

AGREEMENT  
FOR  
PROFESSIONAL DESIGN SERVICES  
(Construction Manager Involved)

This Agreement for Professional Design Services (this "Agreement"), made as of \_\_\_\_\_, 2010, by and between the City of North Royalton (the "City"), whose contact person shall be designated below or successor, the YMCA of Greater Cleveland (the "YMCA"), whose contact person and address are set forth below, and Brandstetter Carroll Inc., Cleveland, Ohio, (the "Architect/Engineer"), whose contact person and address are set forth below.

WHEREAS, in the exercise of its powers pursuant to its Charter, it is the intention of the to obtain professional design services for the following project (the "Project"):

**Project Name: North Royalton YMCA**

WHEREAS, the City has entered into a Construction Agency Agreement, dated as of \_\_\_\_\_, 2010, (the "Construction Agency Agreement") and a separate Operating Agreement dated as of \_\_\_\_\_, 2010 (the "Operating Agreement") with the YMCA whose contact person and address are:

City Contact:

Address:

YMCA Contact: Bruce Noll, CFO

Address:

Architect/Engineer: Brandstetter Carroll Inc.

Contact:

Address: 1220 West 6<sup>th</sup> Street, Suite 300  
Cleveland, Ohio

WHEREAS, under the Construction Agency Agreement, the YMCA is to act as the City's agent to provide for the construction, renovation, installation and equipping of the Project, and in that capacity the YMCA will be a party to this Agreement;

WHEREAS, the Architect/Engineer submitted a statement of qualifications in response to the announcement for this Agreement;

WHEREAS, the YMCA ranked the firms which responded to the announcement and has negotiated this Agreement with the Architect/Engineer as the most qualified firm;

WHEREAS, the compensation of the Architect/Engineer set forth herein is determined to be fair and reasonable to the City, the YMCA and the Architect/Engineer;

WHEREAS, the Architect/Engineer desires, and is capable and licensed, to provide professional design services for the Project; and

WHEREAS, the City and the YMCA have engaged or will engage a construction manager (the "Construction Manager") and an Owner's Representative (the "Owner's Representative") for the Project;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the City and the YMCA and the Architect/Engineer agree as follows:

## **ARTICLE I RESPONSIBILITIES OF ARCHITECT/ENGINEER**

### **1.1 Architect/Engineer's Services**

1.1.1 Scope of Services; Applicable Law. The Architect/Engineer shall provide professional design services, including without limitation services customarily furnished in accordance with generally accepted architectural or engineering services, geotechnical services and surveying services for the Project in accordance with the terms of this Agreement. The Architect/Engineer shall provide such services in accordance with the applicable Sections of the Ohio Revised Code and any applicable state rules and regulations, any applicable federal and local statutes, ordinances, rules and regulations and the Contract Documents for the Project, as are in effect from time to time. The Architect/Engineer shall provide to the City a Declaration of Material Assistance/Non-Assistance to Terrorist Organization in accordance with Section 2909.33 of the Ohio Revised Code, when required.

1.1.2 Construction Budget. The total amount available for the construction of the Project is FIVE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$5,500,000) without any design, construction or errors/omissions contingency (the "Construction Budget"). The City and the YMCA shall provide written notice to the Architect/Engineer of any change in the Construction Budget. The Architect shall perform its services so that the cost of construction of the Project shall not exceed the Construction Budget

1.1.3 Timeliness; Standard of Care. The Architect/Engineer shall perform the Architect/Engineer's services in accordance with professional standards of skill, care and diligence in a timely manner in accordance with the Project Schedule so as to cause no delay, interference, disruption or hindrance in the Work, and so that the Project shall be completed as expeditiously and economically as possible within the Construction Budget and in the best interests of the City and the YMCA. The Architect/Engineer owes the YMCA the same performance duties it owes the City, and the YMCA shall have the same rights to enforce the Architect/Engineer's performance obligations as does the City,

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provided however, that if there is disagreement between the City and the YMCA, the Architect/Engineer shall comply with the position of the City.

- 1.1.4                    Design Schedule. Within thirty (30) days after the execution hereof, the Architect/Engineer shall submit to the YMCA for approval by the City and the YMCA a Design Schedule for the performance of the Architect/Engineer's services which shall include allowances for reasonable periods of time required for the review and approval of items by the City and the YMCA and for approvals of governmental authorities having jurisdiction over the Project. Unless the City and the YMCA notify the Architect/Engineer of objections to the Design Schedule within thirty (30) days of receipt thereof by the YMCA, the City and the YMCA shall be deemed to have approved the Design Schedule, and the approved Design Schedule shall supercede any schedule for the YMCA to submit design or construction drawings to the City as set forth in the Operating Agreement. The Architect/Engineer shall coordinate the Design Schedule with the Project Schedule, and shall provide a copy of the Design Schedule to the Construction Manager. The Design Schedule, when approved by the City and the YMCA, shall not be exceeded by the Architect/Engineer without notice and adjustment of the Design Schedule approved by the City and the YMCA.
- 1.1.5                    Personnel. No principal individuals, other than \_\_\_\_\_, shall perform any of the Architect/Engineer's services without the written consent of the City and the YMCA.
- 1.1.6                    Non-Discrimination. The Architect/Engineer represents that the Architect/Engineer is in compliance with all applicable equal employment opportunity requirements under law, if required by Section 153.59 of the Ohio Revised Code or any other applicable state or federal law.
- 1.1.7                    Consultants. The Architect/Engineer may provide services through one or more consultants employed by the Architect/Engineer (the "Consultants"), provided, however, the Architect/Engineer shall remain responsible to the City and the YMCA for all duties and obligations of the Architect/Engineer under this Agreement. Unless waived or otherwise modified in writing by the City and the YMCA upon written request of the Architect/Engineer, no Consultant shall be retained without the approval of the City and the YMCA or upon terms inconsistent with this Agreement. The Architect/Engineer shall provide the City and the YMCA with the names and qualifications of any proposed Consultant, together with a description of the services to be provided by such Consultant for approval. Once approved by the City and the YMCA, the identity of any Consultant and the extent of such Consultant's participation in performing the Architect/Engineer's services shall not be altered without the written consent of the City and the YMCA. Upon the request of the City and the YMCA, the Architect/Engineer shall terminate the employment of any Consultant. The City and the YMCA may communicate with any Consultant either directly or through the Architect/Engineer.
- 1.1.8                    Ethics Laws. The Architect/Engineer represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such

requirements and that there are no unresolved findings against the Architect/Engineer under Section 9.24 of the Ohio Revised Code.

1.1.9                    Kickbacks. The Architect/Engineer shall not provide, attempt to provide, offer to provide, solicit, accept, or attempt to accept any kickback to or from any officer or employee of the City or the YMCA during the term of this agreement; nor shall the Architect/Engineer knowingly include, directly or indirectly, the amount of any kickback or illegal gratuity in the estimated cost of the project or illegal gratuity; nor shall the Architect/Engineer knowingly include, directly or indirectly, the amount of any kickback or illegal gratuity into any request for payment as reimbursement.

1.1.10                  Limitation of Authority. The Architect/Engineer shall not have any authority to bind the City or the YMCA for the payment of any costs or expenses without the express written approval of the City and the YMCA. The Architect/Engineer shall not have any authority to authorize any Contractor to perform additional or extra Work for which the Contractor will seek compensation or time extension. The Architect/Engineer shall have authority to act on behalf of the City and the YMCA only to the extent provided herein or in the Standard Conditions of Contract for Construction (the “Standard Conditions”). The Architect/Engineer’s authority to act on behalf of the City and the YMCA shall be modified only by an amendment in accordance with Subparagraph 9.5.2.

1.1.11                  Approval or Disapproval of Architect/Engineer’s Services. The City and the YMCA shall have the right to reasonably disapprove any portion of the Architect/Engineer’s services for the Project, including, without limitation, any design services, documents or Drawings prepared by the Architect/Engineer. In the event that any Phase of the Architect/Engineer’s services is disapproved by the City and the YMCA, the Architect/Engineer shall proceed, when requested by the City and the YMCA, with revisions to the services, documents or Drawings prepared or performed for that Phase to attempt to satisfy the objections. The Architect/Engineer acknowledges that any review or approval by the City and the YMCA or the Construction Manager of any services, documents or Drawings prepared or performed by the Architect/Engineer pursuant to this Agreement shall not relieve the Architect/Engineer of the Architect/Engineer’s responsibility to properly and timely perform such services and prepare such documents and Drawings.

