circumstances of this case.”** 763 A.2d at 276-277 (emphasis added).

In *Fromer v. Two Hundred Post Associates*, 631 A.2d 347 (Conn.App. 1993), there was a claim that a wetlands permit expired when the developer did not commence significant activity within one year of issuance of the permit. Litigation challenging the permit went on for six years. The Appellate Court of Connecticut rejected claims that the permit expired, stating: **“The regulatory process is not designed to be a spider’s web, snaring one who follows all the regulations and statutes, obtains all the necessary permits, and successfully defends a series of appeals, but then loses his right to proceed because the passage of time has caused the permits to expire.”** 631 A.2d at 353.

Because we find no reported court decisions that are in conflict with this line of cases, we are confident that Kansas courts would follow this line of cases and determine that the twenty-four (24) month time period in which MVS was given to commence construction in accordance with Ordinance 2301 is currently stayed or tolled by operation of law pending the full and final resolution of the pending appeal consistent with the cases discussed above.

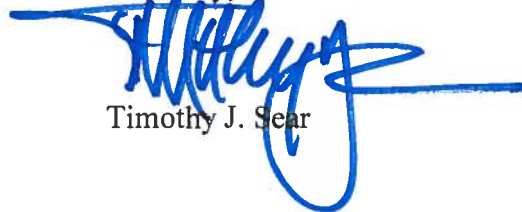
Joyce Hagen Mundy
November 14, 2014
Page 4

However, in lieu of filing yet another lawsuit dealing with Mission Chateau which would request the District Court to enter a judgment confirming that the twenty-four (24) month time period in which MVS was given to commence construction in accordance with Ordinance 2301 is currently stayed or tolled by operation of law pending the full and final resolution of the pending appeal, MVS respectfully requests the City extend the current expiration date of January 6, 2016 contained in Ordinance 2301 to provide that MVS shall have twenty-four (24) months to commence construction beginning from the date upon which a final non-appealable judgment is entered in connection with the Marsh litigation.

Granting such an extension is not only warranted under the circumstances, but also supported by applicable case law, and will put to rest any issues with respect to the date by which MVS has or must commence construction on the project while affording all of the interested parties the opportunity for a judicial review to resolve the legal questions surrounding the issuance of the Special Use Permit.

MVS asks that this Application for Extension of Special Use Permit be placed on the December 2, 2014 Planning Commission Agenda.

Sincerely,



Timothy J. Sear

TJS:mgs
Enclosure

cc: Joseph Tutera
Michael F. Flanagan, Esq.
John D. Petersen, Esq.
Catherine P. Logan, Esq., (by e-mail to Logan@Lathropgage.com)
Ron Williamson (by e-mail to rwilliamson@hwlochner.com)

MEMORANDUM

To: Governing Body and Planning Commission
City of Prairie Village, Kansas

From: Catherine P. Logan, City Attorney

Date: November 26, 2014

Subject: **Mission Chateau Special Use Permit
Ordinance No. 2301
MVS LLC Request for Extension**

Ordinance No. 2301, adopted January 6, 2014, grants a Special Use Permit (“Mission Chateau SUP”) subject to fourteen conditions, including condition #4 which provides, in pertinent part, that “if construction has not begun within twenty-four (24) months from the approval of the Special Use Permit by the Governing Body, the permit shall expire unless the applicant shall reappear to the Planning Commission and Governing Body to receive an extension of time prior to expiration.” By its terms, the Mission Chateau SUP will expire on January 6, 2016, unless construction begins prior to that date, or the time period is extended by the Governing Body.

Prior to the adoption of Ordinance No. 2301, and on December 11, 2013, a number of neighboring property owners filed an action in the District Court of Johnson County, Kansas styled *Gary W. Marsh et al. v. City of Prairie Village, Kansas*, Case No. 13CV08544, seeking to enjoin the City from considering the Mission Chateau SUP at the January 6, 2014 meeting of the Governing Body. For reasons unknown, the plaintiffs changed their minds, and did not pursue a temporary injunction. Thus, the Governing Body approved the Mission Chateau SUP at that meeting.

On February 3, 2014, the original plaintiffs, joined by additional plaintiffs, filed a First Amended Verified Petition against the City challenging the lawfulness of Ordinance No. 2301. MVS LLC (“MVS”) intervened as a party defendant. Subsequently, the parties filed extensive and lengthy cross-motions for summary judgment, seeking a comprehensive ruling and determination of all legal questions that gave rise to this lawsuit. These issues included numerous challenges to the actions of the City, from both the plaintiffs and MVS. On September 12, 2014, the District Court issued an order finding that the Governing Body acted lawfully in passing Ordinance No. 2301, thus fully satisfying, and fully complying with, all aspects of Kansas law in its actions leading up to, and throughout, its passage of Ordinance No. 2301.

On October 20, 2014, MVS filed a motion to stay expiration of the Mission Chateau SUP during the pendency of the lawsuit and any appeal therefrom. On October 30, 2014, the District Court denied MVS's motion, while simultaneously denying the plaintiffs' request to alter or amend its original order regarding the cross-motions for summary judgment.

Subsequently, on October 30, 2014, the plaintiffs filed an appeal of the District Court's summary judgment rulings in the Kansas Court of Appeals, which is presently pending and in its early stages. This appeal is styled Case No. 112706. On November 6, 2014, MVS filed a cross-appeal, seeking review of the District Court's decision which overruled MVS's motion for a stay of the expiration of the Mission Chateau SUP during the pendency of the action, once again including all proceedings in the trial and appellate courts. Lastly, just earlier today, MVS filed a motion with the Kansas Court of Appeals to transfer the appeal to the Supreme Court for review.

An appeal of this type typically takes approximately eight to twelve months before a decision is issued. If a party seeks further review in the Kansas Supreme Court, the Court of Appeals decision does not become final until the Supreme Court either accepts or denies review. This can take an additional twelve months or more. If the Supreme Court denies review, the Court of Appeals decision becomes final essentially immediately. If the Kansas Supreme Court accepts review, the appeal does not become final until the Kansas Supreme Court rules. Based upon these timelines, it is highly unlikely that the *Marsh* case will be finally decided prior to January 6, 2016. However, if the Supreme Court were to grant MVS's motion for transfer, and thus accept review, the appeal would then bypass any consideration or ruling from the Court of Appeals, thus expediting the appeal process substantially. If this were to occur, it is quite possible that a final decision would be rendered in advance of January 6, 2016. As MVS's motion to transfer was just filed earlier today, it is presently unknown what position, if any, the plaintiffs will take in response to the motion. At this time, the City has also yet to take a position on MVS's motion to transfer, if any.

Turning to MVS's request for "staying" or "tolling" the expiration of the Mission Chateau SUP, counsel for MVS, in its letter to the City Clerk dated November 16, 2014, cites case law in which courts in other states have applied an equitable doctrine that time periods similar to the time period in condition No. 4 are automatically "stayed" or "tolled" in certain situations involving litigation. Counsel for MVS admits that there is no controlling case law in Kansas.

Counsel for MVS states that based on this case law in other states, the Planning Commission and Governing Body should grant an extension of the 24 month period to begin construction, and that if the extension is not granted, MVS will file a lawsuit against the City requesting that the District Court enter a judgment that the 24 month period is stayed or tolled pending the final resolution of the *Marsh* case.

