



NORTHERN ARIZONA UNIVERSITY

**DESIGN PROFESSIONAL AGREEMENT
(CONSTRUCTION MANAGER AT RISK FORM)
(OPERATING MANUAL FORM)**

NAU PROJECT NAME: 2009 - 2010 Annual Request for Qualifications (ARQ)

NAU PROJECT NUMBER: 11.160.091

DATE ISSUED:

OWNER

ARIZONA BOARD OF REGENTS

for and on behalf of

NORTHERN ARIZONA UNIVERSITY

DESIGN PROFESSIONAL

**• DESIGN PROFESSIONAL AGREEMENT •
(CONSTRUCTION MANAGER AT RISK FORM)(OPERATING MANUAL FORM) ©
• OCTOBER, 2008 EDITION, Amended June 4, 2010, May 25, 2011 and July 1, 2011 •**

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

AGREEMENT BETWEEN OWNER AND DESIGN PROFESSIONAL, entered into as of _____, by and between the Arizona Board of Regents, for and on behalf of Northern Arizona University ("**Owner**") and ____ ("**Design Professional**" or "**DP**").

SECTION 1. PROJECT

1.1 Project Title: 2009 – 2010 Annual Request for Qualifications (ARQ)

1.2 Project Number: 11.160.091

1.3 Project Location: Northern Arizona University, Flagstaff, Arizona, or as identified in individual supplemental authorization amendments.

1.4 Project Scope: Architecture, Central Plant / Chiller, Civil Engineering, Commissioning, Constructability Review, Construction Administration, Construction Inspection, Construction Management, Electrical Engineering, Facility Audits / Inspections, Land Surveying, LEED Accredited Eng / Architect, Master Planning, Mechanical Engineering, Partnering / Facilitation, Programming / Space Planning, Project Estimating, Project Scheduling, Specifications, Structural Engineering and Value Engineering Services [prior disciplines listed are examples – insert disciplines from firm submittal] as required. Individual fee proposals are to be submitted and supplemental authorization amendments will be issued per each job scope.

SECTION 2. GENERAL

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

2.2 This agreement shall be in effect for the time period July 1, 2009 through June 30, 2012, with extensions on a case-by-case basis to allow for completion of project-specific services under separate Supplemental Authorizations issued from this agreement prior to June 30, 2012. Provided however, the Owner reserves the sole right to terminate this agreement at any time prior to June 30, 2012 and offer a new agreement to the DP, utilizing the DP ARQ submittal resulting from 2009-2010 ARQ.

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

2.4 N/A

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

2.6 N/A

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

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

2.9 All terms defined in the Operating Manual or in other DP Contract Documents will have the same meanings **Owner and Design Professional - CMAR Form-Operating Manual Form**

2009 - 2010 ARQ #11.160.091

Rev. 10/01/08, 06/04/10, 05/25/11 and 07/01/11

when used herein. The following terms shall have their respective designated meanings when used in the DP Contract Documents.

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

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

“**DP Basic Compensation**” means the compensation provided in this Agreement for the DP Basic Services. DP Basic Compensation includes the fees of all DP Consultants. DP Basic Compensation also includes the fees of each Special DP Consultant, unless and to the extent Owner has agreed separately in writing to pay part of all of the fees of such Special DP Consultant.

SECTION 3. AGREEMENT OF DESIGN PROFESSIONAL AND OWNER

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

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

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

- (i) shall be rendered in phases consisting of the Design Phase (which includes of the Program Development subphase, the Schematic Design subphase, the Design Development subphase and the Construction Documents subphase) and Construction Phase, which includes, among other activities, close out and occupancy actions;
- (ii) include the actions of the **DP** described in the DP Contract Documents;
- (iii) shall support as necessary and be coordinated with the activities of the **CMAR** as described in the Operating Manual; and
- (iv) include (but are not limited to) complete architectural, landscaping, civil, structural, mechanical and electrical engineering services for each subphase of the Design Phase. The phases and subphases are to be performed in the sequence set forth in **Section 3.3(i)** above, and under no circumstances shall the **DP** proceed with the next phase or subphase of the DP Basic Services without prior written authorization from the **Owner**.

