



## City Council Staff Report

DATE: June 17, 2015

NEW BUSINESS

SUBJECT: APPROVAL OF THE CONCEPTUAL DESIGN FOR THE EVENT CENTER WITHIN BLOCK E OF THE DOWNTOWN REVITALIZATION PLAN ("DOWNTOWN PALM SPRINGS"), AND AUTHORIZATION TO PROCEED WITH DESIGN DEVELOPMENT, PREPARATION OF CONSTRUCTION DOCUMENTS, BIDDING SERVICES AND CONSTRUCTION ADMINISTRATION

FROM: David H. Ready, City Manager

BY: Office of the City Manager

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### SUMMARY

This action will consider approval of the conceptual design for the Event Center space located within "Block E" of the Downtown Revitalization Plan ("Downtown Palm Springs"), and approve professional services agreements for architectural, civil engineering, landscape architectural and electric engineering design services to proceed with design development, preparation of construction documents, including bidding services and construction administration associated with the Event Center.

### RECOMMENDATION:

- 1) Approve the conceptual design for the Event Center space located in Block E of the Downtown Revitalization Plan ("Downtown Palm Springs"); and
- 2) Approve a Professional Services Agreement (Agreement No. \_\_\_\_ ) with the City's "On-Call" Architect, Urrutia A.I.A. and Associates, Inc., dba Urrutia Architects, in the amount of \$396,575 for architectural design services for the Downtown Event Center, City Project No. 15-07; and
- 3) Approve a Professional Services Agreement (Agreement No. \_\_\_\_ ) with the City's "On-Call" Civil Engineer, MSA Consulting, Inc., in the amount of \$170,700 for civil engineering design services for the Downtown Event Center, City Project No. 15-07; and
- 4) In accordance with Section 7.04.030 of the Palm Springs Municipal Code, determine that RGA Landscape Architects, Inc., and MRC Engineering, Inc., due to their experience demonstrated in prior contracts with the City, are uniquely qualified to provide landscape architectural design services and electrical engineering design services for the Downtown Event Center, City Project No. 15-07; and

ITEM NO. 58

- 5) Approve a Professional Services Agreement (Agreement No. \_\_\_\_ ) with RGA Landscape Architects, Inc., in the amount of \$86,800 for landscape architectural design services for the Downtown Event Center, City Project No. 15-07; and
- 6) Approve a Professional Services Agreement (Agreement No. \_\_\_\_ ) with MRC Engineering, Inc., in the amount of \$30,000 for electrical engineering design services for the Downtown Event Center, City Project No. 15-07; and
- 7) Request an Ad-Hoc Committee consisting of representatives of the Architectural Advisory Committee and Planning Commission, and the City Council Sub-Committee (Pouget/Mills) to participate as an Architectural Review Committee for the Downtown Event Center, City Project No. 15-07; and
- 8) Authorize the City Manager to execute all necessary documents.

STAFF ANALYSIS:

On December 2, 2009, the City Council adopted Ordinance No. 1764, adopting the Museum Market Plaza Specific Plan (the "Specific Plan"). The original land use and development pattern of the Specific Plan area, consisted of Blocks A through H, K1 and K2, and new public streets comprising a total of 18.5 acres within downtown Palm Springs, as shown in Figure 1.



Figure 1 – Original Specific Plan

The central area of the Specific Plan, identified as Block B (0.82 acres), was originally envisioned as a public gathering space as a “Main Plaza”, as described on Page III-28 of the Specific Plan:

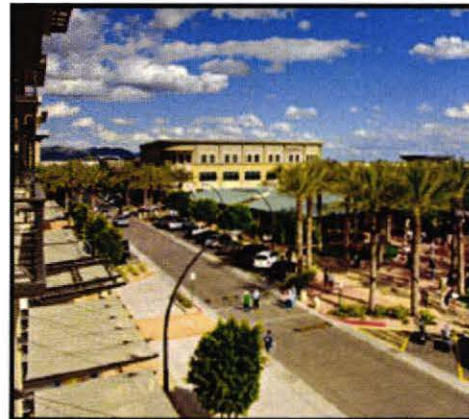
b. Public Open Spaces

The Main Plaza, occupying Block B fulfills the need for a public gathering place in the Specific Plan area. Successful, pedestrian oriented open spaces have clearly defined edges, are well connected by being situated adjacent to, but not on, main movement spaces and they are well integrated into the surrounding urban fabric. The Main Plaza is centrally located between North Palm Canyon Drive and Belardo Road, thereby linking two important north-south routes and providing east-west connectivity. The area is effectively enclosed by the surrounding blocks and its spatial characteristics provide opportunity for extended and varied uses. The Main Plaza is fundamental to the creation of a distinctive sense of place and it will be a definitive space, forming the nucleus of the Museum Market Plaza. Design and detailing must be consistent with the wider Urban Design concept and the Main



Plaza will include a distinctive central focal point, such as a commanding piece of art or water feature, creative landscaping and a wide range of amenities to facilitate pedestrian activities. Built form within the Plaza will remain limited and subordinate; wide views should exist in all directions.

Public gathering spaces on a smaller scale will also be created in front of the Art Museum and in the center of Block K. The two secondary open spaces will form an integral part of the significant view corridor that will exist between the Art Museum to the west and the Block K buildings to the east. The design treatment of the two spaces will complement that of the Main Plaza so that a clear hierarchical relationship between the open spaces within the Museum Market Plaza is evident and continuity of theme maintained.



The Specific Plan envisioned public uses in the Main Plaza, including a potential 6,500 square feet restaurant space, as shown in Figure 2 on the next page.

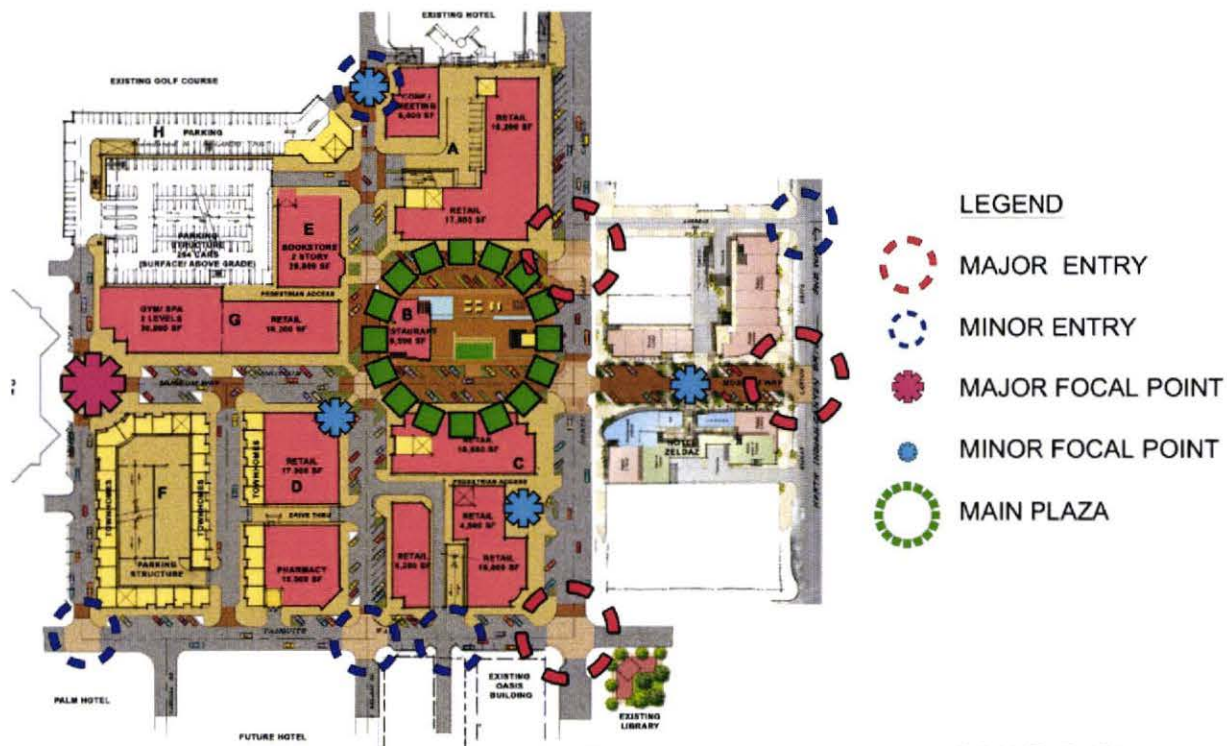


Figure 2

After the City’s approval of the Specific Plan, as the City and the developer (Palm Springs Promenade, LLC, the “Developer”) proceeded to coordinate on development of the Specific Plan, plans for the project area evolved and certain modifications to the layout of the individual blocks and land uses within the Specific Plan were proposed, including relocation of the Main Plaza to Museum Drive immediately adjacent to the Palm Springs Art Museum. On October 17, 2012, the City Council adopted an Addendum to the Specific Plan Environmental Impact Report (“EIR”) allowing for implementation of a revised Downtown Revitalization Plan (“Downtown Palm Springs”), and conforming the revitalization plan to the Specific Plan. The revised layout for Downtown Palm Springs envisioned in the approved amendment to the Specific Plan revised Block letter designations as shown in Figures 3 and 4 on the next page.