## **ARTICLE II SCOPE OF ARCHITECT/ENGINEER’S BASIC SERVICES**

### **2.1    General**

2.1.1 Basic Services to be provided by the Architect/Engineer shall consist of the six (6) phases set forth in Paragraphs 2.1 through 2.6, both inclusive, and include, without limitation, normal architectural, civil, structural, mechanical, electrical, and landscape design and engineering services, and necessary and appropriate geotechnical services and surveying services for the Project. The Architect/Engineer’s Basic Services shall be coordinated with the City and provided in cooperation with the services of the YMCA, the Construction

Manager and the Owner's Representative. The Architect/Engineer shall communicate to the City and the YMCA with notice to the other.

- 2.1.2 The Architect/Engineer shall design for and prepare and submit documentation to the Construction Manager in connection with the City and the YMCA's pursuit of Leadership in Energy and Environmental Design ("LEED") certification at the \_\_\_\_\_ Level for the Project and shall provide the following services to seek such certification, but shall not warrant or guarantee that any LEED certification will be obtained unless the failure to obtain such LEED certification constitutes a breach of the Architect/Engineer's standard of care.
- 2.1.3 The Architect/Engineer acknowledges the provisions of the Operating Agreement, and the YMCA's duty to allow use by Parma Community Hospital (PCH) for specific purposes. The Architect/Engineer agrees to perform its services with the Operating Agreement's requirements in mind, and in the event the City disapproves any design or construction documents, or PCH imposes obligations on the Project, the Architect/Engineer agrees to provide a reasonable amount of revisions and re-work of those documents to obtain the City or PCH's approval without incurring Additional Services expenses.
- 2.1.4 The Architect/Engineer acknowledges the provisions of the YMCA's Maintenance Program attached to the Operating Agreement, that sets forth the YMCA's general maintenance protocols, and the obligations the YMCA has to follow those protocols with respect to its obligations to the City under the Operating Agreement. The Architect/Engineer agrees to perform its services within the applicable standard of care so that the Project when complete can be maintained consistent with the YMCA's Maintenance Program.

## 2.2 Predesign Phase (Program Validation)

- 2.2.1 Program of Requirements and Other Requirements. The Architect/Engineer shall evaluate the City and the YMCA's requirements of the Project, including without limitation the Program of Requirements, schedule and budget requirements, including the Construction Budget and site alternatives, each in terms of the other. The Architect/Engineer shall suggest revisions to the Program of Requirements. Knowing the parties' intentions to achieve LEED \_\_\_\_\_ Certification for this Project, the Architect/Engineer will advise the parties among the available alternatives within the standard of care to achieve this level of LEED Certification, and to advise the parties if any Program Requirements contemplated by the City or the YMCA would impair or impede obtaining LEED Certification.
  - 2.2.1.1 Approved Program of Requirements and Revisions. The Architect/Engineer shall prepare, date and sign the revised Program of Requirements upon approval by the City and the YMCA (the "Approved Program of Requirements"). If any changes or adjustments to the Approved Program of Requirements are desired at any time after the Approved Program of Requirements has been approved by the City

and the YMCA, the Construction Manager shall assist the Architect/Engineer to prepare a written amendment to the Approved Program of Requirements describing the changes or adjustments. The Approved Program of Requirements, as amended from time to time with the approval of the City and the YMCA, shall determine the Scope of the Project.

- 2.2.1.2 The Architect/Engineer shall assist the City and the YMCA and the Construction Manager to determine whether Building Information Modeling (“BIM”) will be used for the Project and to determine any BIM software, protocols or agreements necessary.

## 2.3 Schematic Design Phase (Preliminary Drawings)

- 2.3.1 Review and Consultation. The Architect/Engineer shall provide any necessary further evaluation or refinement of the Approved Program of Requirements and the schedule and budget requirements to the City and the YMCA and the Construction Manager, shall identify and analyze requirements of governmental authorities having jurisdiction to approve design of the Project and participate in consultations with such authorities and shall, investigate existing conditions and verify the accuracy of information provided by the City and the YMCA about existing conditions, as reasonably necessary.
- 2.3.2 Recommendations and Costs. The Architect/Engineer shall review site use and improvements and alternative approaches to selection of materials, building systems and equipment with the City and the YMCA and the Construction Manager. The Architect/Engineer shall provide recommendations on constructability, availability and suitability of materials, labor and systems, quality control, emergency efficiency, life cycle analysis, time requirements for construction and factors related to the cost of the Project including costs of alternative sites, designs or materials, preliminary budgets and possible economies.
- 2.3.3 Schematic Design Documents. Based upon the current Approved Program of Requirements, the site alternatives and the schedule and budget requirements, the Architect/Engineer shall prepare Schematic Design Documents consisting of architectural drawings and other documents illustrating the scale of the Project, of the relationship of components of the Project to one another and of the Project to surrounding properties and a life cycle analysis for the Project. Upon completion of the Schematic Design Phase, the Architect/Engineer shall provide four copies (4) of the Schematic Design Documents, unless a different number is required by the City and the YMCA in writing, to the Construction Manager who shall submit two (2) copies to the City and the YMCA for review and written approval. The Architect/Engineer shall revise the Schematic Design Documents to incorporate comments from the City and the YMCA and

provide six (6) copies of the revised Schematic Design Documents to the Construction Manager who shall provide four (4) copies to the City and the YMCA.

2.3.4 Preliminary Cost and Schedule Estimates. Upon completion of the Schematic Design Phase, or appropriate portion thereof, the Architect/Engineer shall assist the Construction Manager to prepare and submit a Statement of Probable Construction Cost for the Project based on current area volume and other unit costs and a Preliminary Project Schedule, which shall incorporate the Design Schedule and the Construction Manager's Management Schedule for approval of the City and the YMCA.

## 2.4 Design Development Phase (Basic Drawings)

2.4.1 Design Development Documents. Based on the approved Schematic Design Documents, the current Approved Program of Requirements, the approved Statement of Probable Construction Cost and the approved Preliminary Project Schedule, the Architect/Engineer shall prepare Design Development Documents consisting of drawings, outline specifications and other documents to fix and describe the size and character of the Project as to architectural, structural, mechanical and electrical systems, materials, and such other essential elements as may be appropriate. Upon completion of the Design Development Phase, the Architect/Engineer shall provide four (4) copies of the Design Development Documents, unless a different number is required by the City and the YMCA in writing, to the Construction Manager who shall submit two (2) copies of the Design Development Documents to the City and the YMCA for review and written approval. The Architect/Engineer shall revise the Design Development Documents to incorporate comments from the City and the YMCA and shall provide six (6) copies of the revised Design Development Documents to the Construction Manager who shall deliver four (4) copies to the City and the YMCA.

2.4.2 Cost Estimate and Project Schedule. Upon completion of the Design Development Phase or appropriate portion thereof, the Architect/Engineer shall assist the Construction Manager to prepare and submit a Detailed Estimate of Construction Cost for the Project and a Project Schedule using the Critical Path Method and indicating milestone completion dates for approval by the City and the YMCA. In establishing the Detailed Estimate of Construction Cost, the Architect/Engineer shall assist the Construction Manager to include reasonable contingencies for design, bidding and price escalation and determine in conjunction with the City and the YMCA and the Construction Manager the materials, equipment, component systems and types of construction to be included in the Contract Documents. The Architect/Engineer and the Construction Manager shall review any difference between the Statement of Probable

Construction Cost and the Detailed Estimate of Construction Cost, identify reasons for any difference and recommend means to eliminate the difference, if necessary. The Architect/Engineer, the Construction Manager and the City and the YMCA shall agree upon the means to eliminate any difference between the Statement of Probable Construction Cost and the Detailed Estimate of Construction Cost, and the Construction Manager, with the assistance of the Architect/Engineer, shall prepare a report describing the agreed upon means. The Architect/Engineer and the Construction Manager shall review any differences between the Preliminary Project Schedule and the Project Schedule, identify reasons for the differences and recommend whether the differences should be eliminated and, if necessary, means to eliminate the differences. If the Architect/Engineer, the Construction Manager and the City and the YMCA agree to eliminate any such differences, the Construction Manager, with the assistance of the Architect/Engineer, shall prepare a report describing the agreed upon means. The Architect/Engineer, the Construction Manager and the City and the YMCA shall make any necessary amendments to the Approved Program of Requirements in accordance with Subparagraph 2.2.2.