SECTION 4. DESIGN PROFESSIONAL RESPONSIBILITY

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

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

4.3 The **DP** acknowledges that errors and omissions or either in the documents prepared by **DP** or any **DP Consultant**

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

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

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

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

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

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

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

SECTION 5. ADDITIONAL SERVICES

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

5.1.1 Providing financial feasibility or other special studies.

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

5.1.3 Providing interior design and all other similar services required for or in connection with the selection, procurement or installation of movable furniture, furnishings, and related equipment if not expressly contemplated by the DP Contract Documents.

5.1.4 Providing consultation concerning replacement of any work damaged by fire or natural causes or forces majeure during the Construction Phase.

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

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

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

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

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

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

SECTION 6. REIMBURSABLE EXPENSES

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

SECTION 7. DESIGN PROFESSIONAL'S ACCOUNTING RECORDS

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

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

SECTION 8. INSURANCE AND INDEMNITY

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

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

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

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

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

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

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

8.5 Professional Errors & Omissions Insurance. Professional liability or errors and omissions insurance with minimum limits of **\$1,000,000.00** each occurrence, claim, wrongful act or loss and an unimpaired aggregate limit of **\$2,000,000.00** with respect to the DP Contract Documents. The Retroactive Coverage Date (if the policy is written on a "claims made" form) shall be the same as the effective date of the DP Contract Documents. The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the scope of work of the DP Contract Documents. In the event that the professional liability or errors or omissions insurance is written on a "claims made" basis, coverage shall be maintained for two (2) years past completion and acceptance of the work or services as evidence by annual certificates of insurance delivered to the **Owner**.

**Minimum Required Insurance Limits
Based on Total Construction Costs**

Construction Budget	DP Professional Liability (E&O) Minimum Coverage	Minimum Aggregate
\$0 - \$1,000,000	Value of project budget minimum \$1,000,000	\$2,000,000
\$1,000,000 to \$5,000,000	\$1,000,000	\$2,000,000
\$5,000,000 to \$10,000,000	\$2,000,000	\$3,000,000
\$10,000,000 to \$20,000,000	\$3,000,000	\$3,000,000
\$20,000,000 to \$30,000,000	\$4,000,000	\$4,000,000
\$30,000,000 to \$40,000,000	\$5,000,000	\$5,000,000
above \$40,000,000	\$6,000,000	\$6,000,000

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

8.7 Proof of Insurance. An original certificate of insurance evidencing the coverages required herein and acceptable to the **Owner** shall be filed with the **Owner** as evidence that policies providing the required coverages' conditions of limit are in full force and effect prior to the **Design Professional** performing any work on the Project. All of the above conditions shall be clearly shown on each certificate. Such certificates shall identify the DP Contract Documents or be an annual or periodic certificate stating that it covers any and all projects or work performed by the **Design Professional** during said period and shall contain provisions that coverage afforded under the policies will not be canceled, terminated, or materially altered until at least thirty (30) days prior written notice has been given to the **Owner**. The certificates for insurance for the coverages required by **Sections 8.2** and **8.3** shall contain a waiver of subrogation as required in **Section 8.10** and statement that the following are additional insureds under the policy to the extent of the acts and omissions of the **DP** and its officers, employees and agents: the State of Arizona, the Arizona Board of Regents, Northern Arizona University and their officers, employees and agents. Certificates of insurance should be addressed as follows:

Capital Assets and Services
State of AZ, AZ Board of Regents and NAU
Box 6016
Flagstaff, Arizona 86011

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

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

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

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

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

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

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

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

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

SECTION 9. OWNERSHIP OF DOCUMENTS

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

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

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

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

SECTION 10. NO ASSIGNMENTS

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

SECTION 11. DISPUTES AND REMEDIES

11.1 Except as otherwise provided in **Section 11.3** and **Section 11.5**, the **DP** hereby agrees that all disputes and disagreements and claims and controversies relating to the Project involving **Owner** or **DP** and all claims made by the **Owner** against the **DP** and by the **DP** against the **Owner** in respect of the DP Contract Documents, including, without limitation, controversies based on breach of contract, mistake, misrepresentation, contract modification or rescission or any other claim which arises under or by virtue of the DP Contract Documents shall be resolved in the following manner. Initially, appropriate representatives of the **Owner** and the **DP** shall meet and attempt to resolve the matter. If either party believes that the matter will not be able to be resolved by the **Owner** and **DP** representatives, the party may request an attempt to resolve the matter through any partnering procedures to which **DP**, **Owner** and **CMAR** have agreed for the Project. If there are no partnering procedures for the Project or if the partnering procedures are exhausted and there is no resolution, the matter shall be handled in accordance with **Arizona Board of Regents Policy Section 3-809(C)**, as amended or superseded, which at that point shall be the parties' sole remedy. By submitting a proposal or its qualifications for this Project, the **DP** agrees to be bound by **ABOR Policy Section 3-809(C)** and the other procedures described in this **Section 11** and waives any objections to those procedures.