The original Specific Plan proposed a gym/spa, various retail purposes (a potential movie theater) and multi-family residential on what was previously designated as Block G in Figure 2, however, as shown in Figures 3 and 4, the “Main Plaza” was relocated to Block E, (50,530 square feet or 1.16 acres) for use as an outdoor entertainment venue, or “Event Center”. Under terms of the Downtown Palm Springs revitalization plan, the Developer proposed that the Event Center be provided for use by both the City and Developer for 10 years, after which the Developer was fully entitled to develop Block E as retail commercial, professional office, multi-family residential or other purposes as authorized by the Specific Plan.

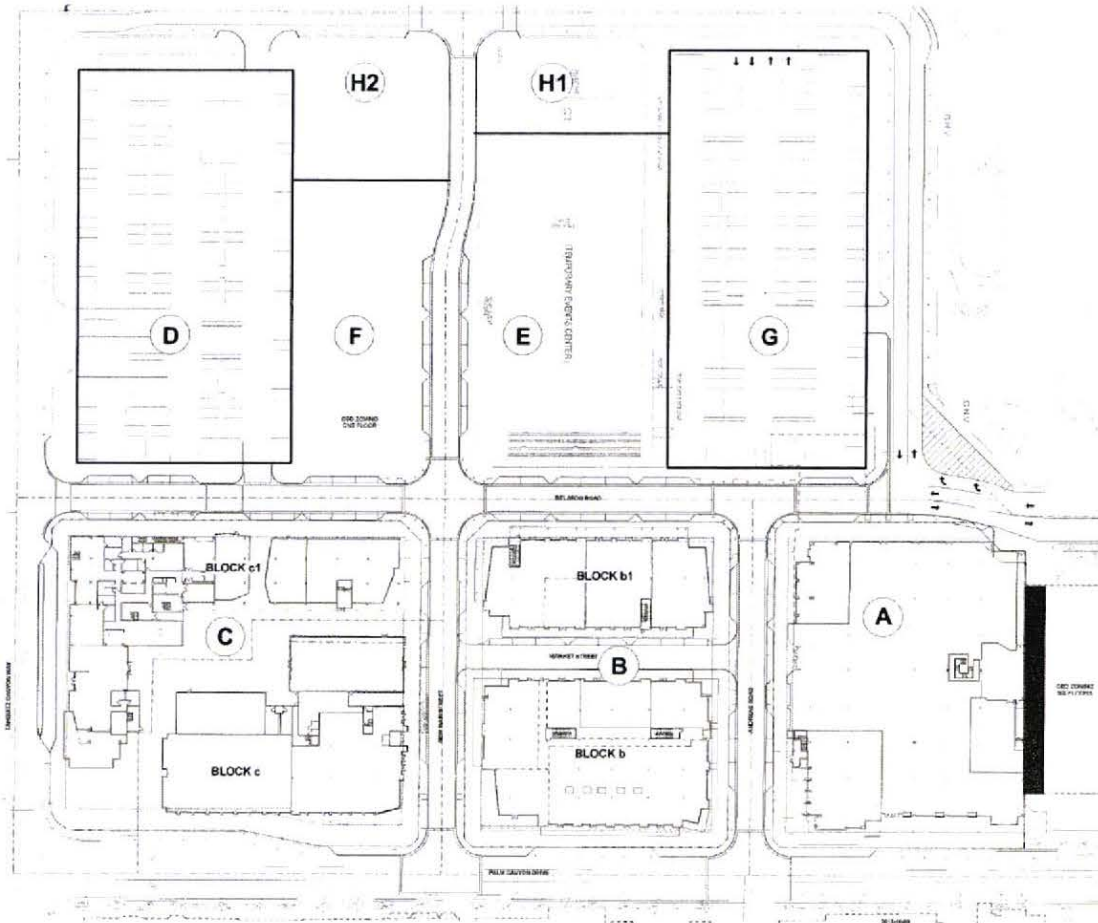


Figure 3

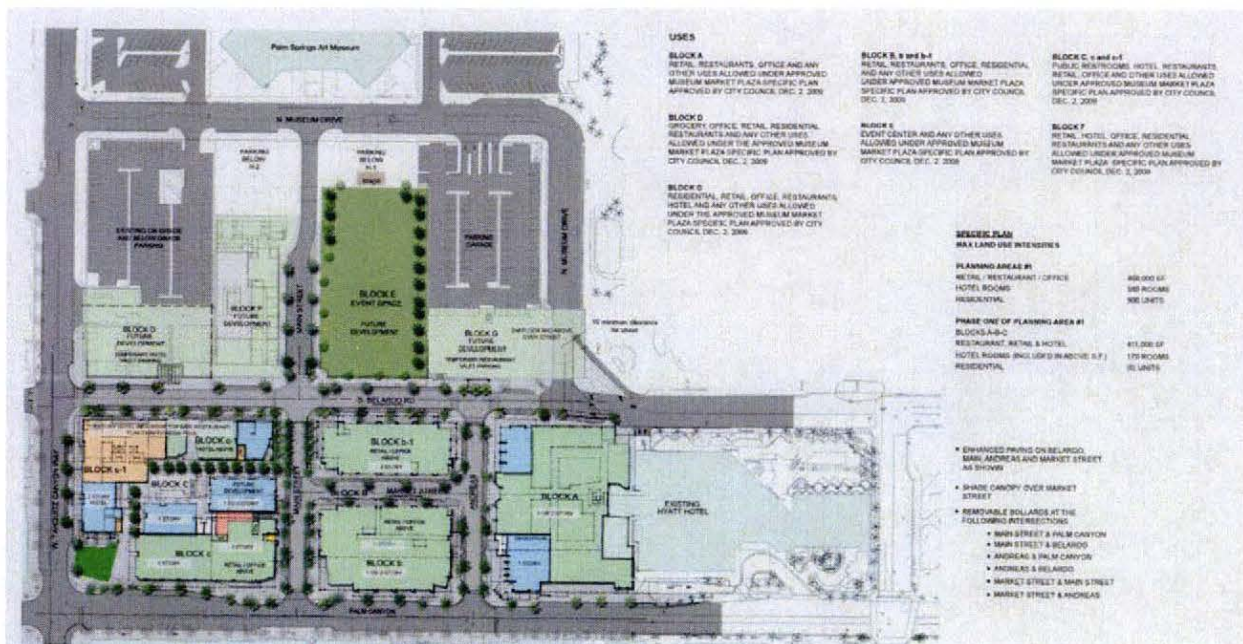


Figure 4

On September 17, 2014, the City Council approved the acquisition of the Event Center identified on Block E from the Developer as permanent public open space, to be owned and operated by the City as an active and vibrant area for staging community and public events such as concerts, movies, farmers markets, public gatherings, or community events. As reported to the City Council at that time, it is the intention to coordinate management of the Event Center by a third party (or "Event Coordinator"), such as the operator of the Convention Center (SMG). Therefore, the design and construction of a first-class public space is paramount to the success of the Event Center.

### ***Event Center Initial Planning***

Initial planning for the preliminary concept of the Event Center was initiated in February 2015. Under the City Manager's authority, the City's on-call civil engineering firm, MSA Consulting, was authorized to proceed with conceptual design planning of the Event Center for a not to exceed budget of \$21,000. An initial meeting was held on February 9, 2015, with the City Council sub-committee, City staff, and MSA Consulting, to identify the important elements forming the basis of the conceptual design, such as:

- A performance event stage;
- Public restroom facilities;
- A one-story building for downtown police sub-station, storage use, and potential observation deck;
- A permanent location for the Forever Marilyn statue;
- A permanent location for the Albert Frey designed "Aluminaire" House;
- A flexible design to allow multi-function use as a public park, including events ranging from Village Fest type farmer's markets to large entertainment concerts attracting 5,000 attendees

A subsequent meeting was held March 5, 2015, with the City Council sub-committee (Pouget/Mills), City staff, and MSA Consulting, to review the first initial conceptual plan identifying a location for the Aluminaire House at the southwest corner of the Event Center adjacent to the Palm Springs Art Museum, and a location for the Forever Marilyn statue, to the extent she is acquired for permanent relocation to Palm Springs, at the southeast corner of the Event Center at the corner of the intersection of Main Street and Belardo Road. Other concepts proposed generally include:

- Elimination of on-street parallel parking along the Main Street frontage in an effort to expand the size of the public space;
- Location of a main performance stage at the west end of the Event Center allowing for views to the stage with a perspective framed with Mt. San Jacinto as a background;
- Location of back-of-house facilities to support the main performance stage, buffered by a proposed sculpture garden and palm tree grotto on Museum Drive to block views of the back-of-house facilities from the Palm Springs Art Museum;
- Location of a second performance stage at the north end of the Event Center allowing for viewing of films and small performances;
- New public restroom facilities, concession space, and police substation within a new one-story building with roof-top observation deck for additional seating/standing

- capacity;
- Development of two circular outdoor spaces providing a total capacity of approximately 3,000 attendees with additional viewing platforms on the existing parking garage along the north side of the Event Center, and a potential observation deck above the new one-story building;
- Three points of main access along the south, east, and north sides of the Event Center, with final design to incorporate landscaping, berming, or fencing to allow for securing access into the Event Center for ticketed performances;

The basis of the initial conceptual plan proposed by MSA Consulting was taken from the design of Yerba Buena Gardens in downtown San Francisco, which is described by San Francisco as:

*...the heart of the City's downtown cultural district. It's a place to embrace your every mood, celebrate diversity, and find green relief. Discover renowned galleries, museums, cafes, restaurants and theaters cradled by landscaped lawns, public art, award-winning architecture, Dr. Martin Luther King Jr. Memorial, and Yerba Buena Center for the Arts. Revel in hundreds of free outdoor performances. Experience the Children's Garden, play circle and Children's Creativity Museum. Or join people of all ages enjoying ice skating, bowling, the historic carousel, as well as the Contemporary Jewish Museum, restaurants and shopping at Jessie Square and Yerba Buena Lane. No wonder YBG is recognized as one of the United States' top 30 urban parks. It's the perfect place to play, dine, shop or just relax.*

For those unfamiliar with Yerba Buena Gardens, a map and site plan showing how its design complements the dense urban core of that area of San Francisco is shown in Figure 5 on the next page. Similar to the context of the Event Center planned within the "Downtown Palm Springs," one-way streets circulate traffic around various hotel and commercial retail uses, adjacent to significant cultural event centers. A main "Esplanade" lawn used as an outdoor public space with a main performance stage provides for a variety of events, outdoor concerts, and other attractions to be organized as a means of inviting the public to the area. More information is available about Yerba Buena Gardens at <http://yerbabuenagardens.com/>



Figure 5

MSA Consulting completed refinements to the initial conceptual plan for the Event Center, and a meeting was held March 20, 2015, with the City Council sub-committee, as well as representatives of the Palm Springs Art Museum, City staff, and MSA Consulting. At that meeting, the representatives of the Palm Springs Art Museum thought the conceptual plan was well conceived, and agreed with the location proposed for the Aluminaire House at the southwest corner of the Event Center, adjacent to the Art Museum.

Staff also met with representatives of Golden Voice (operator of the Coachella, Stage Coach, and other performance events) to review the initial conceptual plan for the Event Center. Golden Voice supported the orientation of the main performance stage, allowing for attendees' perspective to the west over the length of the Event Center towards the mountain backdrop, and provided recommendations for stage lighting,



acoustical, and other performance related design issues to City staff and MSA Consulting.

A final meeting was held June 2, 2015, with the City Council sub-committee, as well as representatives of the Palm Springs Art Museum, PS Resorts, City staff, and MSA Consulting to again review the draft conceptual plan for the Event Center. Consultants recommended by the Art Museum were invited to attend and participate in the conceptual planning for the Event Center, which will continue through the next phases of the project (design development and final design). One item of discussion which warrants decision during the design development phase is the development of a temporary or permanent main performance stage. This subject will be further vetted through collaboration with the Art Museum, as the location of the performance stage will most directly impact it, and the Art Museum may prefer clear visibility extending from its east façade through to Palm Canyon Drive across the Event Center. A temporary stage allows for clear visibility to the Art Museum during most of the year when main performances are not scheduled; however, a permanent stage may give the City greater control over the operation and use of it throughout the year.

As a result of the initial conceptual planning for the Event Center to date, the City Council sub-committee, and representatives of the Palm Springs Art Museum and PS Resorts have agreed that the City Council should now review the Conceptual Plan and move forward with the design development and final design phases allowing for its ultimate construction. The final conceptual plan for the Event Center is shown as Figure 6, a representation of the proposed Event Center as part of the overall "Downtown Palm Springs" revitalization plan is shown as Figure 7, a perspective view of the Event Center from the northwest corner of the Event Center looking towards the proposed AC Marriott Hotel is shown as Figure 8, and a perspective view of the Event Center from the southeast corner of the Event Center looking to the northwest is shown as Figure 9 on the following pages.

Staff recommends that the City Council review and approve the Conceptual Design as identified in Figure 6, and authorize staff to proceed with final design.

### ***Event Center Final Design***

It is important that the City embark on completing the design development and final design phases of the Event Center, to allow for its construction and ultimate grand opening to coincide with the planned opening of the Kimpton Hotel and AC Marriott Hotel beginning around Fall 2016. Staff has coordinated with its on-call civil engineering consultant, MSA Consulting, and has also coordinated with its on-call architect, Urrutia A.I.A. and Associates, to obtain proposals to proceed with the design development and final design phases.



**Conceptual Development Plan**

*Downtown Palm Springs Event Center*

**Museum Market Plaza**

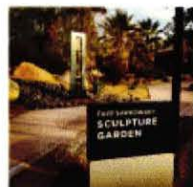


Figure 6

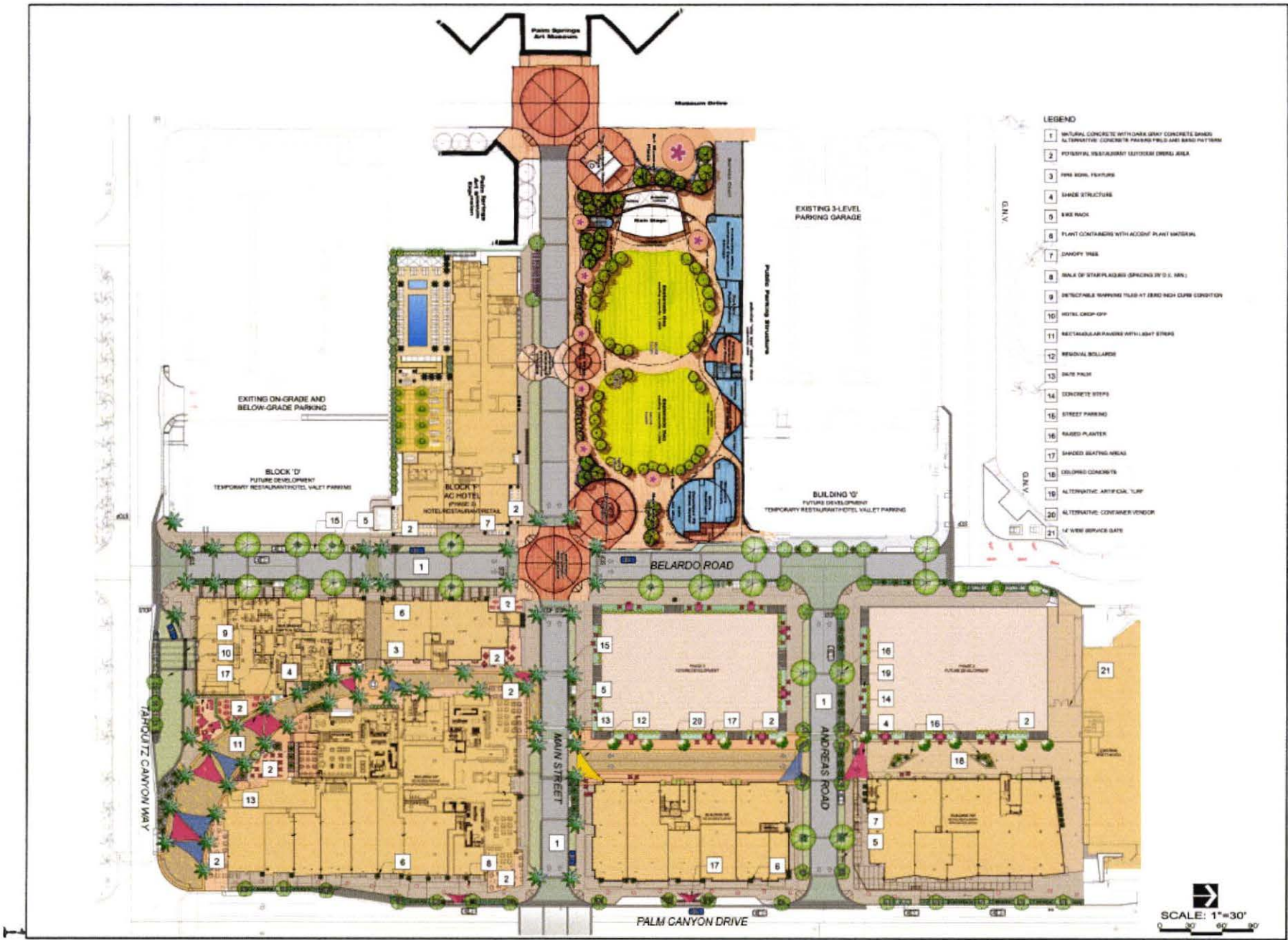


Figure 7



DOWNTOWN EVENTS CENTER  
City of Palm Springs



Figure 8



Figure 9

Additionally, staff has requested proposals from two other firms who are essential to completing plans for landscape architectural design and electrical engineering design for the Event Center – RGA Landscape Architects and MRC Engineering. Both of these local firms have extensive experience with the City on other projects, including work related to the Downtown Palm Springs revitalization plan. However, these firms are not part of the City’s network of “on-call” professional design firms, and staff is recommending that the City Council consider that RGA Landscape Architects and MRC Engineering have special expertise in providing the requested design services associated with the Downtown Palm Springs revitalization plan, and pursuant to Section 7.04.030 “Special Expertise Procurement,” of the Palm Springs Municipal Code (PSMC), waive requirements for a competitive qualifications based solicitation pursuant to Section 7.04.050 of the PSMC.