## 2.5 Construction Documents Phase (Construction Drawings and Specifications)

2.5.1 Drawings and Specifications. Based on the approved Design Development Documents, approved Detailed Estimate of Construction Cost, approved Project Schedule and any further revisions to the Approved Program of Requirements, the Architect/Engineer shall prepare, for approval by the City and the YMCA, Drawings and Specifications setting forth in detail the requirements for the construction of the Project. With the consent of the City and the YMCA, the Architect/Engineer shall include Alternates in the Contract Documents. The Drawings and Specifications shall encourage competition, shall provide for construction by multiple prime contractors, as applicable, and shall be reasonably complete and unambiguous and in accordance with all applicable codes, ordinances, statutes, laws, regulations, except to the extent stated otherwise in writing by the Architect/Engineer for necessary variances and waivers at the time of submission thereof by the Architect/Engineer to the City and the YMCA for approval and to any Contractor for bidding or negotiation, as applicable. In preparing the Drawings and Specifications, the Architect/Engineer shall consider factors, including without limitation, general market conditions, any analysis of labor provided by the Construction Manager, time of performance, availability of labor, overlapping trade jurisdictions, provision of training for start-up and maintenance, provision of operation and maintenance manuals, temporary facilities and provisions to eliminate areas of conflict and overlap in the Work to be performed by various Contractors. The Architect/Engineer shall include the Scope of Work (Construction Specifications Institute

Division 1) prepared by the Construction Manager in the Specifications. The Architect/Engineer shall not amend the Standard Conditions except by Special Conditions approved by the City and the YMCA in writing. From time to time, the Architect/Engineer shall make any necessary revisions to the Drawings and Specifications. Upon completion of the Construction Documents Phase, the Architect/Engineer shall provide four (4) copies of the respective Drawings and Specifications, unless a different number is required by the City and the YMCA in writing, to the Construction Manager who shall submit three (3) copies to the City and the YMCA for review and approval. The Architect/Engineer shall revise the Drawings and Specifications to incorporate comments from the City and the YMCA and shall provide a maximum of ten (10) copies of the revised Drawings and Specifications to the Construction Manager who shall transmit two (2) copies to the City and the YMCA.

- 2.5.2 Revisions to Cost Estimate and Project Schedule. The Architect/Engineer shall inform the City and the YMCA and the Construction Manager of the need for any changes in Project requirements or in construction materials, systems or equipment as the Drawings and Specifications are developed and of the need for any adjustments in the Detailed Estimate of Construction Cost and the Project Schedule. Upon approval of the City and the YMCA of any such changes or adjustments, the Architect/Engineer shall assist the Construction Manager to prepare a revised Detailed Estimate of Construction Cost for the Project or a revised Project Schedule, as applicable, incorporating such changes or adjustments.
- 2.5.3 Bidding Documents. The Architect/Engineer shall assist the Construction Manager and the City and the YMCA in the preparation of documents necessary for bidding of Contracts for the Project, including without limitation bidding information and instructions, estimates of cost, Notices to Bidders, Bid Forms and Special Conditions.
- 2.5.4 Government Approvals. In cooperation with the Construction Manager, the Architect/Engineer shall submit to the Building Department such sets of the Drawings and Specifications as the Building Department may require for approval, together with any necessary completed applications and all required fees. The Architect/Engineer, with the assistance of the Construction Manager, shall secure the required general building permits for the Project. The Architect/Engineer, with the assistance of the Construction Manager, shall secure any necessary National Pollution Discharge Elimination System Storm Water General Permit for the Project by submitting a notice of intent application form to the Ohio Environmental Protection Agency at least forty-five (45) days prior to the commencement of the Construction Phase, shall prepare and certify a storm water pollution prevention plan for the Project to provide sediment

and erosion controls at the Project and shall prepare and process the applicable required notice of termination prior to Contract Completion. In addition, the Architect/Engineer, in cooperation with the Construction Manager, shall assist the City and the YMCA, including without limitation, by provision of technical criteria, provision of written descriptions and design data and consultations with appropriate officials in connection with filing of documents required for the approval of governmental authorities having jurisdiction over the Project.

2.5.5 Additional Filings. Upon approval of the Building Department of the Drawings and Specifications, the Architect/Engineer shall obtain four (4) sets of corrected copies of the Drawings and Specifications bearing approval stamps of the Building Department for the Project. The Architect/Engineer shall distribute such corrected copies as follows

- (a) Two sets to the City and the YMCA,
- (b) One set to the Construction Manager, and
- (c) One set retained by the Architect/Engineer.

In addition, the Architect/Engineer shall file any Drawings and Specifications necessary for the approval of any other governmental authority which has jurisdiction over the Project.

2.5.6 Items for Common Use. The Architect/Engineer shall attend any necessary meetings with the Construction Manager and the City and the YMCA and provide recommendations and information to the Construction Manager and the City and the YMCA for discussion at such meetings regarding the assignment of responsibilities for refuse removal and for temporary Project facilities and utilities, weather protection, fire protection and equipment, materials and services for common use of Contractors, if any.

## 2.6 Bidding or Negotiation Phase (Bidding Assistance and Recommendation)

2.6.1 Obtaining Bids. The Architect/Engineer shall render interpretations and clarifications of the Contract Documents in Addenda, shall develop and make recommendations for bidding criteria, bidding schedules and bidding information, and shall assist the Construction Manager to develop Bidders' interest in the Project.

2.6.2 Prebid Meetings. The Architect/Engineer shall attend and assist the Construction Manager to conduct prebid meetings with prospective Bidders to familiarize Bidders with the Contract Documents, any special

requirements of the Contract Documents and equal employment opportunity and prevailing wage requirements. Based upon the record of questions and answers discussed at the prebid meetings prepared by the Construction Manager, the Architect/Engineer shall prepare Addenda to respond to questions at prebid meetings and shall submit the Addenda to the Construction Manager for review. The Architect/Engineer shall revise the Addenda to incorporate any recommendations of the Construction Manager. The Architect/Engineer shall assist the Construction Manager to prepare minutes of the prebid meetings.

- 2.6.3 Bid Packages. The Architect/Engineer shall assist the Construction Manager to assemble the Contract Documents into appropriate packages broken down into multiple prime contract packages to meet the requirements of the City's Charter regarding competitive bidding of construction contracts.
- 2.6.4 Bid Review. The Architect/Engineer shall assist the Construction Manager to review all bids received for lowest bid and responsiveness, participate in investigating the responsibility of Bidders to determine whether a Bidder is best and deliver a written recommendation of the Construction Manager and the Architect/Engineer to the City and the YMCA about the award of, or rejection of, any bid or bids for each Contract for the Project in accordance with applicable law. In making the recommendation, the Architect/Engineer shall evaluate all applicable Alternates referenced in the Contract Documents.
- 2.6.5 Bid Substitutions. Substitutions contained in the bid of any Bidder shall not be considered by the Architect/Engineer in recommending the award of any Contract.
- 2.6.6 Conferences. The Architect/Engineer shall attend if requested, and assist the Construction Manager to conduct pre-award and post-award conferences with apparently successful Bidders and shall gather documentation for contract execution from such Bidders. Upon the failure of a Bidder to provide such documentation in a timely manner, the Architect/Engineer shall assist the City and the YMCA in considering whether an extension of time for submitting such documentation is appropriate.
- 2.6.7 Subcontractor and Material Supplier Review. The Architect/Engineer, based upon review of the Contract Documents, any past experience and reasonable inquiry, shall participate in investigating any Subcontractor or Material Supplier proposed by any Contractor and recommend approval or disapproval in accordance with the Standard Conditions.
- 2.6.8 Over Budget Options. If the Construction Budget is exceeded by the total of the lowest and best bids and any legally negotiated prices for the

Project, the City and the YMCA shall, at the City and the YMCA's option (1) approve in writing an increase in the Construction Budget; (2) authorize rebidding or renegotiation for some or all portions of the Project within a reasonable time without an increase in the Construction Budget; (3) suspend or abandon the Project, in whole or in part, and terminate this Agreement, in whole or in part, in accordance with Subparagraph 8.1.1 and Subparagraph 8.1.2 or Subparagraph 8.1.4, as applicable; or (4) cooperate in the revision of the Scope of the Project as defined in Subparagraph 2.2.2 to reduce the actual cost of construction to the Construction Budget. If the City and the YMCA adopts option (1), the Architect/Engineer may request, in writing, an adjustment to the Basic Fee in accordance with Subparagraph 5.4.5. If the City and the YMCA adopts options (2), (3) or (4), the Architect/Engineer shall modify the Scope of the Project, the Project Schedule and the Contract Documents and cooperate in any necessary bidding or negotiation without additional charge.