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

11.3 Any dispute, disagreement, claim or controversy involving the **DP** or any of **DP Consultant** and also involving the **CMAR** or any **Subcontractor** of the **CMAR** shall be handled as provided for such matters in the CMAR Design

Phase Contract Documents or the CMAR Construction Contract Documents, as applicable, even if the matter involves the **Design Professional** or any **DP Consultant**. As to such matters the **DP** agrees to be subject to the procedures in the CMAR Design Phase Contract Documents or the CMAR Construction Contract Documents, as applicable.

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

11.5 The parties agree that should a dispute arise between them concerning this Agreement and no party seeks affirmative relief other than money damages in the amount of Fifty Thousand Dollars (\$50,000) or less, exclusive of interest, costs and attorneys' fees, the parties shall submit the matter to arbitration pursuant to the Revised Uniform Arbitration Act, A.R.S §12-3001 et seq. (the "Act"), whose rules shall govern the interpretation, enforcement, and proceedings pursuant to this section. Except as otherwise provided in the Act, the decision of the arbitrator(s) shall be final and binding upon the parties.

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

SECTION 12. TERMINATION OR SUSPENSION

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

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

12.3 If funds are not appropriated by the Legislature of the State of Arizona to pay for the Project or if appropriated funds become unavailable, the **Owner** may delay design and/or construction for a period up to six months, after which date if no appropriated funds are made available by the Legislature, this Agreement and the other DP Contract Documents shall terminate at the option of the **Owner**.

12.4 The **Owner** may, by written notice to the **DP**, terminate this Agreement and the other DP Contract Documents if it is found by the **Owner** that improper gratuities, in the form of entertainment, gifts or otherwise, were offered or given by the **DP** or any agent or representative of the **DP** to any officer or employee of the **Owner** or State of Arizona.

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

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

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

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

SECTION 13. COMPENSATION FOR THE DESIGN PROFESSIONAL'S SERVICES

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

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

13.1.2 DP Basic Compensation shall be computed on the following basis: Individual fee proposals are to be submitted and supplemental authorization amendments will be issued per each job scope.

13.1.3 When DP Basic Compensation is based on a stipulated sum, the payments of DP Basic Compensation shall be allocated to each subphase as follows: Individual fee proposals are to be submitted and supplemental authorization amendments will be issued per each job scope.

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

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

13.1.6 If and to the extent that the time initially established for the Construction Phase of the Project is exceeded or extended through no fault of the **DP** as determined by the **Owner**, DP Basic Compensation for DP Basic Services required for such extended Construction Phase shall be computed as set forth in **Section 13.2** for DP Additional Services.

13.1.7 **DP** shall pay to each **DP Consultant** within thirty (30) days of receipt of **DP's** monthly payment from **Owner**, that amount properly due and payable to said **DP Consultant** for services performed within the payment period. **DP** shall, by an appropriate agreement with each **DP Consultant**, require each **DP Consultant** to make

payments to its sub-consultants in a similar manner. Upon request of the **Owner**, **DP** shall furnish documentary evidence of compliance with these payment provisions.

13.2 Payment for DP Additional Services

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

13.2.2 For DP Additional Services in the nature of project representation beyond that specified for DP Basic Services, as approved in writing by the **Owner**, the **DP's** compensation shall be as follows:
Individual fee proposals are to be submitted and supplemental authorization amendments will be issued per each job scope.

13.2.3 For DP Additional Services in retaining consultants, including surveyors, engineers and others whose work does not fall within the DP Basic Services, as approved in writing by the **Owner**, the **Owner** will be charged the actual cost to the **DP** for such services multiplied by a factor of 1.10% (cost plus 10%).

13.2.4 For all other DP Additional Services, the **DP's** compensation will be computed as follows:
Individual fee proposals are to be submitted and supplemental authorization amendments will be issued per each job scope.