Accordingly, staff has prepared four separate Professional Service Agreements (PSAs), one with each firm identifying the full scope of work and fees associated with the following four phases: Design Development, Final Design, Bidding, and Construction Administration, as follows:

- Urrutia A.I.A. and Associates, Inc., dba Urrutia Architects, in the amount of \$396,575 for architectural design services, (**Attachment 1**);
- MSA Consulting, Inc., in the amount of \$170,700 for civil engineering design services, (**Attachment 2**);
- RGA Landscape Architects, Inc., in the amount of \$86,800 for landscape architectural design services, (**Attachment 3**);
- MRC Engineering, Inc., in the amount of \$30,000 for electrical engineering design services, (**Attachment 4**)

#### ***Schedule / Timing of Design & Architectural Review Processing***

It is staff’s intention to complete the design of the Event Center to allow for bidding and construction of it to coincide during construction of the Kimpton Hotel and AC Marriott Hotel properties. However, completing the design development and final design of the Event Center, which is one of the most important public spaces to be developed in the City of Palm Springs, will require extensive collaboration by multiple parties, outside stakeholders (Palm Springs Art Museum, Downtown Merchants, etc.), including formal review through the City’s Major Architectural Review process as required by Section 94.04.00 of the Palm Springs Zoning Code (PSZC).

Staff has outlined the steps required in the next phases of this process, and coordinated with its four consultants on a schedule in accordance with that process. At this time, the schedule prepared by the consultants does not facilitate completion of the Event Center by Fall 2016, but extends that date to Fall 2017, as shown on the following page.

**PRELIMINARY SCHEDULE**

<b>Phase 2: Design Development</b>		<b>Completion Date</b>
1	Council Approval of Schematic Design/Approval to Proceed with Design	7/1/15
2	Design Development (Consultants)	11 weeks
3	First Submittal (Consultants)	9/14/15
4	AAC Review	9/21/15
5	Design Revisions (Consultants)	2 weeks – 10/5/15
6	AAC Approval	10/12/15
7	Submit for PC Review	10/14/15
8	PC Review	10/28/15
9	Design Revisions (Consultants)	2 weeks
10	PC Approval	11/12/15
11	City Council Approval	12/2/15

<b>Phase 3: Construction Documents</b>		<b>Completion Date</b>
1	Preparation of drawings (grading, architectural [MEP], landscaping, electrical) (Consultants)	21 weeks (NTP date refers to Item 10 under Phase 2)
2	Submittal of drawings for plan check (Consultants)	5/2/16
3	Plan Check	3 weeks
4	Plan Revisions (Consultants)	2 weeks
5	Resubmittal of drawings for plan check (Consultants)	6/6/16
6	2 <sup>nd</sup> Plan Check	2 weeks
7	Corrections and Resubmit	2 weeks
8	Plan Approval	7/6/16
9	City Council approval of plans and authorization to bid	7/22/16

<b>Phase 4: Bid Services</b>		<b>Completion Date</b>
1	Notice to Bid	8/3/16 (Date refers to Item 6 under Phase 3)
2	Bidding	30 days
3	End of Bidding Period	9/14/16
4	Contract Award	9/21/16

<b>Phase 5: Construction Administration</b>		<b>Completion Date</b>
1	Executed Contracts – 4 weeks from contract award	10/19/16
2	Pre-Construction Meeting – 2 weeks from contract award	11/2/16
3	Notice to Proceed – 2 weeks from Item 2	11/16/16
4	Construction	228± working days
5	Completion/Opening	10/3/17

Staff suggests a process, whereby some of the schedule associated with the design development process may be shortened, through the City Council's authorization to establish an Ad-Hoc Committee with representatives of the Architectural Advisory Committee (AAC) and Planning Commission (PC), and the City Council Sub-Committee to participate as an Architectural Review Committee for the Downtown Event Center, to complement the Major Architectural Review process otherwise required by Section 94.04.00 of the PSZC. The Ad-Hoc Committee meetings will be publicly noticed pursuant to the Brown Act allowing for public participation and attendance while the design development phase of the Event Center is completed, with meetings held at City Hall.

As the City Council is the applicant of this project, staff suggests that upon completion of the design development for the Event Center, following a recommendation for approval of it by the Ad-Hoc Architectural Review Committee, that the City Council consider approval of the final architectural design for the Event Center at a public hearing, whereupon a formal application for Major Architectural Review pursuant to Section 94.04.00 of the PSZC is initiated. However, staff further suggests that a combined publicly noticed meeting of the AAC and PC be convened for the formal architectural review of the Event Center to facilitate a more streamlined process given the involvement of the AAC and PC through its appointees to the Ad-Hoc Architectural Review Committee throughout the design development phase

#### ENVIRONMENTAL IMPACT:

On June 13, 2008, the City of Palm Springs, acting as Lead Agency under the California Environmental Quality Act ("CEQA"), issued a Notice of Preparation ("NOP") and Initial Study for the preparation of a Draft Environmental Impact Report (the "Draft EIR") on the Museum Market Plaza Specific Plan (Case No. 5.1204). The NOP was circulated for public review from June 16 through July 17, 2008. The Draft EIR was subsequently circulated for public review from October 22 through December 17, 2008. In accordance with the CEQA Guidelines, on November 18, 2009, the City Council adopted Resolution No. 22625, certifying the Final Environmental Impact Report (State Clearing House No. 2008061084) (the "Final EIR") for the Museum Market Plaza Specific Plan (Case No. 5.1204), including amendments to the 2007 General Plan and Palm Springs Zoning Code, making certain findings relating to the environmental effects identified in the Final EIR, and adopting a Statement of Overriding Considerations and a Mitigation Monitoring and Reporting Program. The City Council subsequently reaffirmed and re-adopted Resolution No. 22625 on December 2, 2009.

On October 17, 2012, the City Council adopted Resolution No. 23238, approving an Addendum to the Final EIR for the Museum Market Plaza Specific Plan (Case No. 5.1204), and identifying the implementation of a revised Downtown Revitalization Plan ("Downtown Palm Springs") as conforming to the Museum Market Plaza Specific Plan. Included as part of the Downtown Revitalization Plan is the development of the outdoor public event space identified in Block E; therefore, development of the Downtown Event



Center, as a "Project" under CEQA, has previously completed environmental review as required by the CEQA Guidelines, and no further environmental review is required.

FISCAL IMPACT:

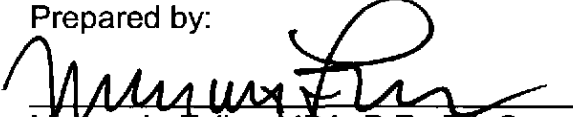
The City Council previously appropriated and approved an expenditure of \$4,500,000 for the acquisition of Block E for the purposes of its development as permanent open space for an outdoor Event Center, with an additional expenditure of \$800,000 associated with construction of additional underground parking within the Downtown Revitalization Plan. These costs were previously budgeted as part of the Measure J Capital Project Fund (Fund 260), in Account No. 260-4500-59437 (Property Acquisition).

On June 4, 2014, the City Council adopted Resolution No. 23708 appropriating a budget of \$2,115,605 from the Measure J Capital Project Fund (Fund 260) for the Downtown Revitalization Project for additional work associated with the City parking structure and future improvements for the Event Center. Currently, a budget of \$199,433 remains available in Account No. 260-4500-59464 (Event Center/Parking). As part of the City Council's consideration of the 2015/16 Fiscal Year budget, an additional appropriation of \$1,155,142 to Account No. 260-4500-59464 (Event Center/Parking) is proposed. On the basis of the City Council's adoption of the 2015/16 Fiscal Year budget as proposed, sufficient funding will be available in Account No. 260-4500-59464 to approve the total expenditure of \$684,075.

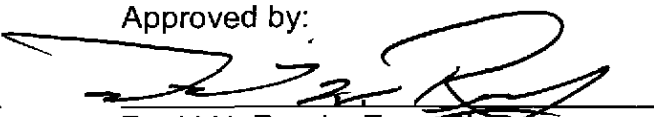
As the design development and final design phases are completed, a construction estimate of the Event Center will be identified. For planning purposes only, the City Council should be aware that the Event Center may cost as much as \$5,000,000 depending upon the final elements incorporated into the design, such as a permanent performance stage and the related lighting and sound equipment, or the quality and character of the buildings proposed within the Event Center. Construction funding ultimately would be a Measure J expense and will be submitted to the Measure J Commission, and supplemented by Quimby funds.

SUBMITTED:

Prepared by:

  
Marcus L. Fuller, MPA, P.E., P.L.S.  
Assistant City Manager/City Engineer

Approved by:

  
David H. Ready, Esq., Ph.D.  
City Manager

Attachments:

1. Urrutia Architects Agreement
2. MSA Consulting Agreement
3. RGA Landscape Architects Agreement
4. MRC Engineering Agreement

ATTACHMENT 1

**PROFESSIONAL SERVICES AGREEMENT  
ARCHITECTURAL DESIGN SERVICES  
DOWNTOWN EVENT CENTER  
CITY PROJECT NO. 15-07**

THIS PROFESSIONAL SERVICES AGREEMENT ( "Agreement") is entered into, and effective on \_\_\_\_\_, 2015, between the **CITY OF PALM SPRINGS**, a California charter city and municipal corporation, ("City") and **Urrutia A.I.A. and Associates, Inc., dba Urrutia Architects**, ("Consultant"). City and Consultant are individually referred to as "Party" and are collectively referred to as the "Parties".

**RECITALS**

A. City has determined that there is a need for professional architectural design services for the Downtown Event Center, City Project No. 15-07, (the "Project").

B. Consultant has submitted to City a proposal to provide professional architectural design services to City for the Project under the terms of this Agreement.

C. Consultant is qualified by virtue of its experience, training, education, reputation, and expertise to provide these services and has agreed to provide such services as provided in this Agreement.