The purpose of this Memorandum is to briefly respond to the legal issue raised in the letter from MVS's legal counsel in order to assist the Planning Commission and the Governing Body in considering the request for extension. Nothing contained herein will constitute a waiver of matters not addressed in this Memorandum.

1. I agree with counsel for MVS that there are no reported Kansas cases which have considered whether equity requires that conditions similar to condition #4 are automatically tolled or stayed if opponents to a special use permit appeal to the District Court. Kansas courts are not bound by case law from other states, and in any event the determination of whether such an equitable remedy should apply depends on the facts and circumstances in each case.

2. There are no Kansas statutes or provisions in the Prairie Village City Code which impose an automatic stay when zoning matters are appealed, by either automatically staying the right of the successful applicant to build, or automatically staying any time period in which the successful applicant is required to build.

3. MVS wants the right, but not the obligation, to build within the 24 month period. This is contrary to what was approved in Ordinance 2301 and for the following reasons I believe that it would not be unreasonable for the Planning Commission or Governing Body to deny an extension under the circumstances.

When Ordinance No. 2301 was considered by the Governing Body on January 6, 2014, MVS stated that it accepted all the conditions. It did not ask for the period to begin construction to exceed 24 months. It also did not suggest or ask that the condition state that the period be tolled until completion of any appeal, even though some of the opposing neighboring property owners had already filed a lawsuit against the City to challenge the Mission Chateau SUP. Although Ordinance No. 2301 gives MVS the right to *request* an extension, there is no right to *obtain* an extension.

The *Marsh* plaintiffs asked the District Court to enjoin the right of MVS to begin construction. MVS successfully opposed the injunction request in the District Court. In doing so, MVS argued that the construction of senior living structures approved by the Mission Chateau SUP should not be enjoined because it should be up to MVS to take the risk that such structures must be removed if the case is ultimately decided in favor of the *Marsh* plaintiffs.¹

¹ "That is, we need the SUP only to build those structures and use it as a senior living community. So should MVS decide that they want to take the risk while this litigation is pending of going ahead and beginning construction, whether they ultimately would use the construction as a senior living community under an SUP, or as another allowed use without a permit under R-1A zoning, is completely up to MVS." Transcript of Hearing on TRO 4-18-14. Pp 14-15, Mr. Sear.

"They say that if we build and lose the lawsuit, we have to tear it down and that we are at risk. Well, let us take the risk if we choose to do that." Transcript of Hearing on TRO 4-18-14. Pp 123, Mr. Sear.

Belatedly in the *Marsh* case², MVS asked the District Court for the relief its counsel now states that it may seek in a new lawsuit. The District Court ruled that it was not certain that the matter was properly before the Court, but even if it was, it was not ripe as the period of time had not yet expired, nor had MVS sought and been denied an extension.

In a decision not mentioned by MVS's legal counsel, a Maine court took a view that an applicant also assumed the risk that a construction deadline would expire. The applicant, which had been granted a conditional use permit, had not commenced construction within a required time period, and argued that the time to commence construction was automatically tolled while two appeals that questioned the legality of the conditional use permit were pending. A Maine statute provided that an appeal of the zoning decision did not automatically stay the grant of the conditional use permit, and that a stay could be requested from the court. Although Kansas does not have a similar statute, the law in Kansas is the same. Stays in zoning appeals are not automatic but may be requested by a party, as was done by the *Marsh* plaintiffs in the pending case.

The Maine court found that because construction was not commenced within the required time period, the conditional use permit expired. The Maine court ruled that appeals by opponents to the grant of a conditional use permit did not result an automatic stay of the construction period, noting that the applicant did not ask for a stay at the local town level, or in either of two appeals challenging the conditional use permit. *Cobbossee Development Group v. Town of Winthrop*, 585 A.2d 190, 194 (Me. 1991).

Similarly, although MVS is now asking for an extension, it accepted a 24-month construction period when the Mission Chateau SUP was granted, even though a lawsuit was already pending challenging the City's authority to grant the Mission Chateau SUP. It further opposed a motion to enjoin construction sought by the *Marsh* plaintiffs, expressly assuming the "risk" that it might begin construction of the assisted living facility and then be required to remove improvements if the *Marsh* plaintiffs were ultimately successful in their challenge. Since Ordinance No. 2301 does not grant a right to an extension, only the right to seek an extension, MVS also assumed the risk that the Planning Commission and Governing Body might not grant an extension, causing the Mission Chateau SUP to expire if MVS choses not to begin construction.

One of the primary reasons for condition #4 is that the use approved by the Mission Chateau SUP is dissimilar to the normal uses found in R-1A districts. The bodies considering the Mission Chateau SUP took into consideration numerous factors, including then-existing conditions and surrounding uses. Those conditions and surrounding uses change over time. If the special use is not required to commence within a reasonable time after approval, the factors relied upon may become less relevant, and

² MVS LLC filed a motion with the District Court seeking this relief after the entry of Judgment on September 12, 2014, and prior to the hearing on the *Marsh* Plaintiffs' motion to reconsider.

new relevant factors may arise. The use proposed by the Mission Chateau SUP involves a complex project and therefore a majority of the Planning Commission and Governing Body considered a period of 24 months to commence construction to be a reasonable period. MVS agreed to the condition which included the right to return and request an extension of time.

Finally, it should be noted that MVS is not without a remedy. The zoning regulations do not prohibit a reapplication for a special use permit, other than Section 19.28.075, which imposes a reapplication waiting period of 6 months if an application is denied. If the Mission Chateau SUP expires, MVS may reapply for a special use permit, at which point the current factors and conditions could be weighed by the Planning Commission and Governing Body.

In conclusion, under the above circumstances, a Kansas court could very well refuse to apply the equitable doctrine that an appeal “stays” a mandatory construction period followed by courts in some other states because: (a) in opposing the injunctive relief in the *Marsh* case, MVS willingly assumed the risks that an extension may not be granted, and that it would have to begin construction prior to a final decision in the *Marsh* case; (b) MVS can prevent the SUP from expiring by beginning construction before January 6, 2016; and (c) if the Mission Chateau SUP expires because MVS elects not to begin construction, then it may reapply for a special use permit.

DRAFT
PLANNING COMMISSION MINUTES
December 2, 2014

**PC2013-11 Request for extension to SUP for Mission Chateau
8500 Mission Road**

David Waters, representing the City Attorney, stated on January 6, 2014 the City granted a Special Use Permit for Mission Chateau subject to 14 conditions. Condition #4 provides that “if construction has not begun within twenty-four (24) months of the approval of the Special Use Permit by the Governing Body, the permit shall expire unless the applicant shall reappear to the Planning Commission and Governing Body to receive an extension of time prior to expiration.” This is the request before the Planning Commission.