- 2.6.9 Further Revisions to Cost Estimate and Project Schedule. If necessary, the Architect/Engineer shall inform the Construction Manager and the City and the YMCA of the need for any adjustments in the Detailed Estimate of Construction Cost and the Project Schedule. Upon approval of the City and the YMCA of any such adjustments, the Architect/Engineer shall assist the Construction Manager to prepare a revised Detailed Estimate of Construction Cost or a revised Project Schedule, as applicable, incorporating such adjustments for delivery to the City and the YMCA.
- 2.6.10 Guaranteed Maximum Price Concept. Architect/Engineer acknowledges that the YMCA is obligated by the Construction Agency Agreement to guarantee to the City that the Project can be completed for a guaranteed maximum price (GMP) subject to contractually permitted increases in the contract values. Architect/Engineer will assist the YMCA in preparing its GMP proposal to the City for review and acceptance, and will advise the YMCA and the City *in writing* of any material contingencies, allowances or discrepancies in the bid tabulations, award, or final contract values used to calculate the GMP, or of any needed revisions to the Detailed Estimate of Construction Cost or Project Schedule that could result in the GMP being exceeded. Further, the Architect/Engineer will assist the YMCA in calculating an appropriate GMP contingency to include within the YMCA's proposal to the City, particularly for any allowance or unit priced work that could increase contract values. At the conclusion of the bidding process, the City and the YMCA will enter into negotiations to set a GMP that will be determined and fixed prior to the commencement of construction of the Project. The Architect/Engineer will provide a final recommendation to the City and the YMCA as to an appropriate GMP for the Project based upon the Architect/Engineer's experience, professional judgment and skill as a design professional experienced in public facility

construction like that called for on this Project, and the City and YMCA will have the right to rely on the Architect/Engineer's recommendation in setting the GMP under the Construction Agency Agreement.

## 2.7 Construction Phase (Administration of Construction)

- 2.7.1 Duration, Extent, Access. The Construction Phase will commence with the award of a Contract for the Project to a Contractor and will terminate upon Final Acceptance of the Project by the City and the YMCA. The Architect/Engineer shall provide its services during the Construction Phase in accordance with the Standard Conditions. The Architect/Engineer shall at all times have access to the Project whenever any Work is in preparation or in progress.
- 2.7.2 Interpretation. The Architect/Engineer shall respond to all questions for interpretation or clarification of the Contract Documents, including questions referred by the Construction Manager or the City and the YMCA. The Architect/Engineer shall render interpretations and clarifications necessary for the proper execution or progress of the Work on the Project. All interpretations and clarifications shall be in writing, shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be delivered to the Construction Manager and the City and the YMCA.
- 2.7.3 Investigation of Conditions. The Architect/Engineer shall assist the Construction Manager, as portions of the Project become accessible and as reasonably necessary, to investigate existing conditions and verify the accuracy of information provided by the City and the YMCA about existing conditions.
- 2.7.4 Site Visits. The Architect/Engineer and appropriate Consultants shall visit the Project at appropriate intervals, or at such intervals as the Architect/Engineer and the City and the YMCA agree, to review the Work of each Contractor for Defective Work, to become familiar with the progress and quality of the Work on the Project and to determine if the Work is proceeding in conformity with the Contract Documents. Such visits shall specifically include, without limitation, observation of large excavations, observation of footings during placement of concrete and observation of masonry work, structural steel erection, roofing work and interior finishes and when notified by the Construction Manager that the Architect/Engineer's presence on the site is necessary. In all events, the Architect/Engineer and appropriate Consultants shall be on the site of the Project for such purposes an average of \_\_ hours per week whenever any Work is in preparation or progress, unless otherwise expressly provided in writing by the City and the YMCA. If the Architect/Engineer shall become aware, either through such visits or otherwise, of any Defective Work on the Project, the Architect/Engineer shall report all Defective

Work to the Construction Manager and the City and the YMCA, together with recommendations for the correction thereof, and the Construction Manager shall notify any applicable Contractor to correct such Defective Work.

- 2.7.5 Construction Schedule. The Architect/Engineer shall review and approve the Construction Schedule for conformance with the Contract Documents. The Architect/Engineer shall periodically inform the Construction Manager of the need to update the Project Schedule as required to show current conditions, including without limitation, to conform to the Construction Schedule, as updated from time to time. If such conditions indicate that milestone completion dates or Contract Completion dates shown on the Project Schedule may not be met, the Architect/Engineer shall recommend corrective action to the City and the YMCA and comply with the requirements of the City and the YMCA so that the milestone completion dates may be met, unless the City and the YMCA agrees in writing to revise the milestone completion dates. Whenever the Project Schedule is revised or updated as provided in this Subparagraph, the Architect/Engineer shall assist the Construction Manager to prepare a revised Project Schedule for delivery to the City and the YMCA.
- 2.7.6 Meetings. The Architect/Engineer shall participate in preconstruction, progress, quality control and special meetings with the Construction Manager, the City and the YMCA, appropriate Consultants, the Contractors and any other Persons involved in the Project to discuss such matters as procedures, progress, problems and scheduling. The Architect/Engineer shall participate in partnering meetings with the Construction Manager, the City and the YMCA, appropriate Consultants, the Contractors and other Persons involved in the Project. The Architect/Engineer shall participate in coordination meetings as requested by the Construction Manager.
- 2.7.7 Tests; Inspections. The Architect/Engineer shall advise and consult with the City and the YMCA during the applicable Construction Phase as to the need for, and shall obtain the written approval of the City and the YMCA for, any special testing, inspections or approval of Work on the Project. The Architect/Engineer shall order, or shall notify the appropriate Contractor in writing to order, any necessary special testing, inspections or approval of Work on the Project. The Architect/Engineer shall report to the Construction Manager any failure of the Contractor to provide such testing, inspections or approval within thirty (30) days of the notice to the Contractor. The Architect/Engineer shall notify the Construction Manager of the times for any scheduled special testing, inspections or approvals.
- 2.7.8 Submittal Review. As provided in the Standard Conditions, the Architect/Engineer shall review and approve or take other appropriate action upon Contractor submittals such as Shop Drawings and Samples,

for reasonable conformity with the Contract Documents and shall review drawings, calculations and designs required of Contractors and provided with such submittals (except calculations and designs of manufacturers of original equipment and systems to be installed in the Project and except calculations and designs which the Contract Documents expressly make the sole responsibility of one or more Contractors, Subcontractors, Material Suppliers or other Persons).

- 2.7.9 Bulletins; Change Orders. The Architect/Engineer shall recommend necessary or desirable changes in the Project to the City and the YMCA, prepare Bulletins and other necessary documentation seeking Proposals from Contractors for changes in the Work and submit Bulletins to the Construction Manager for review. The Architect/Engineer shall keep a log of all Requests for Information, Bulletins, Contractor Proposals and Change Orders. The Architect/Engineer shall prepare Change Orders and any necessary Drawings, Specifications and other documents and supporting data for Change Orders. The Architect/Engineer shall recommend approval or rejection of each Change Order, and shall deliver each such recommendation to the Construction Manager for review.
- 2.7.10 Project Costs. The Architect/Engineer shall monitor Project cost accounting records kept by the Construction Manager on Work performed by Contractors under unit costs, actual costs for labor and materials, or other appropriate basis. The Construction Manager shall afford the Architect/Engineer and the City and the YMCA access to these records at all times.
- 2.7.11 Contractor Payments. Based upon the Architect/Engineer's review of the applicable Work and evaluations of the applicable Contractor's Applications for Payment, the Architect/Engineer shall review and recommend for approval, modification or rejection the amounts shown on such Applications as being due to the applicable Contractor in accordance with the Contract Documents. Each Application for Payment shall be signed by the Architect/Engineer and delivered to the Construction Manager.
- 2.7.12 Partial Occupancy. The Architect/Engineer shall assist the City and the YMCA in determining dates of Partial Occupancy of the Work or portions thereof designated by the City and the YMCA and shall assist in obtaining any necessary temporary occupancy certificate or other certificate from any applicable government authority. The Architect/Engineer shall prepare lists of incomplete or unsatisfactory Work and submit them to the Construction Manager.
- 2.7.13 Contract Close-out. Upon receipt of a Contractor's Punch List, the Architect/Engineer and the Construction Manager shall provide written notice to the Contractor of the acceptance or rejection of the Contractor's

request for Final Inspection and to the City and the YMCA when the Work is ready for Final Inspection in accordance with the Standard Conditions. The Architect/Engineer shall assist the Construction Manager to conduct the Final Inspection. If applicable, the Architect/Engineer shall prepare an Architect/Engineer's Punch List and transmit it to the Construction Manager, the City and the YMCA and the Contractor. The Architect/Engineer shall process certificates of Contract Completion as provided in the Standard Conditions. The Architect/Engineer shall transmit a copy of any guarantees, warranties, releases, bonds and waivers in its possession to the City and the YMCA.