D. City desires to retain Consultant to provide such professional services.

In consideration of these promises and mutual obligations, covenants, and conditions, the Parties agree as follows:

**AGREEMENT**

**1. SERVICES OF CONSULTANT**

**1.1 Scope of Services.** In compliance with all terms and conditions of this Agreement, Consultant agrees to perform the professional services set forth in the Scope of Services described in Exhibit "A" (the "Services" or "Work") , which is attached and incorporated by reference. As a material inducement to the City entering into this Agreement, Consultant represents and warrants that Consultant is a provider of first class work and professional services and that Consultant is experienced in performing the Work and Services contemplated and, in light of such status and experience, Consultant covenants that it shall follow the highest professional standards in performing the Work and Services required in this Agreement. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized as high quality among well-qualified and experienced professionals performing similar work under similar circumstances.

**1.2 Contract Documents.** The Agreement between the Parties shall consist of the following: (1) this Agreement; (2) the Scope of Services; (3) the Consultant's signed, original proposal submitted to the City ("Consultant's Proposal"), (collectively referred to as the "Contract Documents"). The Consultant's Proposal is attached as Exhibits "B," and is incorporated by reference and made a part of this Agreement. The Scope of Services shall include the Consultant's Proposal. All provisions of the Scope of Services and the Consultant's Proposal shall be binding on the Parties. Should any conflict or inconsistency exist in the Contract Documents, the conflict or inconsistency shall be resolved by applying the provisions in the highest priority document, which shall be determined in the following order of priority: (1<sup>st</sup>) the provisions of the Scope of Services (Exhibit "A"); (2<sup>nd</sup>) the terms of this Agreement; and, (3<sup>rd</sup>) the provisions of the Consultant's Proposal (Exhibit "B").

**1.3 Compliance with Law.** Consultant warrants that all Services rendered shall be performed in accordance with all applicable federal, state, and local laws, statutes, ordinances lawful orders, rules, and regulations.

**1.4 Licenses, Permits, Fees, and Assessments.** Consultant represents and warrants to City that it has obtained all licenses, permits, qualifications, and approvals of whatever nature that are legally required to practice its profession and perform the Work and Services required by this Agreement. Consultant represents and warrants to City that Consultant shall, at its sole cost and expense, keep in effect at all times during the term of this Agreement, any license, permit, qualification, or approval that is legally required for Consultant to perform the Work and Services under this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments, and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the Work and Services required by this Agreement. Consultant shall indemnify, defend, and hold harmless City against any such fees, assessments, taxes penalties, or interest levied, assessed, or imposed against City to the fullest extent permitted by law.

**1.5 Familiarity with Work.** By executing this Agreement, Consultant warrants that Consultant (a) has thoroughly investigated and considered the Scope of Services to be performed, (b) has carefully considered how the Services should be performed, and (c) fully understands the facilities, difficulties, and restrictions attending performance of the Services under this Agreement. If the Services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of any Services. Should the Consultant discover any latent or unknown conditions that will materially affect the performance of the Services, Consultant shall immediately inform the City of such fact and shall not proceed except at Consultant's risk until written instructions are received from the City.

**1.6 Care of Work.** Consultant shall adopt reasonable methods during the term of the Agreement to furnish continuous protection to the Work and the equipment, materials, papers, documents, plans, studies, and/or other components to prevent

losses or damages. Consultant shall be responsible for all such damages, to persons or property, until acceptance of the Work by the City, except such losses or damages as may be caused by City's own negligence.

**1.7 Further Responsibilities of Parties.** Parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Parties agree to act in good faith to execute all instruments, prepare all documents, and take all actions as may be reasonably necessary to carry out the purposes of this Agreement.

**1.8 Additional Services.** City shall have the right at any time during the performance of the Services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to, or deducting from such Work. No such extra work may be undertaken unless a written order is first given by the City to the Consultant, incorporating any adjustment in (i) the Maximum Contract Amount, as defined below, and/or (ii) the time to perform this Agreement. Any adjustments must also be approved in writing by the Consultant. Any increase in compensation of up to twenty-five percent (25%) of the Maximum Contract Amount or \$25,000, whichever is less, or in the time to perform of up to thirty (30) days, may be approved by the City Manager, or his designee, as may be needed to perform any extra work. Any greater increases, occurring either separately or cumulatively, must be approved by the Palm Springs City Council. It is expressly understood by Consultant that the provisions of this section shall not apply to the services specifically set forth or reasonably contemplated within the Scope of Services.

## **2. COMPENSATION**

**2.1 Maximum Contract Amount.** For the Services rendered under this Agreement, Consultant shall be compensated by City in accordance with the Schedule of Compensation, which is attached as Exhibit "D" and incorporated in this Agreement by reference. Compensation shall not exceed the maximum contract amount of **Three Hundred Ninety Six Thousand Five Hundred Seventy Five Dollars, (\$396,575.00)** ("Maximum Contract Amount"), except as may be provided under Section 1.8. The method of compensation shall be as set forth in Exhibit "C." Compensation for necessary expenditures for reproduction costs, telephone expenses, and transportation expenses must be approved in advance by the Contract Officer designated under Section 4.2 and will only be approved if such expenses are also specified in the Schedule of Compensation. The Maximum Contract Amount shall include the attendance of Consultant at all Project meetings reasonably deemed necessary by the City. Consultant shall not be entitled to any increase in the Maximum Contract Amount for attending these meetings. Consultant accepts the risk that the services identified in the Scope of Services may be more costly and/or time-consuming than Consultant anticipates, that Consultant shall not be entitled to additional compensation, and that the provisions of Section 1.8 shall not be applicable to the services identified in the Scope of Services. The maximum amount of city's payment obligation under this section is the amount specified in this Agreement. If the City's maximum payment obligation is reached before the Consultant's Services under this Agreement are completed,

Consultant shall complete the Work and City shall not be liable for payment beyond the Maximum Contract Amount.

**2.2. Method of Payment.** Unless another method of payment is specified in the Schedule of Compensation (Exhibit "C"), in any month in which Consultant wishes to receive payment, Consultant shall submit to the City an invoice for services rendered prior to the date of the invoice. The invoice shall be in a form approved by the City's Finance Director and must be submitted no later than the tenth (10) working day of such month. Such requests shall be based upon the amount and value of the services performed by Consultant and accompanied by such reporting data including an itemized breakdown of all costs incurred and tasks performed during the period covered by the invoice, as may be required by the City. City shall use reasonable efforts to make payments to Consultant within forty-five (45) days after receipt of the invoice or as soon as is reasonably practical. There shall be a maximum of one payment per month.

**2.3 Changes in Scope.** In the event any change or changes in the Scope of Services is requested by City, Parties shall execute a written amendment to this Agreement, specifying all proposed amendments, including, but not limited to, any additional fees. An amendment may be entered into:

A. To provide for revisions or modifications to documents, work product, or work, when required by the enactment or revision of any subsequent law; or

B. To provide for additional services not included in this Agreement or not customarily furnished in accordance with generally accepted practice in Consultant's profession.

**2.4 Appropriations.** This Agreement is subject to and contingent upon funds being appropriated by the City Council for each fiscal year covered by the Agreement. If such appropriations are not made, this Agreement shall automatically terminate without penalty to the City.

### **3. SCHEDULE OF PERFORMANCE**

**3.1 Time of Essence.** Time is of the essence in the performance of this Agreement. The time for completion of the services to be performed by Consultant is an essential condition of this Agreement. Consultant shall prosecute regularly and diligently the Work of this Agreement according to the agreed upon attached Schedule of Performance (Exhibit "D"), incorporated by reference.

**3.2 Schedule of Performance.** Consultant shall commence the Services under this Agreement upon receipt of a written notice to proceed and shall perform all Services within the time period(s) established in the Schedule of Performance. When requested by Consultant, extensions to the time period(s) specified in the Schedule of Performance may be approved in writing by the Contract Officer, but such extensions shall not exceed one hundred eighty (180) days cumulatively; however, the City shall not be obligated to grant such an extension.

**3.3 Force Majeure.** The time period(s) specified in the Schedule of Performance for performance of the Services rendered under this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant (financial inability excepted) if Consultant, within ten (10) days of the commencement of such delay, notifies the Contract Officer in writing of the causes of the delay. Unforeseeable causes include, but are not limited to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, and/or acts of any governmental agency, including the City. The City Manager shall ascertain the facts and the extent of delay, and extend the time for performing the Services for the period of the enforced delay when and if in the judgment of the City Manager such delay is justified. The City Manager's determination shall be final and conclusive upon the Parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement under this section.

**3.4 Term.** Unless earlier terminated under this Agreement, this Agreement shall commence upon the effective date of this Agreement and continue in full force and effect until completion of the Services. However, the term shall not exceed three (3) years from the commencement date, except as otherwise provided in the Schedule of Performance described in Section 3.2 above. Any extension must be through mutual written agreement of the Parties.

**3.5 Termination Prior to Expiration of Term.** City may terminate this Agreement for its convenience at any time, without cause, in whole or in part, upon giving Consultant thirty (30) days written notice. Where termination is due to the fault of Consultant and constitutes an immediate danger to health, safety, and general welfare, the period of notice shall be such shorter time as may be determined by the City. Upon such notice, City shall pay Consultant for Services performed through the date of termination. Upon receipt of such notice, Consultant shall immediately cease all work under this Agreement, unless stated otherwise in the notice or by written authorization of the Contract Officer. After such notice, Consultant shall have no further claims against the City under this Agreement. Upon termination of the Agreement under this section, Consultant shall submit to the City an invoice for work and services performed prior to the date of termination. Consultant may terminate this Agreement, with or without cause, upon sixty (60) days written notice to the City, except that where termination is due to material default by the City, the period of notice may be such shorter time as the Consultant may determine.