Mr. Waters reviewed the following history of litigation that has taken place on this project:

- December 11, 2013 - neighboring property owners filed an action in the District Court of Johnson County against the City seeking to enjoin the City from considering the Mission Chateau SUP at the January 6, 2014 meeting. The plaintiffs did not pursue the temporary injunction and the application was considered.
- February 3, 2014 - neighboring property owners filed a First Amended Verified Petition against the City challenging the lawfulness of the adopting Ordinance on a number of issues.
- On September 12, 2014, the District Court issued an order finding that the Governing Body acted lawfully in passing Ordinance #2301 fully satisfying and fully complying with all aspects of Kansas law in its actions leading up to and throughout the passage of Ordinance 2301.
- On October 20, 2014 - MVS filed a motion to stay the expiration of the Mission Chateau SUP during the dependency of the lawsuit and any appeal therefrom.
- On October 30, 2014, the District Court denied MVS’s motion, while simultaneously denying the plaintiffs’ request to alter or amend its original order regarding the cross-motions for summary judgment.
- On October 30, 2014 - the plaintiffs filed an appeal of the District Court’s summary judgment rulings in the Kansas Court of Appeals, which is presently pending and in its early stages.
- On November 6, 2014 - MVS filed a cross-appeal, seeking review of the District Court’s decision which overruled MVS’s motion for a stay of the expiration during the pendency of action.
- On November 26, 2014 - MVS filed a motion with the Kansas Court of Appeals to transfer the appeal to the Supreme Court for review.

Mr. Waters noted the potential timeframe for these actions to move through the court system causing the applicant to be concerned that final action will not be taken until after the expiration of the SUP per condition #4. Therefore, they are requesting an extension.

In the applicant's request to the City they contend that as a matter of law the City should rule that the 24 month period of construction be stayed pending the resolution of the appeals. However, they have formally requested an extension of the 24 month time period listed in condition four from the date that all appeals are final. In support of the request several case law references were presented.

The City Attorney has advised that there are no Kansas cases which have considered whether equity requires that conditions similar to condition #4 are automatically tolled or stayed if opponents to a special use permit appeal to the District Court. Kansas courts are not bound by case law from other states, and in any event the determination of whether such an equitable remedy should apply depends on the facts and circumstances of each case.

There are no Kansas statutes or provisions in the Prairie Village City Code which impose an automatic stay when zoning matters are appealed, by either automatically staying the right of the successful applicant to build, or automatically staying any time period in which the successful applicant is required to build.

Mr. Waters noted there is case law from other jurisdictions ruling in support of stays during litigation as well as some opposing it. It is not the Planning Commission decision to determine what the case law should be, but simply to consider a request for an extension.

In her memo to the Planning Commission the City Attorney stated that she believed it would not be unreasonable for the Planning Commission or Governing Body to deny an extension based on the following circumstances:

- MVS accepted the conditions of approval for the SUP including condition #4
- MVS opposed the injunction request in the District Court stating it should be up to MVS to take the risk that such structures must be removed if the case is ultimately decided in favor of the Marsh plaintiffs.
- Stays in zoning appeals in Kansas are not automatic, but may be requested by a party.
- The applicant could prevent the expiration of the SUP by beginning construction
- MVS is not without a remedy. The zoning regulations do not prohibit a reapplication for a special use permit should the permit expire.

Mr. Waters noted this is not a public hearing, although the Commission can chose to take comment, there are no criteria, standards or Golden Factors that must be met. The Commission should make a good faith consideration of the request. The Commission serves as a recommending body. The final decision will be made by the Governing Body. There is no protest petition or required vote to override the Commission's recommendation. The Planning Commission may recommend granting the request, recommend denying the request, recommend granting the request for a shorter time frame or send it forward with no recommendation.

Gregory Wolf asked if the requested extension was for a specific period of time. Mr. Waters stated the request was for a 24 month period beginning after the final judgment of any appeals.

Bob Lindeblad asked what would constitute commencement of construction. Mr. Waters stated there is no definition for "commencement of construction" in the SUP. He feels it would be a determination of the Governing Body.

Timothy Sear, with Polsinelli representing MVS, LLC, reviewed again with the Commission the series of legal challenges that have been filed against this SUP noting the amount of time it has taken for resolution, although positive, of these challenges. Now an appeal of the ruling has been filed which will further delay final judgment until quite possibly beyond the established termination or expiration of the time period given in the Special Use Permit for Mission Chateau approved by the City on January 6, 2014 for the commencement of construction of the project. Mr. Sear reviewed the possible timetable for possible court appeals that will take well beyond the January 6, 2016 deadline.

MVS filed a motion to stay the expiration of the Mission Chateau SUP during the dependency of the lawsuit and any appeal therefrom to prevent the MVNA appeal of the court's judgment in support of the SUP from essentially keeping the SUP in pending litigation until the expiration of the SUP per condition #4. On October 30, 2014, the District Court did deny MVS's motion; however, not because there was no merit to the motion, but because there had not been an application made to the City for an extension and the judge felt he did not have jurisdiction to decide.

MVS is committed to this project and it is their sincere intention to proceed with it; however, as pointed out if the Courts determine there was a mistake made in the granting of the SUP any improvements made pursuant to the SUP would have to be removed and destroyed.

Mr. Sear stated that land use appeals in the state of Kansas are relatively rare, resulting in not a lot of case law rulings. However, numerous state courts have unanimously held that where the validity of a permit for construction was the subject of pending litigation, the local ordinance providing for the expiration of such permit was stayed or tolled by operation of law until the pending litigation had been fully and finally resolved.

They have found that courts that have dealt with this issue when there is not a statute that deals with this situation, with neither Kansas nor Prairie Village has, they have determined that it would be unreasonable to allow a permit to be lost simply by the delay of litigation as to the legality of the permit. No one has cited any contrary case law. Although it is all from outside Kansas, all courts that they have found that have dealt with this issue have determined that if there is not a statute dealing with the issue already to provide for a tolling of the expiration during the pendency of the legal challenge to the permit that equitably the expiration of the permit is to be tolled during the pendency of it.

Mr. Sear noted the memo from your city attorney regarding a case in Maine that opposed the extension, the judge's ruling found that because there was already a Maine statute that provided for the permit to be saved that tolling was not necessary.

All of the cases cited in their request unanimously stated that the mere specter of litigation regarding the legality of the permit makes it unreasonable to proceed with construction, especially when the stance of the City is that any improvements made would be required to be removed and destroyed if the legality of the permit was upheld. Mr. Sear asked if it would be responsible for the City would undertake a \$55M project under such terms.

Mr. Sear stated that MVS is doing everything possible to expedite this appeal process requesting the Kansas Supreme Court take an immediate transfer of this case from the Appeals Court to shorten the timetable for this process. However, he noted those motions are very seldom granted.

Mr. Sear stated in reference to the City Attorney's memo to the Planning Commission stating reasons why she feels it would not be unreasonable to deny this extension, they believe under the facts of this situation it would be unreasonable for the city to require what all these other states have refused to require - that is to go forward and expend this kind of money while there is litigation pending. The City Attorney points out in opposing the MVNA attempt to enjoin this project in the past that MVS has opposed those requests for injunction. He does not feel that should weigh against MVS getting the full right to exercise it right under the SUP permit. When the lawsuit was first filed and the plaintiff asked that the City and MVS be enjoined by the court from any activities related to the entire 18 acre tract, both the City and MVS opposed that injunction. No one contended that if the injunction was granted that additional time would be given to MVS at the tail end to cover the period of time for the injunction. The mere fact that MVS like the city opposed this effort to shut down this project through an injunction that that we told the court that risk if we started construction was on MVS is not an unusual position to take and should not weigh against the approval of an extension of time relative to the SUP permit.