- 2.7.14 Contractor Claims. The Architect/Engineer shall review claims from Contractors for additional compensation and extension of time and equitable adjustment thereof, and shall deliver a written recommendation to the City and the YMCA about each claim and attend any dispute resolution meetings related to each claim.
- 2.7.15 Record Drawings. Based on marked-up prints, drawings or data provided by the Contractors and the As Built Drawings transmitted by the Construction Manager, the Architect/Engineer shall furnish to the City and the YMCA one (1) set of Record Drawings in the form of reproducible Drawings correctly marked to show the Project as completed in the form of Mylar tracings, one (1) set of all other Contract Documents showing the Project as completed in the form of paper documents and one (1) set of all Contract Documents showing the Project as completed on a computer medium approved by the City and the YMCA. The Record Drawings, to the best of the Architect/Engineer's knowledge based upon the As-Built Drawings delivered by the Contractors and the Architect/Engineer's observations during the progress of the Project, shall detail the actual construction of the Project and contain such annotations by the Architect/Engineer as may be necessary for someone unfamiliar with the Project to understand the changes that were made to the original Drawings.
- 2.7.16 Contractor Responsibilities. The Architect/Engineer shall not be responsible for and shall not have control or charge of construction means, methods, manners, techniques, sequences, procedures or scheduling used by a Contractor to comply with the Contractor's obligations under its Contract for the Project or for safety precautions and programs in connection with the Work on the Project. The Architect/Engineer shall not be responsible for or have control or charge over the acts or omissions of Contractors or Subcontractors or any of their agents or employees, or any other persons performing any Work on the Project.

## ARTICLE III            ADDITIONAL SERVICES

- 3.1    General.            The following services are not included in Basic Services and shall be provided only if approved by the City and the YMCA in writing. The following services shall be paid for as provided in this Agreement in addition to the compensation for Basic Services; provided, however, the Architect/Engineer shall not be compensated for any of the following services made necessary by the act or omission of the Architect/Engineer or any Consultant. Unless waived by the City and the YMCA in writing, authorization to provide Additional Services must be obtained prior to providing the Additional Services. Any Additional Services of the Architect shall be coordinated with and provided in cooperation with the Construction Manager.
- 3.1.1 Specialized Services. Providing specialized design and engineering services, including without limitation such services for acoustics, computers, communications, fixtures, furnishings and equipment.
- 3.1.2 Partnering Consultant. Serving as a partnering consultant.
- 3.1.3 Perspectives, Models, Renderings. Preparing professional perspectives, models or renderings which are not otherwise useful or necessary to the Architect/Engineer in the provision of Basic Services hereunder at the written request of the City and the YMCA.
- 3.1.4 Grant Applications. Preparing applications and supporting documents for governmental grants, loans or advances.
- 3.1.5 Special Studies. Providing planning, site evaluations, environmental studies, or comparative studies of prospective sites, and preparing special surveys, studies and submissions required for approval of governmental authorities or others having jurisdiction over the Project.
- 3.1.6 Constructability and Cost Analyses. Preparing analyses of the construction feasibility of the Project or of owning and operating costs or preparing detailed quantity surveys or inventories of material, equipment and labor beyond those services to be provided as Basic Services.
- 3.1.7 Off-Site Services. Providing planning or design services for off-site utilities which are not adjacent to the Project, building connections or roadways.
- 3.1.8 Certain Revisions. Making revisions in Drawings, Specifications or other Contract Documents when such revisions are inconsistent with written approvals or instructions previously given or are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents.

3.1.9 Replacement Work. Providing consultation concerning replacement of any Work on the Project damaged by fire, casualty or other cause not due to negligence of the Architect/Engineer or any Consultant and furnishing services as may be required in connection with the replacement of such Work.

3.1.10 Contractor Default. Providing services made necessary by the default of a Contractor.

#### **ARTICLE IV                    RESPONSIBILITIES OF THE CITY AND THE YMCA**

4.1 Required Actions. The City and the YMCA shall review, approve or take such actions as are required of the City and the YMCA by this Agreement, the Contract Documents and applicable law in a reasonable and timely manner.

4.2 Instructions to Contractors. All instructions of the City and the YMCA to Contractors shall be through, or in consultation with, the Construction Manager, with notice to the Architect/Engineer.

4.3 YMCA's Requirements. The YMCA shall provide full information regarding requirements for the Project including without limitation any program of requirements, any agreements related to the Project, design and construction standards and work rules which shall set forth the YMCA's use, design, time and financial objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability, time constraints imposed by fiscal and budgetary considerations, special equipment and systems and site requirements.

4.4 Authorized Representative. The City and the YMCA shall designate an Authorized Representative i.e. a person authorized to act on the City and the YMCA's behalf with respect to the Project to the extent provided in the Contract Documents.

4.5 Site Description. If reasonably requested by the Architect/Engineer as necessary for the Project, the shall furnish an existing legal description of the site, if any.

4.6 Notice to Architect/Engineer. If the City and the YMCA observes or otherwise becomes aware of any Defective Work or other fault or defect in the Project, prompt notice thereof shall be given to the Architect/Engineer.

4.7 Legal Representation. The City and the YMCA shall not be responsible to provide, or pay for, any legal representation of the Architect/Engineer.

4.8 Construction Manager. The City and the YMCA shall retain a Construction Manager to provide administration of the Project, schedule the Work and coordinate the Contractors. The Construction Manager's services, duties and responsibilities are described in the Contract Documents and the Agreement for Construction Management Services between the City and the YMCA and the Construction Manager. Upon request, the City and the YMCA shall provide a

copy of the executed Agreement for Construction Management Services to the Architect/Engineer.

- 4.9 Construction Agent. The City has contracted with the YMCA to serve as the City's Construction Agent for the Project. The City may communicate to the Architect/Engineer or perform the City's responsibilities under this Agreement by or through the YMCA; provided however, the YMCA shall not have any authority to make or provide any agreements, approvals, consents, waivers or similar decisions to be made by the City under this Agreement.

## **ARTICLE V COMPENSATION**

### **5.1 Direct Personnel Expense**

- 5.1.1 Definition. Direct Personnel Expense shall mean the portion of direct salaries and wages of all personnel of the Architect/Engineer or any Consultants, as applicable, including professional, technical, management, administrative and clerical employees, and principals engaged on the Project related to their time devoted to the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto such as employment taxes and other statutory employee benefits, social security contributions, insurance, sick leave, holidays, vacations, pension and profit sharing pursuant to plans qualified under federal law and similar benefits related to their time devoted to the Project. Direct Personnel Expense shall not include any bonus or similar plan or arrangement related to the Architect/Engineer's performance on, or profit from, the Project.
- 5.1.2 Records. Direct Personnel Expense for the Architect/Engineer's employees for such hours of their time as are devoted to performing services to the Project shall be determined in accordance with the Direct Personnel Expense Schedule attached hereto and incorporated by reference herein. Such Direct Personnel Expense shall be evidenced by time records certified by the Architect/Engineer.
- 5.1.3 Limit. The Architect/Engineer shall use all reasonable means to minimize Direct Personnel Expense.

### **5.2 Reimbursable Expenses**

- 5.2.1 Definition. Reimbursable Expenses means actual expenditures incurred by the Architect/Engineer or its Consultants in the interest of the Project approved by the City and the YMCA for reproduction of Construction Documents for distribution to Bidders, general building and NPDES permits, any other building permits not obtained by Contractors, soil or other testing or special inspections of and, if requested by the City and the YMCA, reformatting of Project Record Submittals to a computer medium different than a computer medium used by the Architect/Engineer. No other expenditures shall be Reimbursable Expenses unless so provided in an amendment in accordance with Subparagraph 9.5.2.