SECTION 14. PROJECT SPECIFIC PROVISIONS

In addition to the foregoing for this Project, the **DP** shall: Project specific provisions and Consultant Field Administration and Observation requirements shall be established by Supplemental Authorization.

SECTION 15. MISCELLANEOUS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15.17 To the extent required by **Section 35-214, Arizona Revised Statutes**, **DP** agrees to retain all records

relating to the DP Contract Documents. DP agrees to make those records available at all reasonable times for inspection and audit by Owner or the Auditor General of the State of Arizona during the term of the DP Contract Documents and for a period of five (5) years after the completion of the DP Contract Documents. The records shall be provided at Northern Arizona University, Flagstaff, Arizona, or another location designated by Owner upon reasonable notice to DP.

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

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

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

15.21 Legal Worker Requirements

15.21.1 As required by Arizona Revised Statutes §41-4401 the University is prohibited after September 30, 2008 from awarding a contract to any contractor or consultant who fails, or whose subcontractors or subconsultants fail, to comply with Arizona Revised Statutes § 23-214-A. The **DP** warrants that it complies fully with all federal immigration laws and regulations that relate to its employees, that it shall verify, through the U.S. Department of Homeland Security's E-Verify program, the employment eligibility of each employee hired after December 31, 2007, and that it shall require its subconsultants and sub-subconsultants to provide the same warranties to the **DP**.

15.21.2 The **DP** acknowledges that a breach of this warranty by **DP** or by any subconsultant or sub-subconsultant under this Contract shall be deemed a material breach of this Contract, and is grounds for penalties, including termination of this Contract, by the University. The University retains the right to inspect the records of any **DP**, subconsultant and sub-subconsultant employee who performs work under this Contract, and to conduct random verification of the employment records of the **DP** and any subconsultant and sub-subconsultant who works on this Contract, to ensure that the **DP** and each subconsultant and sub-subconsultant is complying with the warranties set forth above. The portion of this provision dealing with the **DP's** warranty is not applicable where the **DP** is a governmental entity nor is the **DP** required to pass this provision through to subconsultants and sub-subconsultants who are governmental entities.

15.22 Sudan and Iran. Pursuant to Arizona Revised Statutes § 35-397, **DP** certifies that it does not have a scrutinized business operation in either Sudan or Iran.

15.23 Veterans Preference

15.23.1 **DP** agrees to provide preference in initial employment for U.S. veterans by:

- Adding points to the raw score of a numerically scored screening instrument, or
- Hiring a veteran if, at the conclusion of the search process, a veteran is one of a number of comparably qualified candidates.

15.23.2 For purposes of this certification, "veteran" means: an honorably separated person (honorable or general discharge) who served on active duty (not active duty for training) in the Armed Forces:

- During any war declared by Congress;
- During the period April 28, 1952 through July 1, 1955;
- For more than 180 consecutive days, any part of which occurred after January 31, 1955, and before October 15, 1976;
- During the Gulf War period beginning August 2, 1990, and ending January 2, 1992; or
- For more than 180 consecutive days, any part of which occurred during the period beginning September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last day of Operation Iraqi Freedom; or

- In a campaign or expedition for which a campaign medal has been authorized, such as El Salvador, Lebanon, Granada, Panama, Southwest Asia, Somalia, and Haiti.

Medal holders and Gulf War veterans who originally enlisted after September 7, 1980, or entered on active duty on or after October 14, 1982, without having previously completed 24 months of continuous active duty, must have served continuously for 24 months or the full period called or ordered to active duty. Effective on October 1, 1980, military retirees at or above the rank of major or equivalent, are not entitled to preference unless they qualify as disabled veterans.

DESIGN PROFESSIONAL:

By: _____

Name: _____
(Printed)

Title: _____

Date: _____

Address for notices to **DP:**

FAX: _____

OWNER:

ARIZONA BOARD OF REGENTS

for and on behalf of

NORTHERN ARIZONA UNIVERSITY

By: _____

Name: _____
(Printed)

Title: _____

Date: _____

Addresses for notices to **Owner:**

Capital Assets and Services
P.O. Box 5637
Flagstaff, AZ 86011

FAX: (928) 523-9441 _____

With a required copy to:

Office of NAU General Counsel

EXHIBIT A

Operating Manual for Construction Manager at Risk Projects

SAMPLE