They contend that although there is no Kansas case law on the tolling argument that if the Kansas Court were given this issue, that the Kansas court would likely follow these other states. However, that would only be determined if MVS is denied an extension and has to file a declaratory judgment against the City. They are not interested in more litigation and more delays, although they feel the Kansas Court would find the permit should be tolled, that is why they are requesting grant an extension beyond the date when all of the appeals end. There would be no harm to anyone in extending this permit for a period of time beyond the time period appeals process ends. The City has already determined that this project should be built in the City of Prairie Village. He stated the SUP should not be defeated by the mere filing of continuous legal appeals regardless of the outcome of the appeal. The SUP should only be defeated by the Court deciding the legality of the SUP based on the process followed by the City which has already been found to be valid.

In summing up the City Attorney presents in her memo of last week three statements a) In opposing the injunctive relief in the *Marsh* case, MVS willingly assumed the risks that an extension may not be granted.; b) MVS can prevent the SUP from expiring by beginning construction before January 6, 2016 and c) if the Mission Chateau SUP expires because MVS elects not to begin construction, then it may reapply for a special use permit.

Mr. Sear responded to (a) that MVS is at risk to construct before the appeal is over; however, that does not weigh against the City granting the extension. In fact it weighs in favor of the extension as it would be unreasonable to put at risk that kind of money when the City is saying if you build it and the City loses, as it is the City that is being challenged on the legality of the SUP, that it must be removed.

Mr. Sear responded to (b) it is the same argument worded differently. If the City would require us to remove improvements, if the City loses the appeal, it is unreasonable to require MVS to expend that kind of money during dependency of the appeal.

Finally (c) seems nonsensical in that this process has already gone on for two years. Why would anyone want to let the SUP expire due to pending litigation and require a new application to be filed to begin the entire process again.

MVS wants to proceed, they want the litigation to end; however, there is only so much they can do under the situation where the city is going to insist that improvements be torn out if the City loses the appeal by the MVNA.

Gregory Wolf asked if all the appeals were to end tomorrow, how long would it take to commence construction. Mr. Sear replied 10 to 14 months to get the contracts let and the demolition done, noting the abatement work that has been completed at the school. He noted it is in their benefit to begin as quickly as possible. Current interest rates are at their lowest and in financing \$40M even a change of 1% in the interest rate impacts the financing by \$400,000 per year. It is in their best interest to proceed as quickly as possible after appeals are completed.

Mr. Wolf asked for clarification on what is being requested. Mr. Sear responded they are seeking an extension in time. He noted "tolling" is court language. They are asking that pursuant to condition #4 of the SUP that it be extended for a period of two years beyond the end of the appeal process. He noted that is beyond the time that is needed. Mr. Wolf asked why they were then asking for two years. Mr. Sear replied the court decisions on tolling have determined in those states that if you have 24 months in the permit that you get 24 months after the legal challenge is over. So they are simply mirroring what has been done. He is quite certain that 12 or 14 months beyond the end of the appeals process would be acceptable to them.

Mr. Wolf asked why the issue was not addressed when the initial litigation was filed. Mr. Sear noted that any SUP application can result in litigation, however they rarely do and with filed rarely goes on the extent that the litigation has in this case.

He does not feel it was the City's intent by Condition #4 which is standard language in Special Use Permits issued by the City was meant to kill a project just by legal delay and not by delay of the developer. That is what the cases that they have cited stand for - developers are not going to forward in all likelihood in this situation and that is why even in the absence of a regulation or statute or a condition, the state courts that have heard this issue have said that it must be "tolled" otherwise the permit becomes meaningless even by a losing lawsuit being filed.

Mr. Wolf stated he is trying to understand why 24 months. Mr. Sear responded that as soon as the appeal was filed it became clear that the request for extension would need to be filed as the process would not end prior to January 6, 2016. Mr. Sear noted the similar situation faced by the City of Prairie Village in the length of time taken for the appeal of Councilman David Morrison and now subsequent appeal by the County to the Kansas Supreme Court.

Nancy Vennard stated the City has had to spend an enormous amount of money with meetings at offsite locations and now ongoing legal fees. She would not want to see the City go through this process again if the extension is not granted.

Gregory Wolf does not see the need for a 24 month extension. He feels they should be ready to begin once the litigation ends. Based on their comments, he could support a 14 month extension. Nancy Vennard noted she understand the rationale behind the 24 month request. Bob Lindeblad reminded the Commission that their action is only a recommendation to the Governing Body.

Nancy Wallerstein asked if the extension was not granted by the Governing Body, they could still start construction under the current SUP. What would constitute commencement of construction. Mr. Lindeblad responded that would be the decision of the Governing Body.

Nancy Wallerstein noted there is not a precedence either for or against extending an SUP. She stated they owned the land regardless of the outcome of the litigation.

Nancy Vennard acknowledged the extensive and costly preparation work that needed to be done prior to commencing construction in design, construction documents, etc. She also added that if they had to refile for the SUP there is no guarantee the current plans would be accepted by the Planning Commission and/or Governing Body at that time, noting the several changes that have taken place for the Mission Mall property.

Gregory Wolf stated in reality, if the extension is not granted, a lawsuit will be filed against the City for declarative judgment on the failure to grant the extension.

Mike Flanagan, General Counsel for the Tutera Group, stated that last week they met with Prairie Village staff to discuss the issue of what is "commencement of construction" which staff believed would be a decision of the Governing Body, but were checking with the City Attorney. The building permit process was discussed and expectations for and timetable for plan reviews. The possibility of a phased building permit was discussed.

They would need to seek a full building permit. He would expect the cost of full construction documents to be as Mrs. Vennard indicated several thousands of dollars. The lead time needed by public works, the building official and fire department for review of plans of this size is significant. He does believe the 14 month period of time would work for MVS to get the building permit approved. If the definition of commencement of construction was less, they could begin sooner. This needs to be determined. Mr. Flanagan noted that in regard to "tolling" you generally are either granted 24 months or nothing.

They feel it is appropriate to grant the extension as it is of no harm to anyone, it does not cost anything of the city and it allows the court, who is the appropriate party, to make its determination on whether the Special Use Permit is valid or if it should be revoked.

Chairman Bob Lindeblad opened the floor for comments from the public.

Andrew Spitsnogle, attorney speaking on behalf of the Mission Valley Neighborhood Association, noted that Mr. Sear made several comments regarding legal interpretations; however, Mr. Waters direction to the Commission was that it was not your job to make a legal determination. It is the job of your city attorney and her analysis is clear. "MVS wants the right, but not the obligation, to build within the 24 month period. This is contrary to what was approved in Ordinance 2301 and that she feels it would not be unreasonable for the Governing Body to deny an extension under the circumstances". They concur with her assessment.

Mr. Spitsnogle made the following additional comments:

- MVS request for an extension is premature - noting that the deadline does not expire until January 6, 2016 and that this was one of the reasons for the denial of their motion on October 30th.
- If the Governing Body intended for the SUP to be "stayed or tolled" it is their view that they would have included that language in the SUP
- The Ordinance was approved with full knowledge that a lawsuit would be filed challenging the validity of the Special Use Permit
- Concur that it would not be unreasonable to deny the two year extension as factors for approval change over time.

They do not feel the applicant should have another two years after the final judgment in which to begin construction on one of the most valuable pieces of land in the City.