- 5.2.2. Limits. The Architect/Engineer shall use its best efforts to minimize Reimbursable Expenses. In all events, total Reimbursable Expenses shall not exceed TEN THOUSAND DOLLARS (\$10,000).

### 5.3 Basis of Compensation

- 5.3.1 Basic Fee. For Basic Services provided by the Architect/Engineer and all Consultants, the City shall pay the Architect/Engineer a Basic Fee in accordance with Paragraph 5.4 hereof in the amount of THREE HUNDRED THIRTY THOUSAND DOLLARS (\$330,000). A change in the Basic Fee may be made only by an amendment in accordance with Subparagraph 9.5.2.
- 5.3.2 Additional Fees. For Additional Services provided by the Architect/Engineer and any Consultants in accordance with Article III, the City shall pay the Architect/Engineer Additional Fees in an amount negotiated to the mutual reasonable satisfaction of the City and the YMCA and the Architect/Engineer, but in all events, such Additional Fees shall not exceed one and one-half (1.5) times the Direct Personnel Expense incurred by the Architect/Engineer and any applicable Consultant in providing those Additional Services. Additional Services and any Additional Fees may be approved only by an amendment in accordance with Subparagraph 9.5.2. The Architect/Engineer, with the prior written consent of the City and the YMCA, may provide Additional Services through one or more Consultants.
- 5.3.3 Extent of Basic Fee. The Architect/Engineer's Basic Fee includes all compensation for Basic Services, including without limitation, for salaries or other compensation of the Architect/Engineer's employees at the principal office, branch offices and the field office, general operating expenses of the Architect/Engineer's principal office, branch offices and the field office, any part of the Architect/Engineer's capital expenses, including interest on the Architect/Engineer's capital employed for the Project, overhead or expenses of any kind, except Reimbursable Expenses, any costs incurred due to the negligence of the Architect/Engineer, the Architect/Engineer's general advertising, federal, state or local income, sales or other taxes, state franchise taxes and qualification fees, and membership in trade, business or professional organizations.
- 5.3.4 Total Compensation. The total compensation of the Architect/Engineer and all the Consultants shall consist of the Basic Fee, any Additional Fees and Reimbursable Expenses.

### 5.4 Method and Terms of Payment

- 5.4.1 Basic Fee. Payment of the Basic Fee shall be made in the following amounts upon completion of services performed in each Phase:

	<u>Amount</u>
Schematic Design Phase	\$75,000
Design Development Phase	\$50,000
Construction Documents Phase	\$100,000
Bidding or Negotiation Phase	\$39,000
Construction Phase	\$66,000

- 5.4.2 Additional Fees, Reimbursable Expenses. Payments of Additional Fees for Additional Services in accordance with Article III and Subparagraph 5.3.2 and for Reimbursable Expenses as set forth in Paragraph 5.2 shall be made monthly based upon services performed or expenses incurred, as applicable, and as shown upon statements prepared and submitted by the Architect/Engineer in such detail as the City and the YMCA may reasonably require to enable the City and the YMCA to verify, evaluate and approve them.
- 5.4.3 Payments by Architect/Engineer. Within ten (10) business days of receipt of payment made pursuant to this Agreement, the Architect/Engineer shall pay all portions thereof due to Consultants and to Persons who provided items the expenses of which are Reimbursable Expenses.
- 5.4.4 Compensation for Extension of Project Time. If the Architect/Engineer notifies the City and the YMCA not less than 60 days prior to the time for completion of the Project set by the Project Schedule approved pursuant to Subparagraph 2.4.2, that such time for completion is reasonably expected to be exceeded by more than ten percent (10%) through no fault of the Architect/Engineer, the compensation, if any, for Basic Services to be rendered during such extended period shall be negotiated to the mutual reasonable satisfaction of the City and the YMCA and the Architect/Engineer. If, as a result of such negotiation, the City and the YMCA agrees that the Architect/Engineer shall be paid additional compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 before the Architect/Engineer renders any services made necessary by such extension of the time of completion, unless otherwise agreed in writing by the City and the YMCA.
- 5.4.5 Compensation for Change of Scope of Project or Construction Budget. The Scope of the Project is defined in Subparagraph 2.2.1. The Construction Budget is defined by the Approved Program of Requirements as provided in Subparagraph 1.1.2. Except as provided in Subparagraph 2.6.8, if the City and the YMCA materially changes the Scope of the Project after the Schematic Design Phase or the Construction Budget at any time after the Design Development Phase through no fault of the Architect/Engineer, any necessary adjustment in the compensation of the Architect/Engineer shall be negotiated to the mutual reasonable satisfaction of the City and the YMCA

and the Architect/Engineer. If, as the result of such negotiation, the City and the YMCA agrees that the Architect/Engineer shall be paid additional compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 before the Architect/Engineer renders any services made necessary by such change in the Scope of the Project or the Construction Budget, unless otherwise agreed in writing by the City and the YMCA. If as a result of such negotiation, the Architect/Engineer agrees to a reduction in compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 as soon as practicable.

## **ARTICLE VI INSURANCE AND INDEMNIFICATION**

### **6.1 Insurance**

6.1.1 Casualty Insurance. Except when a modification is requested in writing by the Architect/Engineer and approved in writing by the City and the YMCA, the Architect/Engineer shall carry and maintain at the Architect/Engineer's cost, with companies authorized to do business in Ohio, all necessary liability insurance (which shall include as a minimum the requirements set forth below) during the term of this Agreement:

(a) General Liability

«Commercial General Liability –Each occurrence \$500,000 Limit  
Medical Expense (any one person) \$5,000 Limit  
General Aggregate \$1,000,000  
Products –Comp/OP Aggregate \$1,000,000

Excess/Umbrella Liability –Each occurrence \$1,000,000  
Aggregate \$2,000,000»

(b) Automobile Liability

Liability – Bodily Injury \$500,000/\$500,000; Property Damage \$500,000  
No-Fault \$10,000  
250 Deductible Comprehensive  
500 Deductible Collision  
Emergency Road Service  
Car Rental & Travel Expense \$25 per day, \$600 Maximum  
Uninsured Motor Vehicle – Bodily Injury \$250,000/\$500,000  
Underinsured Motor Vehicle – Bodily Injury \$250,000/\$500,000

(c) Workers' Compensation

Bodily Injury by Accident \$100,000 each accident  
Bodily Injury by Disease \$100,000 each employee  
Bodily Injury by Disease \$500,000 Policy Limit»

6.2.2 Professional Liability Insurance. The Architect/Engineer shall maintain insurance to protect against claims arising from the performance of the Architect/Engineer's services on the Project caused by any negligent acts, errors or omissions for which the Architect/Engineer is legally liable ("Professional Liability Insurance"). Except when a modification is approved by the City and the YMCA in writing, such Professional Liability Insurance shall be in an amount not less than One Million Dollars (\$1,000,000) per claim and \$2,000,000 in the annual aggregate. The Architect/Engineer shall endeavor to keep such insurance in effect for so long as the Architect/Engineer may be held liable for its performance of services for the Project. If the Professional Liability Insurance is written on a claims-made basis, such insurance shall have a retroactive date no later than the date on which the Architect/Engineer commenced to perform services relating to the Project. The insurance company issuing the Professional Liability Insurance policy must be authorized to do business in Ohio and have a rating of at least A status as noted in the most recent edition of the Best's Insurance Reports. If the insurance limits are impaired or reduced prior to Contract Close-out due to other claims, or other causes, then Architect/Engineer shall notify the City and the YMCA in writing of the impairment or reduction and secure such replacement or additional coverage that the City and the YMCA may reasonably request to provide consistent insurance protection as required under this paragraph.

6.2.3 Certificates. The Architect/Engineer shall provide the City and the YMCA with certificates of insurance evidencing the required coverages and amounts, including without limitation any certificates of renewal of insurance. The certificates of insurance shall contain a provision that the policy or policies will not be canceled without thirty (30) days prior written notice to the City and the YMCA.