#### **4. COORDINATION OF WORK**

**4.1 Representative of Consultant.** The following principal of Consultant is designated as being the principal and representative of Consultant authorized to act in its behalf and make all decisions with respect to the Services to be performed under this

Agreement: **Francisco Urrutia**. It is expressly understood that the experience, knowledge, education, capability, expertise, and reputation of the foregoing principal is a substantial inducement for City to enter into this Agreement. Therefore, the foregoing principal shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services performed hereunder. The foregoing principal may not be changed by Consultant without prior written approval of the Contract Officer.

**4.2 Contract Officer.** The Contract Officer shall be the City Manager or his/her designee ("Contract Officer"). Consultant shall be responsible for keeping the Contract Officer fully informed of the progress of the performance of the services. Consultant shall refer any decisions that must be made by City to the Contract Officer. Unless otherwise specified, any approval of City shall mean the approval of the Contract Officer.

**4.3 Prohibition Against Subcontracting or Assignments.** The experience, knowledge, capability, expertise, and reputation of Consultant, its principals and employees, were a substantial inducement for City to enter into this Agreement. Therefore, Consultant shall not assign full or partial performance of this Agreement, nor any monies due, voluntarily or by operation of law, without the prior written consent of City. Consultant shall not contract with any other entity to perform the Services required under this Agreement without the prior written consent of City. If Consultant is permitted to subcontract any part of this Agreement by City, Consultant shall be responsible to City for the acts and omissions of its subcontractor(s) in the same manner as it is for persons directly employed. Nothing contained in this Agreement shall create any contractual relationships between any subcontractor and City. All persons engaged in the Work will be considered employees of Consultant. City will deal directly with and will make all payments to Consultant. In addition, neither this Agreement nor any interest in this Agreement may be transferred, assigned, conveyed, hypothecated, or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written consent of City. Transfers restricted in this Agreement shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release Consultant or any surety of Consultant from any liability under this Agreement without the express written consent of City.

**4.4 Independent Contractor.** The legal relationship between the Parties is that of an independent contractor, and nothing shall be deemed to make Consultant a City employee.

A. During the performance of this Agreement, Consultant and its officers, employees, and agents shall act in an independent capacity and shall not act or represent themselves as City officers or employees. The personnel performing the Services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither City nor any of its officers,



employees, or agents shall have control over the conduct of Consultant or any of its officers, employees, or agents, except as set forth in this Agreement. Consultant, its officers, employees, or agents shall not maintain an office or any other type of fixed business location at City's offices. City shall have no voice in the selection, discharge, supervision, or control of Consultant's employees, servants, representatives, or agents, or in fixing their number, compensation, or hours of service. Consultant shall pay all wages, salaries, and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, including but not limited to social security income tax withholding, unemployment compensation, workers' compensation, and other similar matters. City shall not in any way or for any purpose be deemed to be a partner of Consultant in its business or otherwise a joint venturer or a member of any joint enterprise with Consultant.

B. Consultant shall not have any authority to bind City in any manner. This includes the power to incur any debt, obligation, or liability against City.

C. No City benefits shall be available to Consultant, its officers, employees, or agents in connection with any performance under this Agreement. Except for professional fees paid to Consultant as provided for in this Agreement, City shall not pay salaries, wages, or other compensation to Consultant for the performance of Services under this Agreement. City shall not be liable for compensation or indemnification to Consultant, its officers, employees, or agents, for injury or sickness arising out of performing Services. If for any reason any court or governmental agency determines that the City has financial obligations, other than under Section 2 and Subsection 1.8 in this Agreement, of any nature relating to salary, taxes, or benefits of Consultant's officers, employees, servants, representatives, subcontractors, or agents, Consultant shall indemnify City for all such financial obligations.

## **5. INSURANCE**

**5.1 Types of Insurance.** Consultant shall procure and maintain, at its sole cost and expense, the insurance described below. The insurance shall be for the duration of this Agreement and includes any extensions, unless otherwise specified in this Agreement. The insurance shall be procured in a form and content satisfactory to City. The insurance shall apply against claims which may arise from the Consultant's performance of Work under this Agreement, including Consultant's agents, representatives, or employees. In the event the City Manager determines that the Work or Services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the City Manager or his designee. Consultant shall immediately substitute any insurer whose A.M. Best rating drops below the levels specified in this Agreement. Except as otherwise authorized below for professional liability (errors and omissions) insurance, all insurance provided under this Agreement shall be on an occurrence basis. The minimum amount of insurance required shall be as follows:

A. Errors and Omissions Insurance. Consultant shall obtain and maintain in full force and effect throughout the term of this Agreement, standard industry form professional liability (errors and omissions) insurance coverage in an amount of not less than one million dollars (\$1,000,000.00) per occurrence and two-million dollars (\$2,000,000.00) annual aggregate, in accordance with the provisions of this section.

(1) Consultant shall either: (a) certify in writing to the City that Consultant is unaware of any professional liability claims made against Consultant and is unaware of any facts which may lead to such a claim against Consultant; or (b) if Consultant does not provide the certification under (a), Consultant shall procure from the professional liability insurer an endorsement providing that the required limits of the policy shall apply separately to claims arising from errors and omissions in the rendition of services under this Agreement.

(2) If the policy of insurance is written on a "claims made" basis, the policy shall be continued in full force and effect at all times during the term of this Agreement, and for a period of three (3) years from the date of the completion of the Services provided hereunder. In the event of termination of the policy during this period, Consultant shall obtain continuing insurance coverage for the prior acts or omissions of Consultant during the course of performing Services under the terms of this Agreement. The coverage shall be evidenced by either a new policy evidencing no gap in coverage, or by obtaining separate extended "tail" coverage with the present or new carrier or other insurance arrangements providing for complete coverage, either of which shall be subject to the written approval by the City Manager.

(3) In the event the policy of insurance is written on an "occurrence" basis, the policy shall be continued in full force and effect during the term of this Agreement, or until completion of the Services provided for in this Agreement, whichever is later. In the event of termination of the policy during this period, new coverage shall immediately be obtained to ensure coverage during the entire course of performing the Services under the terms of this Agreement.

B. Workers' Compensation Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, workers' compensation insurance in at least the minimum statutory amounts, and in compliance with all other statutory requirements, as required by the State of California. Consultant agrees to waive and obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies. If Consultant has no employees, Consultant shall complete the City's Request for Waiver of Workers' Compensation Insurance Requirement form.

C. Commercial General Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of commercial general liability insurance written on a per occurrence basis with a

combined single limit of at least one million dollars (\$1,000,000.00) and two million dollars (\$2,000,000.00) general aggregate for bodily injury and property damage including coverages for contractual liability, personal injury, independent contractors, broad form property damage, products and completed operations.

D. Business Automobile Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of business automobile liability insurance written on a per occurrence basis with a single limit liability in the amount of one million dollars (\$1,000,000.00) bodily injury and property damage. The policy shall include coverage for owned, non-owned, leased, and hired cars.

E. Employer Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of employer liability insurance written on a per occurrence basis with a policy limit of at least one million dollars (\$1,000,000.00) for bodily injury or disease.

**5.2 Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to and approved by the City Manager or his/her designee prior to commencing any work or services under this Agreement. Consultant guarantees payment of all deductibles and self-insured retentions. City reserves the right to reject deductibles or self-insured retentions in excess of \$10,000, and the City Manager or his/her designee may require evidence of pending claims and claims history as well as evidence of Consultant's ability to pay claims for all deductible amounts and self-insured retentions proposed in excess of \$10,000.

**5.3 Other Insurance Requirements.** The following provisions shall apply to the insurance policies required of Consultant under this Agreement:

5.3.1 For any claims related to this Agreement, Consultant's coverage shall be primary insurance with respect to the City and its officers, council members, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City and its officers, council members, officials, employees, agents, and volunteers shall be in excess of Consultant's insurance and shall not contribute with it.

5.3.2 Any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to City and its officers, council members, officials, employees, agents, and volunteers.

5.3.3 All insurance coverage and limits provided by Consultant and available or applicable to this Agreement are intended to apply to each insured, including additional insureds, against whom a claim is made or suit is brought to the full extent of the policies. Nothing

contained in this Agreement or any other agreement relating to the City or its operations shall limit the application of such insurance coverage.

- 5.3.4 No required insurance coverages may include any limiting endorsement which substantially impairs the coverages set forth in this Agreement (e.g., elimination of contractual liability or reduction of discovery period), unless the endorsement has first been submitted to the City Manager and approved in writing.
- 5.3.5 Consultant agrees to require its insurer to modify insurance endorsements to delete any exculpatory wording stating that failure of the insurer to mail written notice of cancellation imposes no obligation, or that any party will "endeavor" (as opposed to being required) to comply with the requirements of the endorsements. Certificates of insurance will not be accepted in lieu of required endorsements, and submittal of certificates without required endorsements may delay commencement of the Project. It is Consultant's obligation to ensure timely compliance with all insurance submittal requirements as provided in this Agreement.
- 5.3.6 Consultant agrees to ensure that subcontractors, and any other parties involved with the Project who are brought onto or involved in the Project by Consultant, provide the same minimum insurance coverage required of Consultant. Consultant agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this section. Consultant agrees that upon request, all agreements with subcontractors and others engaged in the Project will be submitted to the City for review.
- 5.3.7 Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any insurance requirement in no way imposes any additional obligations on the City nor does it waive any rights in this or any other regard.
- 5.3.8 Consultant shall provide proof that policies of insurance required in this Agreement, expiring during the term of this Agreement, have been renewed or replaced with other policies providing at least the same coverage. Proof that such coverage has been ordered shall be submitted prior to expiration. Endorsements as required in this Agreement applicable to the renewing or new coverage shall be provided to City no later than ten (10) days prior to expiration of the lapsing coverage.