Gregory Wolf asked Mr. Spitsnogle that their position was that it was reasonable to force the applicant to spend hundreds if not millions of dollars to begin construction that if you win will have to be removed and destroyed. This is what he is struggling with.

Mr. Spitsnogle responded that that point has not been reached yet and this request is premature. Mr. Wolf asked when would it be appropriate. Mr. Spitsnogle responded it is currently in the court of appeals and MVS has filed for an immediate transfer to the Supreme Court and they do not intend to oppose that filing. It is their intention to get

this resolved as quickly as possible. It is more than a year to the deadline and things change. He cannot say when it would be appropriate to make the request.

Nancy Wallerstein asked Mr. Sear to confirm that he stated it would be 12 months before the case was even heard before the Supreme Court. Mr. Sear replied there is no timetable and the motions are rarely granted. For example in the Morrison case, there was a motion to transfer that case to the Supreme Court and it was denied. If denied, then the Kansas Court of Appeals will continue to proceed until the Kansas Supreme Court says it is not theirs to decide. They believe they are looking at a period of time of at least a year to get a decision on whether to even hear the case.

Mr. Wolf asked Mr. Spitsnogle for his prediction as to how it will take for the appeal. He responded that he has no idea, but doesn't feel that is the issue before the Commission. The issue is whether it would be unreasonable to deny the request.

Mr. Wolf noted the legal costs the city has already incurred thousands of dollars of legal expense on this application and asked Mr. Spitsnogle if he felt that was in the best interest of the city to put itself in the position for yet another lawsuit with the filing a declaratory judgment if the extension is denied.

Mr. Spitsnogle stated he does not feel zoning decisions should be made on the basis of fear of legal costs and secondly he does not know that a separate law suit would be filed.

Bob Lindeblad closed the public comment at 10:00 p.m.

James Breneman believes the request for the extension is justified. He would not want to commit the amount of money that will need to be committed to commence construction with the potential that it may need to be eventually torn down. January 6, 2016 is 13 months away, they would have to begin preparation of construction documents now to meet that deadline. It would be unreasonable for the city not to approve the extension.

Larry Levy stated more harm is being done to the landowners in going through the court system to determine the validity prior to construction in the increased costs that they will occur. He does not see the request for the extension as unreasonable.

Greg Wolf moved the Planning Commission recommend that the 24 month deadline in the SUP shall be extended to 14 months after the termination of the pending litigation involving Mission Valley Chateau project. Termination means dismissal with prejudice or the issuance of a final judgment and all appeal and/or motion to reconsider deadlines/rights expire. Applicant shall notify the City of PV within three business days of the termination as defined herein that the termination has occurred and the 14 months have commenced. The motion was seconded by Larry Levy.

Nancy Wallerstein questioned if 14 months was sufficient time when under normal conditions they would have been given 24 months.

Bob Lindeblad stated he would support 14 months as the applicant has stated they can work within that timeframe. He feels it would be reasonable to grant the extension.

Larry Levy noted this could take 3 years. Mr. Wolf states the applicant knows the risk.

The motion was voted on and passed unanimously.

Next Meeting

At this time the Planning Commission has two Special Use Permit applications filed for the service stations at Mission Road and Tomahawk. The filing deadline is this Friday, so more items could be submitted.

ADJOURNMENT

With no further business to come before the Commission, Chairman Bob Lindeblad adjourned the meeting at 10:10 p.m.

Bob Lindeblad
Chairman

Nancy Vennard
Vice Chairman

DRAFT



6201 College Boulevard, Suite 500, Overland Park, KS 66211-2435 • 913.451.8788

December 10, 2014

Timothy J. Sear
(913) 234-7402
(913) 451-6205 Fax
tsear@polsinelli.com

BY U.S. MAIL AND E-MAIL to CLogan@Lathropage.com

Catherine P. Logan, Esq.
Lathrop & Gage LLP
10851 Mastin Boulevard
Building 82, Suite 1000
Overland Park, KS 66210-1669

Re: MVS LLC Application for Extension of Special Use Permit

Dear Ms. Logan:

This letter is a response to your Memorandum of November 26, 2014 to the Governing Body and Planning Commission of Prairie Village setting forth your analysis as to why it would not be “unreasonable” to deny MVS’s Request for an extension of the Special Use Permit (the “Extension”).

As you are aware, on December 2, 2014, the Planning Commission unanimously recommended that the Extension be granted for a period of 14 months from the conclusion of the litigation/appeal challenging the legality of the SUP. To a member, the Planning Commission agreed that it would be “unreasonable” for the City to deny the Extension because it would be “unreasonable” for the City to require MVS to spend hundreds of thousands of dollars to prepare construction plans, and millions of dollars more in construction costs should the City lose the pending appeal and the SUP be set aside by the Kansas Appellate Courts, the City would require any improvements previously constructed by MVS to be immediately removed.

The statements made by the Planning Commission members were remarkably similar to the analysis contained in the line of cases cited by MVS from non-Kansas courts unanimously holding that the expiration of a permit is stayed by operation of law during the pendency of legal proceedings challenging the legality of the grant of such permit. We explained that even the *Cobbossee Development Group* case cited in your Memorandum is not contrary to the holdings in the other cases cited by MVS, as the Maine court noted that it did not have to undertake the “tolling” analysis because there was a Maine court rule expressly providing for such the granting of a stay upon application to the court, and the applicant in *Cobbossee Development Group* had failed to make a timely request for such stay in accordance with that Maine court rule. Obviously, Kansas has no such court rule and the analysis undertaken by the Maine court in *Cobbossee Development Group* as to why there was no tolling therefore has no application to this matter.

polsinelli.com

Chattanooga Chicago Dallas Denver Edwardsville Jefferson City Kansas City Los Angeles New York Overland Park
Phoenix St. Joseph St. Louis Springfield Topeka Washington, D.C. Wilmington

Polsinelli PC, Polsinelli LLP in California

072868/449966-TJSEA-49330457.4

The language contained in Condition 4 of the MVS SUP (relating to expiration of the SUP if construction is not commenced within two years of the date of the SUP) is consistently and routinely required by the City of Prairie Village as a condition of granting Special Use Permits and was not carefully tailored solely for the MVS SUP. By way of illustration, on December 2, 2014, the Planning Commission recommended approval of a Special Use Permit for Highlawn Montessori to add a second story to one of its buildings with that identical condition. Yet, no one could ever seriously expect that Highlawn Montessori should have to commence adding a new second story to its existing building if an opponent to the Special Use Permit were to file a legal challenge to the issuance of that Special Use Permit. If that were indeed the case, a single disgruntled neighbor could simply file appeals that would cause that Special Use Permit to expire by its own terms in 2 years.

We also pointed out to the Planning Commission that it would be unfair to deny MVS the Extension based on the fact that MVS previously opposed the injunction sought by the Plaintiffs in the District Court. As you will recall, both MVS and the City jointly opposed the injunction sought by the Plaintiffs, which sought to not only enjoin any construction pursuant to the SUP, but also any activities on the entire 18-acre parcel owned by MVS, and to enjoin the construction of single family homes on the 6-acre portion not the subject of the SUP and/or the demolition of the existing middle school. Entry of such a broad injunction was simply unacceptable to MVS for a variety of legitimate business reasons, not the least of which is that demolishing the Mission Valley Middle School will substantially reduce the real property taxes which are currently being assessed against the property.