### 6.3 Indemnification

6.3.1 Indemnification by Architect/Engineer Generally. To the fullest extent permitted by law, the Architect/Engineer shall and does agree to indemnify and hold harmless the City and the YMCA, and the City and the YMCA's members, officials, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, which (a) arise out of, are caused by or result from performance of the Architect/Engineer's services hereunder, and (b) are attributable to bodily injury, personal injury, sickness, disease or death of any person, or to damage to or destruction of property, including the loss of use and consequential damages resulting therefrom, but (c) only to the extent they are caused by any negligent acts, errors or omissions of the Architect/Engineer, anyone directly or indirectly

employed by the Architect/Engineer or anyone for whose acts the Architect/Engineer may be legally liable. This Subparagraph is intended to be, and shall be construed as consistent with, and not in conflict with, Section 2305.31 of the Ohio Revised Code.

- 6.3.2 Intellectual Property Indemnification. To the fullest extent permitted by law, the Architect/Engineer shall and does agree to indemnify and hold harmless the City and the YMCA, and the City and the YMCA's members, officials, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including reasonable attorney's fees and other costs of defense), of any nature, kind or description, which result from any claimed infringement of any copyright, patent or other intangible property right by the Architect/Engineer, anyone directly or indirectly employed by the Architect/Engineer or anyone for whose acts the Architect/Engineer may be legally liable.

## **ARTICLE VII           DISPUTE RESOLUTION PROVISIONS**

- 7.1 Mediation. In addition to the procedures set forth below, the City and the YMCA and the Architect/Engineer may, by written agreement, submit any claims, requests, disputes or matters in question between or among them to mediation upon such terms as shall be mutually reasonably agreeable.
- 7.2 Notice and Filing of Requests. Any request by the Architect/Engineer for additional fees or expenses shall be made in writing to the City and the YMCA and filed prior to payment of the final five percent (5%) of the Basic Fee. Failure of the Architect/Engineer to timely make such a request shall constitute a waiver by the Architect/Engineer of any request for such fees and expenses.
- 7.3 Request Information. In every written request filed pursuant to Paragraph 7.2, the Architect/Engineer shall provide the nature and amount of the request; identification of persons, entities and events responsible for the request; activities on the Project Schedule affected by the request or new activities created by any delay and the relationship with existing activities; anticipated duration of any delay; and recommended action to avoid or minimize any future delay.
- 7.4 Meeting With Authorized Representative. If the Architect/Engineer files a written request with the City and the YMCA pursuant to Paragraph 7.2, the Authorized Representative shall, within forty-five (45) days of receipt of the request, schedule a meeting in an effort to resolve the request and render a decision on the request promptly thereafter or render a decision on the request without a meeting, unless a mutual agreement is made to extend such time limit. The meeting scheduled by the Authorized Representative shall be attended by persons expressly and fully authorized to resolve the request on behalf of the Architect/Engineer.

- 7.5 Appeal To Council. If the efforts of the Authorized Representative do not lead to resolution of the request, the Architect/Engineer may appeal to the City Council by notice in writing. The Architect/Engineer shall be permitted to appear at the next meeting of Council at which the Architect/Engineer's appeal can be reasonably scheduled. The decision of the Council shall be the final and conclusive determination of the dispute, subject to litigation in a court of competent jurisdiction.
- 7.6 Delegation. No provision of this Article shall prevent the Authorized Representative from delegating the duties or authorities of the Authorized Representative to any other person selected at the discretion of the Authorized Representative.
- 7.7 Performance. The Architect/Engineer shall proceed with the Architect/Engineer's performance of this Agreement during any dispute resolution process, unless otherwise agreed by the Architect/Engineer and the City and the YMCA in writing. The shall continue to make payment, in accordance with this Agreement, of any amounts not in dispute pending final resolution of any dispute in accordance with this Article.

## **ARTICLE VIII      TERMINATION AND REMEDIES**

### **8.1      Termination of Agreement**

- 8.1.1 Means of Termination. This Agreement may be terminated by either party upon seven (7) days written notice should the other party fail to perform in accordance with the terms of this Agreement; provided, however, the Architect/Engineer shall not terminate this Agreement for non-payment if the City and the YMCA initiates the payment process by preparing, executing and submitting a voucher for all reasonably undisputed amounts due to the Architect/Engineer within ten (10) days of receipt of the Architect/Engineer's written notice to terminate. This Agreement may be terminated by the City and the YMCA, in whole or in part, without cause upon fifteen (15) days written notice to the Architect/Engineer. This Agreement may be terminated at any time upon the mutual consent of the City and the YMCA and the Architect/Engineer.
- 8.1.2 Architect/Engineer's Remedies Upon Termination by the City and the YMCA Without Cause or Termination by Architect/Engineer. In the event of a termination which is not due to the failure of the Architect/Engineer to perform in accordance with the terms of this Agreement, the Architect/Engineer shall be compensated for all Basic Services of a completed Phase performed prior to the termination date in accordance with the percentages set forth in the Appendix, together with Reimbursable Expenses incurred prior to the termination date. In such an event, for services rendered prior to the termination date in an uncompleted Phase and for Additional Services, the Architect/Engineer

shall receive compensation based on the percentages of completion of that Phase or those Additional Services, as applicable, and as reasonably determined by the City and the YMCA, together with Reimbursable Expenses incurred prior to the termination date.

- 8.1.3 Architect/Engineer's Remedies Upon Termination by the City and the YMCA for Cause. In the event of a termination which is due to the failure of the Architect/Engineer to perform in accordance with the terms of this Agreement, the Architect/Engineer shall be compensated only for Basic Services performed and paid for prior to the termination date in accordance with the percentages set forth in Article 5, together with the Additional Services completely performed prior to the termination date. In such event, the Architect/Engineer shall be reimbursed only for Reimbursable Expenses incurred prior to the date of the notice of termination, unless the City and the YMCA consents in writing to the payment of Reimbursable Expenses incurred after that date.
- 8.1.4 Architect/Engineer's Remedies Upon Termination by Mutual Consent. In the event of a termination upon the mutual consent of the City and the YMCA and the Architect/Engineer, any compensation for Basic Services or for Additional Services or payment of Reimbursable Expenses shall be negotiated and set forth in an amendment to this Agreement in accordance with Subparagraph 9.5.2 prior to such termination.
- 8.1.5 Post-Termination Matters. If the City and the YMCA and the Architect/Engineer agree that any services are to be performed for the Project by the Architect/Engineer after any termination date, the amount of any compensation and the method and terms of payment of such compensation or any Reimbursable Expenses related to such services shall be negotiated and set forth in an amendment to this Agreement in accordance with Subparagraph 9.5.2 prior to the commencement of such services. Such amendment and any relevant provisions of this Agreement shall survive termination of this Agreement.

## 8.2 Remedies

- 8.2.1 Cumulative Remedies. No remedy conferred upon the City and the YMCA by the terms of this Agreement is intended to be exclusive of any other remedy provided at law or in equity. Each and every remedy of the City and the YMCA shall be cumulative and shall be in addition to any other remedy given to the City and the YMCA hereunder or now or hereafter existing. Except as otherwise provided in this Agreement, no remedy conferred upon the Architect/Engineer by the terms of this Agreement is intended to be exclusive of any other remedy provided at law or in equity. Except as otherwise provided in this Agreement, each and every remedy of the Architect/Engineer shall be cumulative and shall

be in addition to any other remedy given to the Architect/Engineer hereunder or now or hereafter existing.

- 8.2.2 Remedies Not Waived. No delay, omission or forbearance to exercise any right, power or remedy accruing to the City and the YMCA or the Architect/Engineer hereunder shall impair any such right, power or remedy or shall be construed to be a waiver of any breach hereof or default hereunder. Every such right, power or remedy may be exercised from time to time and as often as deemed expedient.

## **ARTICLE 9 MISCELLANEOUS PROVISIONS**

### **9.1 Ownership And Use Of Documents**

- 9.1.1 Property of the City and the YMCA. Drawings, Specifications and other documents prepared by, or with the cooperation of, the Architect/Engineer or any Consultant pursuant to this Agreement (“Instruments of Service”) including all copyrights, are the property of the City and the YMCA whether or not the Project for which they are prepared is commenced or completed. As between the City and the YMCA, their rights to be Architect/Engineers Instruments of Service shall be determined by the Construction Agency Agreement and/or the Operating Agreement. The Architect/Engineer or Consultant, as applicable, may retain copies, including reproducible copies of such Drawings, Specifications and other documents for information and reference. Such Drawings, Specifications or other documents may be used by the City and the YMCA or others employed by the City and the YMCA for reference in any completion, correction, remodeling, renovation, reconstruction, alteration, modification of or addition to the Project, without compensation to the Architect/Engineer or Consultant. Such Drawings, Specifications or other documents shall not be used by the City and the YMCA, or be given or sold by the City and the YMCA to be used by others, on other projects except by agreement in writing and with agreed upon appropriate compensation to the Architect/Engineer or Consultant, as applicable. If an event occurs for which the Architect/Engineer or Consultant may be liable, the City and the YMCA shall notify the Architect/Engineer or Consultant of such event as soon as practical after such event and shall provide access to the Project to the Architect/Engineer or Consultant and their representatives. This Subparagraph shall survive termination of this Agreement.