- 5.3.9 Requirements of specific insurance coverage features or limits contained in this section are not intended as limitations on coverage, limits, or other requirements, or as a waiver of any coverage normally provided by any given policy. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue, and is not intended by any party or insured to be limiting or all-inclusive.
- 5.3.10 The requirements in this section supersede all other sections and provisions of this Agreement to the extent that any other section or provision conflicts with or impair the provisions of this section.
- 5.3.11 Consultant agrees to provide immediate notice to City of any claim or loss against Consultant arising out of the Work performed under this Agreement and for any other claim or loss which may reduce the insurance available to pay claims arising out of this Agreement. City assumes no obligation or liability by such notice, but has the right (but not the duty) to monitor the handling of any such claim or claims if they are likely to involve City, or to reduce or dilute insurance available for payment of potential claims.
- 5.3.12 Consultant agrees that the provisions of this section shall not be construed as limiting in any way the extent to which the Consultant may be held responsible for the payment of damages resulting from the Consultant's activities or the activities of any person or person for which the Consultant is otherwise responsible.

**5.4 Sufficiency of Insurers.** Insurance required in this Agreement shall be provided by authorized insurers in good standing with the State of California. Coverage shall be provided by insurers admitted in the State of California with an A.M. Best's Key Rating of B++, Class VII, or better, unless such requirements are waived in writing by the City Manager or his designee due to unique circumstances.

**5.5 Verification of Coverage.** Consultant shall furnish City with both certificates of insurance and endorsements, including additional insured endorsements, affecting all of the coverages required by this Agreement. The certificates and endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All proof of insurance is to be received and approved by the City before work commences. City reserves the right to require Consultant's insurers to provide complete, certified copies of all required insurance policies at any time. Additional insured endorsements are not required for Errors and Omissions and Workers' Compensation policies.

Verification of Insurance coverage may be provided by: (1) an approved General and/or Auto Liability Endorsement Form for the City of Palm Springs or (2) an

acceptable Certificate of Liability Insurance Coverage with an approved Additional Insured Endorsement with the following endorsements stated on the certificate:

1. *"The City of Palm Springs, its officials, employees, and agents are named as an additional insured..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

2. *"This insurance is primary and non-contributory over any insurance or self-insurance the City may have..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

3. *"Should any of the above described policies be canceled before the expiration date thereof, the issuing company will mail 30 days written notice to the Certificate Holder named." Language such as, "endeavor to" mail and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representative" is not acceptable and must be crossed out.*

4. Both the Workers' Compensation and Employers' Liability policies shall contain the insurer's waiver of subrogation in favor of City, its elected officials, officers, employees, agents, and volunteers.

In addition to the endorsements listed above, the City of Palm Springs shall be named the certificate holder on the policies. All certificates of insurance and endorsements are to be received and approved by the City before work commences. All certificates of insurance must be authorized by a person with authority to bind coverage, whether that is the authorized agent/broker or insurance underwriter. Failure to obtain the required documents prior to the commencement of work shall not waive the Consultant's obligation to provide them.

## **6. INDEMNIFICATION**

**6.1 Indemnification and Reimbursement.** To the fullest extent permitted by law, Consultant shall defend (at Consultant's sole cost and expense), indemnify, protect, and hold harmless City, its elected officials, officers, employees, agents, and volunteers (collectively the "Indemnified Parties"), from and against any and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards, settlements, damages, demands, orders, penalties, and expenses including legal costs and attorney fees (collectively "Claims"), including but not limited to Claims arising from injuries to or death of persons (Consultant's employees included), for damage to property, including property owned by City, from any violation of any federal, state, or local law or ordinance, and from errors and omissions committed by Consultant, its officers, employees, representatives, and agents, that arise out of or relate to Consultant's performance under this Agreement. This indemnification clause excludes Claims arising from the sole negligence or willful misconduct of the City, its elected officials, officers, employees, agents, and volunteers. Under no circumstances shall the insurance requirements and limits set forth in this Agreement be construed to limit

Consultant's indemnification obligation or other liability under this Agreement. Consultant's indemnification obligation shall survive the expiration or earlier termination of this Agreement until all actions against the Indemnified Parties for such matters indemnified are fully and finally barred by the applicable statute of limitations or, if an action is timely filed, until such action is final. This provision is intended for the benefit of third party Indemnified Parties not otherwise a party to this Agreement.

**6.2 Design Professional Services Indemnification and Reimbursement.** If the Agreement is determined to be a "design professional services agreement" and Consultant is a "design professional" under California Civil Code Section 2782.8, then:

A. To the fullest extent permitted by law, Consultant shall indemnify, defend (at Consultant's sole cost and expense), protect and hold harmless City and its elected officials, officers, employees, agents and volunteers and all other public agencies whose approval of the project is required, (individually "Indemnified Party"; collectively "Indemnified Parties") against any and all liabilities, claims, judgments, arbitration awards, settlements, costs, demands, orders and penalties (collectively "Claims"), including but not limited to Claims arising from injuries or death of persons (Consultant's employees included) and damage to property, which Claims arise out of, pertain to, or are related to the negligence, recklessness or willful misconduct of Consultant, its agents, employees, or subcontractors, or arise from Consultant's negligent, reckless or willful performance of or failure to perform any term, provision, covenant or condition of this Agreement ("Indemnified Claims"), but Consultant's liability for Indemnified Claims shall be reduced to the extent such Claims arise from the negligence, recklessness or willful misconduct of the City and its elected officials, officers, employees, agents and volunteers.

B. The Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to execute an Indemnification Agreement adopting the indemnity provisions in sub-section 6.1 in favor of the Indemnified Parties. In addition, Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to obtain insurance that is consistent with the Insurance provisions as set forth in this Agreement, as well as any other insurance that may be required by Contract Officer.

## **7. REPORTS AND RECORDS**

**7.1 Accounting Records.** Consultant shall keep complete, accurate, and detailed accounts of all time, costs, expenses, and expenditures pertaining in any way to this Agreement. Consultant shall keep such books and records as shall be necessary to properly perform the Services required by this Agreement and to enable the Contract Officer to evaluate the performance of such Services. The Contract Officer shall have full and free access to such books and records at all reasonable times, including the right to inspect, copy, audit, and make records and transcripts from such records.

**7.2 Reports.** Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the Services required by this Agreement, or as the Contract Officer shall require. Consultant acknowledges that the City is greatly concerned about the cost of the Work and Services to be performed under this Agreement. For this reason, Consultant agrees that Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the contemplated Work or Services. If Consultant is providing design services, Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost for the project being designed if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the design services.

**7.3 Ownership of Documents.** All drawings, specifications, reports, records, documents, memoranda, correspondence, computations, and other materials prepared by Consultant, its employees, subcontractors, and agents in the performance of this Agreement shall be the property of City and shall be promptly delivered to City upon request of the Contract Officer or upon the termination of this Agreement. Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership of the documents and materials. Any use of such completed documents for other projects and/or use of incomplete documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and the City shall indemnify the Consultant for all resulting damages. Consultant may retain copies of such documents for their own use. Consultant shall have an unrestricted right to use the concepts embodied in this Agreement. Consultant shall ensure that all its subcontractors shall provide for assignment to City of any documents or materials prepared by them. In the event Consultant fails to secure such assignment, Consultant shall indemnify City for all resulting damages.

**7.4 Release of Documents.** All drawings, specifications, reports, records, documents, and other materials prepared by Consultant in the performance of services under this Agreement shall not be released publicly without the prior written approval of the Contract Officer. All information gained by Consultant in the performance of this Agreement shall be considered confidential and shall not be released by Consultant without City's prior written authorization.

**7.5 Audit and Inspection of Records.** After receipt of reasonable notice and during the regular business hours of City, Consultant shall provide City, or other agents of City, such access to Consultant's books, records, payroll documents, and facilities as City deems necessary to examine, copy, audit, and inspect all accounting books, records, work data, documents, and activities directly related to Consultant's performance under this Agreement. Consultant shall maintain such books, records, data, and documents in accordance with generally accepted accounting principles and shall clearly identify and make such items readily accessible to such parties during the



term of this Agreement and for a period of three (3) years from the date of final payment by City hereunder.

## **8. ENFORCEMENT OF AGREEMENT**

**8.1 California Law and Venue.** This Agreement shall be construed and interpreted both as to validity and as to performance of the Parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such County, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

**8.2 Interpretation.** This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties. The terms of this Agreement are contractual and the result of negotiation between the Parties. Accordingly, any rule of construction of contracts (including, without limitation, California Civil Code Section 1654) that ambiguities are to be construed against the drafting party, shall not be employed in the interpretation of this Agreement. The caption headings of the various sections and paragraphs of this Agreement are for convenience and identification purposes only and shall not be deemed to limit, expand, or define the contents of the respective sections or paragraphs.

**8.3 Default of Consultant.** Consultant's failure to comply with any provision of this Agreement shall constitute a default.