The Planning Commission also rejected the suggestion that if MVS is unwilling to risk hundreds of thousands of dollars preparing for construction, or risk millions of dollars constructing improvements during the pendency of the appeal, MVS can choose to simply allow the SUP to expire and thereafter file an application for a new SUP. Members of the Planning Commission recognized that this would make no business sense whatsoever as this purported remedy would only likely result in the City facing new litigation over the issuance or non-issuance of a new SUP a year or two from now and that any benefit of having gotten the existing dispute before the Kansas Court of Appeals would be lost. Given that the City has incurred in excess of \$333,000 during 2013-14 in legal fees alone for services that relate to the issuance and appeal of the existing SUP, it is not "reasonable" or practical to suggest that the entire SUP process be started anew when the Kansas Court of Appeals is now in a position to resolve all issues pertaining to the existing SUP.

As you are now likely aware, counsel for Plaintiffs appeared at the Planning Commission to oppose the Extension. Counsel for Plaintiffs argued that it was "premature" for MVS to seek the Extension, although counsel for Plaintiffs stated that he could not dispute that the appeal would likely continue past the January 6, 2016 expiration date. The Planning Commission asked counsel for Plaintiffs when would be the appropriate time for MVS to ask for the Extension if not now—to which counsel for Plaintiffs had no meaningful response.

Based on all of the foregoing, the Planning Commission unanimously agreed that it was in the best interests of the City to approve the Extension rather than force MVS to file a Declaratory Judgment action to determine whether Kansas courts would follow the unanimous line of case law mentioned above. At the request of the Planning Commission, MVS voluntarily agreed to reduce the time period in which to commence construction to 14 months after the SUP is determined to be a final and non-appealable SUP.

No party is more interested in commencing the immediate construction of Mission Chateau once all pending legal issues have been resolved than MVS. In fact, as stated in our presentation to the Planning Commission, MVS is most anxious to complete construction and obtain permanent financing during the current low-interest environment, for even a one percent increase in interest rates would equate to \$400,000 per year in additional interest expense on a \$40,000,000 permanent loan. However, it would be “unreasonable” to require MVS to proceed forward until the legal validity of the SUP has been fully and finally resolved.

The issue of whether to grant MVS a Special Use Permit is no longer before the City. The issue of whether the City followed the proper procedure in granting the Special Use Permit is currently pending before the Kansas Court of Appeals. The sole issue now before the City is whether the Special Use Permit should be extended to allow all parties to find out whether the prior grant of the Special Use Permit was indeed valid, and then allow MVS with a reasonable period of time in which to proceed with construction if the SUP is upheld.

Your Memorandum focused only on factors and arguments as to why a court might determine why it was not “unreasonable” for the Planning Commission and Governing Body to deny the request for the Extension. However, your Memorandum failed to discuss any of the numerous and compelling factors and arguments as to why it would not only be “reasonable” to grant the Extension, and perhaps more importantly, why a court might determine why it would be “unreasonable” for the Governing Body to deny the Extension. Those factors and arguments include the following:

- The Planning Commission unanimously recommended that MVS be granted a 14 month extension and the Governing Body cannot ignore the various reasons stated on the record which supported that recommendation.
- Granting the Extension does not prejudice any party. The validity of the SUP will be determined by a Kansas appellate court in due course and none of the parties to that litigation have any control over when that decision will be rendered.
- Granting the Extension allows the City to avoid the legal fees that will be required to defend a Declaratory Judgment action with respect to the tolling issue. All of the relevant case law which has examined the tolling issue has unanimously held that tolling occurs by operation of law upon the filing of an appeal with regard to a permit that has a

Catherine P. Logan Esq.
December 10, 2014
Page 4

performance deadline. There can and should be little doubt that a Kansas court would issue a ruling consistent with the cases we have cited. The City has spent more than \$333,000 on Mission Chateau related legal issues, and there is absolutely no tangible benefit to be obtained by the City in engaging in unnecessary and expensive litigation over the tolling issue.

- A vote to grant the Extension is not an endorsement of the SUP, but rather a recognition that the Kansas appellate courts are in the process of determining the validity of the SUP.

- The last thing that any opponent of Mission Chateau really wants is for MVS to actually proceed with demolishing the school. One additional benefit to granting the Extension is that Mission Valley Middle School can remain in place and available for a possible future user in the event that the pending appeal overturns the SUP.

MVS looks forward to appearing before the Governing Body on December 15 to seek the Extension.

Sincerely,



Timothy J. Sear

TJS:mgs

cc: Joyce Hagen Mundy, City Clerk
Joseph Tutera
Michael F. Flanagan, Esq.
John D. Petersen, Esq.



6201 College Boulevard, Suite 500, Overland Park, KS 66211-2435 • 913.451.8788

January 2, 2015

Timothy J. Sear
(913) 234-7402
(913) 451-6205 Fax
tsear@polsinelli.com

Joyce Hagen Mundy
City Clerk
City of Prairie Village, Kansas
7700 Mission Road
Prairie Village, KS 66208

Re: MVS LLC Application for Extension of Special Use Permit

Dear Ms. Mundy:

The Governing Body has on its Agenda for Monday, January 5, 2015, the recommendation of the Planning Commission to extend the MVS Special Use Permit for a period of 14 months beyond the end of all litigation challenging the legality of the Special Use Permit. MVS believes that the Governing Body should adopt the Planning Commission recommendation for all the reasons stated by MVS and stated by the Planning Commission. Extensions of this sort are routinely granted and the City Attorney has not advised that an extension of the Special Use Permit would be unreasonable.

MVS has also presented interested parties with a revised conceptual plan for the MVS development. MVS is hopeful that this revised plan can serve as the basis for a resolution of the disputes surrounding the Special Use Permit.

There has been a suggestion that in order to allow interested parties an opportunity to fully explore the resolution of this matter that the Special Use Permit be extended, or the expiration of the Special Use Permit be stayed, pending these discussions. MVS supports these efforts.

If the Governing Body is unwilling to adopt the recommendation of the Planning Commission at this time, MVS would suggest that the Governing Body consider extending the Special Use Permit for such time as negotiations continue. At the same time, MVS recommends that the City and MVS seek a judicial declaration as to whether Kansas courts adopt the position



Joyce Hagen Mundy
January 2, 2015
Page 2

of other state courts holding that Special Use Permits do not expire pending a challenge to the legality of the grant of the permit.

Under this proposal, and without regard to whether the expiration of the Special Use Permit has been tolled by the filing of litigation challenging the legality of the Special Use Permit, there is one year remaining to begin construction under the Special Use Permit. Further running of time under the Special Use Permit would be stayed until such time as MVS Counsel or Plaintiffs Counsel advise the City Clerk, in writing, that negotiations have ended. Upon such notice being given, time would again begin to run on the remaining twelve months remaining on the Special Use Permit.

If such notice is given, MVS would retain its right to have the Governing Body immediately take up the recommendation of the Planning Commission—without further hearings before the Planning Commission. MVS also does not waive its claim that the expiration of the Special Use Permit has been “tolled” by the filing of the litigation challenging the legality of the Special Use Permit.

I would be pleased to address any of these issues prior to or at the Governing Body meeting.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Sear".