- 9.1.2 Architect/Engineer’s Intellectual Property. All inventions, patents, design patents and computer programs acquired or developed by the Architect/Engineer in connection with or relation to the Project shall remain the property of the Architect/Engineer and shall be protected by the City and the YMCA from use by others except by agreement in

writing with appropriate and agreed upon compensation to the Architect/Engineer.

## 9.2 Public Relations

Prior to completion of the Project, any public relations or public city about the Project shall be solely within the control and with the consent of the City and the YMCA. The Architect/Engineer shall not use the City and the YMCA's name or seal, nor any adoption thereof, for any advertising or trade purposes, including without limitation press releases, without the express written consent of the City and the YMCA.

## 9.3 Accounting Records

The records of all of the Architect/Engineer's Direct Personnel Costs, Reimbursable Expenses and payments to Consultants pertaining to the Project shall be kept on a generally recognized accounting basis and shall be available to the City and the YMCA at all times and shall be maintained for seven (7) years after Final Acceptance of the Project by the City and the YMCA. All other records kept by the Architect/Engineer related to the Project shall be available to the City and the YMCA at all times and shall be maintained for six (6) years after Final Acceptance of the Project by the City and the YMCA.

## 9.4 Successors And Assigns

The City and the YMCA and the Architect/Engineer, each bind themselves, their successors, assigns and legal representatives, to the other party to this Agreement and to the successors, assigns and legal representatives of the other party with respect to all terms of this Agreement. The Architect/Engineer shall not assign, or transfer any right, title or interest in this Agreement without the prior written consent of the City and the YMCA.

## 9.5 Extent Of Agreement

9.5.1 Entire Agreement. This Agreement and the Contract Documents represent the entire and integrated agreement between the City and the YMCA and the Architect/Engineer and supersede all prior negotiations, representations or agreements, either written or oral.

9.5.2 Amendments. This Agreement may be amended only by an amendment prepared by the City and the YMCA and signed by both the City and the YMCA and the Architect/Engineer.

9.5.3 Multiple Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same instrument.

- 9.5.4 Captions. The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections hereof.
- 9.5.5 Precedence. If there are any inconsistencies between the provisions of the Contract Documents and the provisions of the Announcement of this Agreement, the provisions of the Contract Documents shall prevail.
- 9.5.6 Conditions To Validity. None of the rights, duties and obligations contained in this Agreement shall be binding on any party until all legal requirements have been complied with and all necessary funds are available. In addition, if federal funds are to be used to pay fees and expenses under this Agreement, none of the rights, duties and obligations contained in this Agreement shall be binding on any party until the City and the YMCA notifies the Architect/Engineer in writing that such funds are available.

9.6 Governing Law

- 9.6.1 Law Of Ohio. This Agreement shall be governed by the law of the State of Ohio to the exclusion of the law of any other jurisdiction and the Cuyahoga County, Ohio Court of Common Pleas, or if required by law the United States District Court for the Northern District of Ohio, shall have jurisdiction over any action hereunder or related to the Project to the exclusion of any other forum.
- 9.6.2 Capitalized Terms. Capitalized terms in this Agreement shall have the same meaning as those in the Standard Conditions, unless otherwise defined herein or unless another meaning is indicated by the context.

9.7 Notices

- 9.7.1 Addresses. All notices, certificates, requests or other communications hereunder shall be in writing and shall be deemed to be given if delivered personally to the Person for whom the notice is intended, if delivered at or sent by registered or certified mail, postage prepaid, or sent by facsimile transmission or electronic mail to the appropriate following address:

**If to the City:**

**If to the Architect/Engineer:**

**If to the YMCA:**

**If to the Construction Manager:**

- 9.7.2 Additional Notices. A copy of all notices, certificates, requests or other communications to the City and the YMCA shall be sent to the Authorized Representative.
- 9.7.3 Electronic Transmission. For convenience of communication only, notices, certificates, requests or other communications hereunder of fewer than ten (10) pages, except requests for payment, may be sent by facsimile transmission to the City at (\_\_\_\_) \_\_\_\_\_ or electronic mail at \_\_\_\_\_, to the YMCA at (\_\_\_\_) \_\_\_\_\_ or \_\_\_\_\_, to the Construction Manager at (\_\_\_\_) \_\_\_\_\_ or \_\_\_\_\_ and to the Architect/Engineer at (\_\_\_\_) \_\_\_\_\_ or \_\_\_\_\_. Notices, certificates, requests or other communications sent by facsimile transmission shall not be deemed to be given unless confirmed, actually received or a counterpart is received or mailed in accordance with Subparagraph 9.7.1. Requests for payment may be sent to the City and the YMCA by facsimile transmission or electronic mail only with the specific consent of the City and the YMCA.
- 9.7.4 Emergencies. In the event of an emergency involving the Project, including, without limitation, a fatality, serious injury, fire, collapse, flood, utility or power loss to occupied facilities, explosion, or environmental damage, the Architect/Engineer shall immediately notify the City and the YMCA and the Construction Manager by telephone.
- 9.7.5 Change Of Address. The City and the YMCA, the YMCA, the Construction Manager or the Architect/Engineer may, by notice given hereunder, designate any further or different addresses, telephone numbers, facsimile numbers or electronic mail addresses to which subsequent notices, certificates, requests or communications shall be sent.

9.8 Severability

If any provision of this Agreement, or any covenant, obligation or agreement contained herein is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect any other provision, covenant, obligation or agreement, each of which shall be construed and enforced as if such invalid or unenforceable provision were not contained herein. Such invalidity or unenforceability shall not affect any valid and enforceable

application thereof, and each such provision, covenant, obligation or agreement, shall be deemed to be effective, operative, made, entered into or taken in the manner and to the full extent permitted by law.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written.

Brandstetter Carroll Inc.,  
("Architect/Engineer")

By: \_\_\_\_\_

Title: \_\_\_\_\_

City of North Royalton, Ohio  
("City")

By: \_\_\_\_\_

Title: \_\_\_\_\_

and

By: \_\_\_\_\_

Title: \_\_\_\_\_

YMCA as "Construction Agent"

By: \_\_\_\_\_

Title: \_\_\_\_\_

The legal form and correctness of the within instrument is hereby approved.

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Thomas A. Kelly  
Law Director

## CERTIFICATE

The undersigned, Fiscal Officer of the City of North Royalton, certifies that the moneys required to meet the obligations of the City during the year 2010 under the foregoing Construction Agency Agreement have been lawfully appropriated by the Council of the City for such purposes and are in the treasury of the City or in the process of collection to the credit of an appropriate fund, free from any previous encumbrances. This Certificate is given in compliance with Sections 5705.41 and 5705.44, Ohio Revised Code.

Dated: \_\_\_\_\_, 2010

\_\_\_\_\_  
Fiscal Officer,  
City of North Royalton

Document comparison by Workshare Professional on Wednesday, August 25, 2010 12:06:35 PM

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Description	Architect Agreement
Document 2 ID	WORLD\DOX://H:\GOVERNMT\DOBROWSK\00891627.DOC
Description	Architect Agreement
Rendering set	standard

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Insertion	
Moved to	
Style change	
Format change	
Inserted cell	
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Moved cell	
Split/Merged cell	
Padding cell	

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Format changed	0
Total changes	444

Document comparison by Workshare Professional on Wednesday, August 25, 2010 5:17:00 PM

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Description	Architect Agreement with Stan's comments draft 08-25-10
Document 2 ID	WORLD\DOX://H:\government\DOBROVSK\N ROYALTON\00892514.DOC
Description	Architect Agreement with Stan's comments draft 08-25-10
Rendering set	standard

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Moved to	
Style change	
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Format changed	0
Total changes	121