Timothy J. Sear

TJS:jlh

MAYOR'S ANNOUNCEMENTS

June 1, 2015

Committee meetings scheduled for the next two weeks include:

Planning Commission	06/02/2015	7:00 p.m.
Tree Board	06/03/2015	6:00 p.m.
JazzFest Committee	06/10/2015	5:30 p.m.
Council Committee of the Whole	06/15/2015	6:00 p.m.
City Council	06/15/2015	7:30 p.m.

=====

The Prairie Village Arts Council is pleased to present an Acrylic on canvas exhibit by Shawnee Mission East Co-Lab in the R. G. Endres Gallery during the month of June. The artist reception will be Friday, June 12th, from 6:30 - 8:00 p.m.

Recreation sales have begun. The pool diving well and slides will close at 5 p.m. on June 9th for a Dive Meet.

The First Moonlight Swim will be held on Friday, June 12th with the pool remaining open until 10 p.m.

The MARC 19th Annual Regional Assembly Luncheon will take place on Friday, June 5th.

INFORMATIONAL ITEMS
June 1, 2015

1. Planning Commission Agenda - June 2, 2015
2. Tree Board Minutes - May 4, 2015
3. Environment/Recycle Minutes - April 22, 2015
4. VillageFest Committee Minutes - April 23, 2015
5. Mark Your Calendar

**PLANNING COMMISSION AGENDA
CITY OF PRAIRIE VILLAGE
TUESDAY, JUNE 2, 2015
7700 MISSION ROAD
7:00 P.M.**

- I. CALL TO ORDER - Joyce Hagen Mundy, Commission Secretary
- II. INTRODUCTION OF NEW PLANNING COMMISSIONERS & LIAISON
- III. ELECTION OF OFFICERS
- IV. ROLL CALL
- V. APPROVAL OF PC MINUTES - MAY 5, 2015
- VI. PUBLIC HEARINGS
 - PC2015-06 Request for Rezoning from C-O (Office Building District) & R-1b (Single Family Residential) to CP-1 (Planned Restricted Business District) and Development Plan
7930 State Line Road
Current Zoning: C-0 & R-1b
Proposed Zoning: CP-1
Applicant: Mitch DiCarlo with Block & Company
 - PC2015-07 Request for Conditional Use Permit for Drive-Thru Service Window
7930 State Line Road
Current Zoning: C-0 & R-1b
Applicant: Mitch DiCarlo with Block & Company
- VII. NON-PUBLIC HEARINGS
- VIII. OTHER BUSINESS
- IX. ADJOURNMENT

Plans available at City Hall if applicable
If you cannot be present, comments can be made by e-mail to
Cityclerk@Pvkansas.com

***Any Commission members having a conflict of interest, shall acknowledge that conflict prior to the hearing of an application, shall not participate in the hearing or discussion, shall not vote on the issue and shall vacate their position at the table until the conclusion of the hearing**

TREE BOARD

City of Prairie Village, Kansas

MINUTES (draft)

Wednesday April 1, 2015
Public Works Conference Room
3535 Somerset Drive

Board Members: Deborah Nixon, Rick Howell, Linda Marcusen, Jonathan Pruitt
Other Attendees: Suzanne Lownes

Deborah Nixon called the meeting to order at 6:00 p.m. with a quorum present.

- 1) **Review and Approve Minutes of April 1, 2015** - Motion by Rick Howell to accept the minutes, seconded by Deborah Nixon. **Approved unanimously.**
- 2) **Sub-Committee Report**
 - 2.1) **Arbor Day**
 - a) **Event** - The event went well. Jack and several family members were able to attend as well as Mayor Wassmer and former Mayor Schaffer. Suzanne Lownes stated that she would put an article on the Prairie Village Website about the event and make sure to note the donation by Loma Vista Nursery. She will also put an article in the PV Voice, but that will not go out until the beginning of July.
- 3) **EAB Update** - Suzanne Lownes informed the group that Keith Bredehoeft updated the Council on the removal plan and the proposal to treat limited trees in highly concentrated areas. The right-of-way ash trees on the highly saturated streets were reviewed and there are less than 10 streets with about 50 trees that have been identified for treatment. These trees are anticipated to be treated for 10 years while the other ash trees on those streets will be removed within the next couple of years, minimizing the visual impact of the ash tree removal.

Notifications of this treatment will be posted on the City's website as well as letters being sent to all the residents on the streets with planned treatments. Maps will be included to show which trees will be planned for the treatment and which will be removed. Public Works plans on completing the treatment in house.

Deborah Nixon says that there has been a rise in Ash Sawfly which is affecting lilac and ash trees and making the leaves go dormant but they are not dead and will regenerate new leaves next spring. There is no recommended treatment.
- 4) **Prairie Village Approved Tree List** - There was no update.
- 5) **Old Business** - Deborah Nixon stated that she was working on being included in the Meadowlake Project and at this time there was no update on the day or time as of yet.

- 6) New Business** - Suzanne Lownes stated with Jack Lewis' departure that created another opening on the Tree Board, there were several applicants to review but many were months if not years old. The Board suggested contacting each of the applicants to verify that they were still interested. Suzanne Lownes said she would contact them all and then send out the applications that responded as still interested. Then Tree Board would review and discuss at the next meeting to move forward to make a recommendation to the Mayor.

Deborah Nixon brought up that it might be a good idea to refresh and bring up to speed the new Tree Board members on the goals and functions of the Tree Board. Suzanne Lownes said that she would locate the old handouts about Tree Boards.

It was also suggested that a check sheet be provided to all contractors obtaining the required business license to work in the City. Suzanne Lownes said she would check into what it being done currently.

- 7) Next Meeting** - June 3, 2015 at 6:00pm

The meeting adjourned at 6:55 p.m.

Minutes prepared by Suzanne Lownes.

PRAIRIE VILLAGE ENVIRONMENT AND RECYCLE COMMITTEE

Minutes, March 25, 2015

Pete Jarchow, for the steering committee, opened the meeting at 7:00. Attending were Pete, Thomas O'Brien, Karin McAdams, Ben Claypool, Ruth Hopkins, Jori Nelson, Margaret Goldstein, PV staff members Wes Jordan and Laura Wassmer and visitors Emerald Welch and Grace Slosburg.

The minutes from the February meeting were approved as written.

Reports and business:

- **Wes Jordan** introduced himself. He will be taking Kate Gunga's place as Assistant City Manager.
- **Earth Fair:** The fair is coming up this Saturday, March 28, from 10:00 a.m. to 3:00 p.m. There is a full complement of vendors as well as electric cars, three food trucks, entertainment and the library book sale. New this year are six presentations on topics relevant to the fair's theme and the SHARE 3R rummage sale. There will be high-school age volunteers, but adult volunteers are still welcome to sign up.
- **Community Gardens:**
 - Wood chips will be delivered to the gardens this Saturday for the gardeners to use to create paths.
 - The Parks and Recreation Committee will be meeting on April 8, and the garden representatives will attend to request more garden space.
 - Wes Jordan remarked that Johnson County is collecting ideas for the Meadowbrook space and that it would be worthwhile to discuss garden needs with them.
- **Village Fest:** the bike and the recycling "pool" were used at the Belinder School science fair and worked well.
- **Community Forum:** The first meeting will be held on April 7; the event will be on October 2. The committee is seeking good ideas for a theme, which always focuses on environmental issues relevant to Kansans.

Education Committee and featured discussion on plastic bags, presented by Ben Claypool:

- **Introduction** – The City Council will meet April 20 and would like an informal recommendation from this committee by then. One needs to be crafted this evening.
- **Plastic bag research results:**
 - Committee members visited the following businesses to discuss bag options: Euston Hardware, Westlake ACE Hardware, Ball Foods/Hen House, Walgreens, Hy-Vee and CVS.
 - Ben issued a table of the merchants visited, the approximate number of bags given out per year and overall impressions conveyed by the retailers.
 - Except for Hy-Vee, the merchants interviewed by committee members were positive about measures that would limit the number of plastic bags used by local shoppers.

- The merchants were largely more positive about a fee than a ban.
- Both Hen House and Hy-Vee recycle a great many plastic bags from the barrels in the front of the store.
- **Disadvantages of expressly limiting plastic bag use, as according to merchants as well as those present at the PVERC meeting (advantages have been detailed at previous meetings):**
 - Prairie Village is surrounded by other cities; people who were displeased with PV bag policies could easily take their business to a nearby city.
 - Administering a fee is time-consuming for the city, while enforcing an ordinance such as a bag ban is costly for the police department.
- **Suggestions for reducing bag use:**
 - Encourage more retailers to refund five or ten cents of the purchase total for each bag reused, as some do already, and promote this practice to the public.
 - No matter what system is used, track and publicize reduction in plastic bag use.
 - Organize and market a lively education campaign. There is a county in Maryland that has marketing materials and is willing to share them.
 - Create a “green certification” for businesses participating in plastic bag reduction and publicize it widely.
 - Find or create a good logo to represent these efforts.
- **Proposal to take to the City Council:**
 - “The Prairie Village Environment and Recycling Committee will at the present time take an educational/promotional approach to the reduction of plastic bag use in Prairie Village.”
 - This proposal passed.
- **Future action: start by arranging to meet with all local retailers to work out strategies.**
- **New business:** City officials shared that due to the council members’ time being stretched too thin by attending committee meetings, official city committees including the PVERC will meet bi-monthly at 5:30 pm.

The meeting adjourned at 8:30 pm.

The next meeting will be held on May 27 at 5:30 p.m.

Respectfully submitted,

Karin McAdams

VillageFest Planning Committee
April 23, 2015 | 7:00 p.m.

In attendance: Bill Billings, Cindy Clark, Susan Forrest, Ted Fritz, Toby Fritz, Teresa Gibbons, Kathleen Murray, Corbin Trimble, Byron Roberson, Ivan Washington, Ashley Weaver.

I. Open Meeting

Cindy Clark opened the meeting at 7:00 p.m. The committee introduced themselves.

II. Review of Minutes

Corbin Trimble moved to approve the March 26, 2015 meeting minutes. Toby Fritz seconded the motion and it passed unanimously.

Staff Reports

- III. Administration**—Cindy reported on Meghan’s behalf that the craft items for Patty have arrived. Olaf has arrived, Princess Elsa is booked, a check for the snow will be mailed Friday, and the tent is ordered. Meghan has talked to Public Works about updating the layout so we can provide that to All Seasons prior to delivery of the tent. We will need to identify the area we want it placed. Since they stake it, they’ll need to call Dig Right before doing so, and will need a map of the location. There is the potential to have the tent delivered on Thursday so Public Works can build the fence/barrier around the perimeter. All contracts are out and vendors who haven’t returned them have been followed up with. Chris Cakes has returned their contract, and expect several others to arrive this week and next.

Public Works—Bill Billings reported that Public Works is ready. Plan to build the box for the snow on Thursday prior to the event, when the tent is set.

Police Department—Sgt. Byron Roberson introduced Ivan Washington as the new representative from the Police Department. He also reported that everything is on track for the bike rodeo. The department may also have the new squad cars ready to display at VillageFest.

Fire Department—Jeff Scott did not attend but sent word that the fire department is set & ready to go. (They will attend the last two meetings before the event.)

IV. Subcommittees

Spirit Award—Toby Fritz reported have not received any nominations yet. The forms are available online and asked the committee to please help spread the word about the awards. He is going to email out the link to the committee so everyone has the information at their fingertips.

Pancake Breakfast—Dale Warman wasn’t there – but reported to Cindy that he has talked to Chris Cakes and everything is set for the day. Courtney McFadden has arranged the volunteers including a boy scout troop and several others.

Children's Crafts— Cindy reported on Patty Jordan’s behalf, that the craft materials have arrived. Everything is in order for the crafts.

Craft Vendors—Cindy reported for Barb Shaw that she has received four applications back. Cindy also reminded the committee that last year the craft vendors also came in very late.

Live Entertainment—Corbin Trimble reported that the adult band will be Boogie Wonderland. Mr. StinkyFeet, Funky Mama, and Janie Next Door will round out the children’s entertainment. Kristy Lambert, a PV resident and Symphony Chorus member will be singing the National Anthem.

Food Vendors—Susan Forrest reported that all the food vendor contracts have been sent out. Several new food vendors have committed; Dolce and an ice cream truck.

Pie Baking Contest—Theresa's reported that Megan Garrelts from Rye is going to be the fifth judge for the contest. Carter Holton, Julia Westhoff, Charles Ferruzza and Julie Hansen will return as judges. She has attempted to contact Joe Cristofani, the winner the last two years, but still cannot reach him.

Information Booth— no report

YMCA— Betsy Jones could not attend – but sent word that everything is ready to go for the YMCA tumbling area.

Marketing—Kathleen Murray reported that she will work with Teresa to update and include the new bios for the Pie Contest judges on the new pie flyer. She’s working on the general VillageFest flyer as well. She is following a social media schedule and encouraged members to follow the Facebook page.

Volunteers—Courtney McFadden did not attend – but sent word that the volunteers are coming together. If anyone has additional volunteer contacts – let Courtney know. Captain Byron Roberson said his twin 16-year old sons are available to volunteer day of the event.

Water Sales— Cindy reported that SME Orchestra Booster Club is still on track to sell water as a fundraiser

Historic Exhibit— Ted reported that he’s moving forward with the geological exhibit and Mr. Bones presentation.

WOW event—Cindy reported that we are moving forward with the fake snow. We made the announcement on April 1st for “Frozen in the Village”. The tent and supplies have been ordered. We’re going to look at dividing the area for two separate play spaces – one for older children, and one for younger. Public works will build a platform and put fencing around it to help contain the snow.

V. Reminders to committee members

Cindy Clark reminded committee members to encourage “Friends of VillageFest”, Spirit Award nominees, and volunteer recruitment.

VI. Next Meeting

The next meeting will be held on May 28, 2015 at 7:00 p.m.

**Council Members
Mark Your Calendars
June 1, 2015**

June 2015

June 1

Shawnee Mission East Co-Lab exhibit in the R.G. Endres Gallery

June 12

City Council Meeting

June 15

Artist reception in the R. G. Endres Gallery 6:30 - 8:00 p.m.

City Council Meeting

July 2015

July 3

Senior Arts Council exhibit in the R.G. Endres Gallery

July 4

City Offices closed in observance of July 4th Holiday

July 6

VillageFest Celebration

July 10

City Council Meeting

July 20

Artist reception in the R. G. Endres Gallery 6:30 - 8:00 p.m.

City Council Meeting