A. If the City Manager, or his designee, determines that Consultant is in default in the performance of any of the terms or conditions of this Agreement, he/she shall notify Consultant in writing of such default. Consultant shall have ten (10) days, or such longer period as City may designate, to cure the default by rendering satisfactory performance. In the event Consultant fails to cure its default within such period of time, City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice of any remedy to which City may be entitled at law, in equity, or under this Agreement. Consultant shall be liable for all reasonable costs incurred by City as a result of such default. Compliance with the provisions of this section shall not constitute a waiver of any City right to take legal action in the event that the dispute is not cured, provided that nothing shall limit City's right to terminate this Agreement without cause under Section 3.5.

B. If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 8.3A, take over the work and prosecute the same to completion by contract or otherwise. The Consultant shall be liable to the extent that the total cost for completion of the Services required hereunder exceeds the Maximum Contract Amount (provided that the City shall use reasonable efforts to mitigate such damages). The City may

withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated. The withholding or failure to withhold payments to Consultant shall not limit Consultant's liability for completion of the Services as provided in this Agreement.

**8.4 Waiver.** No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought. Any waiver by the Parties of any default or breach of any covenant, condition, or term contained in this Agreement, shall not be construed to be a waiver of any subsequent or other default or breach, nor shall failure by the Parties to require exact, full, and complete compliance with any of the covenants, conditions, or terms contained in this Agreement be construed as changing the terms of this Agreement in any manner or preventing the Parties from enforcing the full provisions.

**8.5 Rights and Remedies Cumulative.** Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

**8.6 Legal Action.** In addition to any other rights or remedies, either Party may take legal action, in law or in equity, to cure, correct, remedy or recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement.

**8.7 Attorney Fees.** In the event any dispute between the Parties with respect to this Agreement results in litigation or any non-judicial proceeding, the prevailing Party shall be entitled, in addition to such other relief as may be granted, to recover from the non-prevailing Party all reasonable costs and expenses. These include but are not limited to reasonable attorney fees, expert consultant fees, court costs and all fees, costs, and expenses incurred in any appeal or in collection of any judgment entered in such proceeding. To the extent authorized by law, in the event of a dismissal by the plaintiff or petitioner of the litigation or non-judicial proceeding within thirty (30) days of the date set for trial or hearing, the other Party shall be deemed to be the prevailing Party in such litigation or proceeding.

## 9. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION

**9.1 Non-liability of City Officers and Employees.** No officer or employee of the City shall be personally liable to the Consultant, or any successor-in-interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

**9.2 Conflict of Interest.** No officer or employee of the City shall have any direct or indirect financial interest in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects their financial interest or the financial interest of any corporation, partnership, or association in which he/she is, directly or indirectly, interested in violation of any state statute or regulation. Consultant warrants that Consultant has not paid or given, and will not pay or give, any third party any money or other consideration in exchange for obtaining this Agreement.

**9.3 Covenant Against Discrimination.** In connection with its performance under this Agreement, Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, marital status, ancestry, or national origin. Consultant shall ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, age, marital status, ancestry, or national origin. Such actions 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.

## 10. MISCELLANEOUS PROVISIONS

**10.1 Patent and Copyright Infringement.** To the fullest extent permissible under law, and in lieu of any other warranty by City or Consultant against patent or copyright infringement, statutory or otherwise:

A. It is agreed that Consultant shall defend at its expense any claim or suit against City on account of any allegation that any item furnished under this Agreement, or the normal use or sale arising out of the performance of this Agreement, infringes upon any presently existing U.S. letters patent or copyright and Consultant shall pay all costs and damages finally awarded in any such suit or claim, provided that Consultant is promptly notified in writing of the suit or claim and given authority, information and assistance at Consultant's expense for the defense of same, and provided such suit or claim arises out of, pertains to, or is related to the negligence, recklessness or willful misconduct of Consultant. However, Consultant will not indemnify City if the suit or claim results from: (1) City's alteration of a deliverable, such that City's alteration of such deliverable created the infringement upon any presently existing U.S. letters patent or copyright; or (2) the use of a deliverable in combination with other material not provided by Consultant when it is such use in combination which

infringes upon an existing U.S. letters patent or copyright.

B. Consultant shall have sole control of the defense of any such claim or suit and all negotiations for settlement in the event City fails to cooperate in the defense of any suit or claim, provided, however, that such defense shall be at Consultant's expense. Consultant shall not be obligated to indemnify City under any settlement that is made without Consultant's consent, which shall not be unreasonably withheld. If the use or sale of such item is enjoined as a result of the suit or claim, Consultant, at no expense to City, shall obtain for City the right to use and sell the item, or shall substitute an equivalent item acceptable to City and extend this patent and copyright indemnity thereto.

**10.2 Notice.** Any notice, demand, request, consent, approval, or communication that either party desires, or is required to give to the other party or any other person shall be in writing. All notices shall be personally delivered, sent by pre-paid First Class U.S. Mail, registered or certified mail, postage prepaid, return receipt requested, or delivered or sent by facsimile with attached evidence of completed transmission. All notices shall be deemed received upon the earlier of (i) the date of delivery to the address of the person to receive such notice if delivered personally or by messenger or overnight courier; (ii) five (5) business days after the date of posting by the United States Post Office if by mail; or (iii) when sent if given by facsimile. Any notice, request, demand, direction, or other communication sent by facsimile must be confirmed within forty-eight (48) hours by letter mailed or delivered. Other forms of electronic transmission such as e-mails, text messages, and instant messages are not acceptable manners of notice required hereunder. Notices or other communications shall be addressed as follows:

To City: City of Palm springs  
Attention: City Manager & City Clerk  
3200 E. Tahquitz Canyon Way  
Palm springs, California 92262  
Telephone: (760) 323-8204  
Facsimile: (760) 323-8332

To Consultant: Urrutia and Associates, Inc.  
165 N. Luring Drive  
Palm Springs, CA 92262  
Attention: Francisco J. Urrutia  
Telephone: (760) 327-6800  
Facsimile: (760) 327-6813

**10.3 Integrated Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior negotiations, arrangements, agreements, representations, and understandings, if any, made by or among the Parties with respect to the subject matter in this Agreement.

**10.4 Amendment.** No amendments or other modifications of this Agreement shall be binding unless through written agreement by all Parties.

**10.5 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Agreement shall be determined to be invalid by a final judgment or decree of a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of that provision, or the remaining provisions of this Agreement unless the invalid provision is so material that its invalidity deprives either Party of the basic benefit of their bargain or renders this Agreement meaningless.

**10.5 Successors in Interest.** This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assignees.

**10.6 Third Party Beneficiary.** Except as may be expressly provided for in this Agreement, nothing contained in this Agreement is intended to confer, nor shall this Agreement be construed as conferring, any rights, including, without limitation, any rights as a third-party beneficiary or otherwise, upon any entity or person not a party to this Agreement.

**10.7 Recitals.** The above-referenced Recitals are hereby incorporated into the Agreement as though fully set forth in this Agreement and each Party acknowledges and agrees that such Party is bound, for purposes of this Agreement, by the same.

**10.8. Corporate Authority.** Each of the undersigned represents and warrants that (i) the Party for which he or she is executing this Agreement is duly authorized and existing, (ii) he or she is duly authorized to execute and deliver this Agreement on behalf of the Party for which he or she is signing, (iii) by so executing this Agreement, the Party for which he or she is signing is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which the Party for which he or she is signing is bound.

***[SIGNATURES ON NEXT PAGE]***

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the dates stated below.

**"CITY"**  
**City of Palm Springs**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
David H. Ready  
City Manager

**APPROVED AS TO FORM:**

**ATTEST**

By: \_\_\_\_\_  
Douglas C. Holland,  
City Attorney

By: \_\_\_\_\_  
James Thompson,  
City Clerk

**APPROVED BY CITY COUNCIL:**

**Date:** \_\_\_\_\_ **Agreement No.** \_\_\_\_\_

Corporations require two notarized signatures. One signature must be from Chairman of Board, President, or any Vice President. The second signature must be from the Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, or Chief Financial Officer.

**CONSULTANT NAME:**

Urrutia and Associates, Inc.  
165 N. Luring Drive  
Palm Springs, CA 92262

By \_\_\_\_\_  
Signature (Notarized)

By \_\_\_\_\_  
Signature (Notarized)

## **EXHIBIT "A"**

### **SCOPE OF SERVICES**

Consultant shall provide all required architectural design services, including project management and coordinating with the various other consultants engaged by City, necessary to complete the development of a final design for the conceptual architectural elements of the Downtown Event Center space with maximum capacity of 3,000 as identified on the schematic design included herein this Exhibit "A". Such architectural elements generally include:

- Main performance stage with ancillary areas (back-of-house, dressing room, restroom, etc.)
- Production Office with mechanical equipment and storage rooms necessary to service the performance stage
- Public restroom facilities (north side)
- Parking structure entry court (north entry) and improvements associated with stair and elevator access
- Secondary performance stage with ancillary areas (back-of-house, dressing room, storage room, etc.)
- Administrative building complete with permanent public restroom facilities, Palm Springs Police satellite office, café/restaurant space with box office, and including second floor rooftop access with seating capacity for 500 additional attendees
- Main entry plaza (west entry)
- Main street entry court (south entry)

Following City's approval of the final design, Consultant shall prepare full and complete construction drawings, technical specifications and construction estimates of the architectural elements identified on the final design, inclusive of all mechanical, electrical, plumbing, structural, acoustical engineering, theatrical and stage lighting design, and other trades, with plan and elevation views and associated technical details and architectural renderings to facilitate City's bidding for construction.

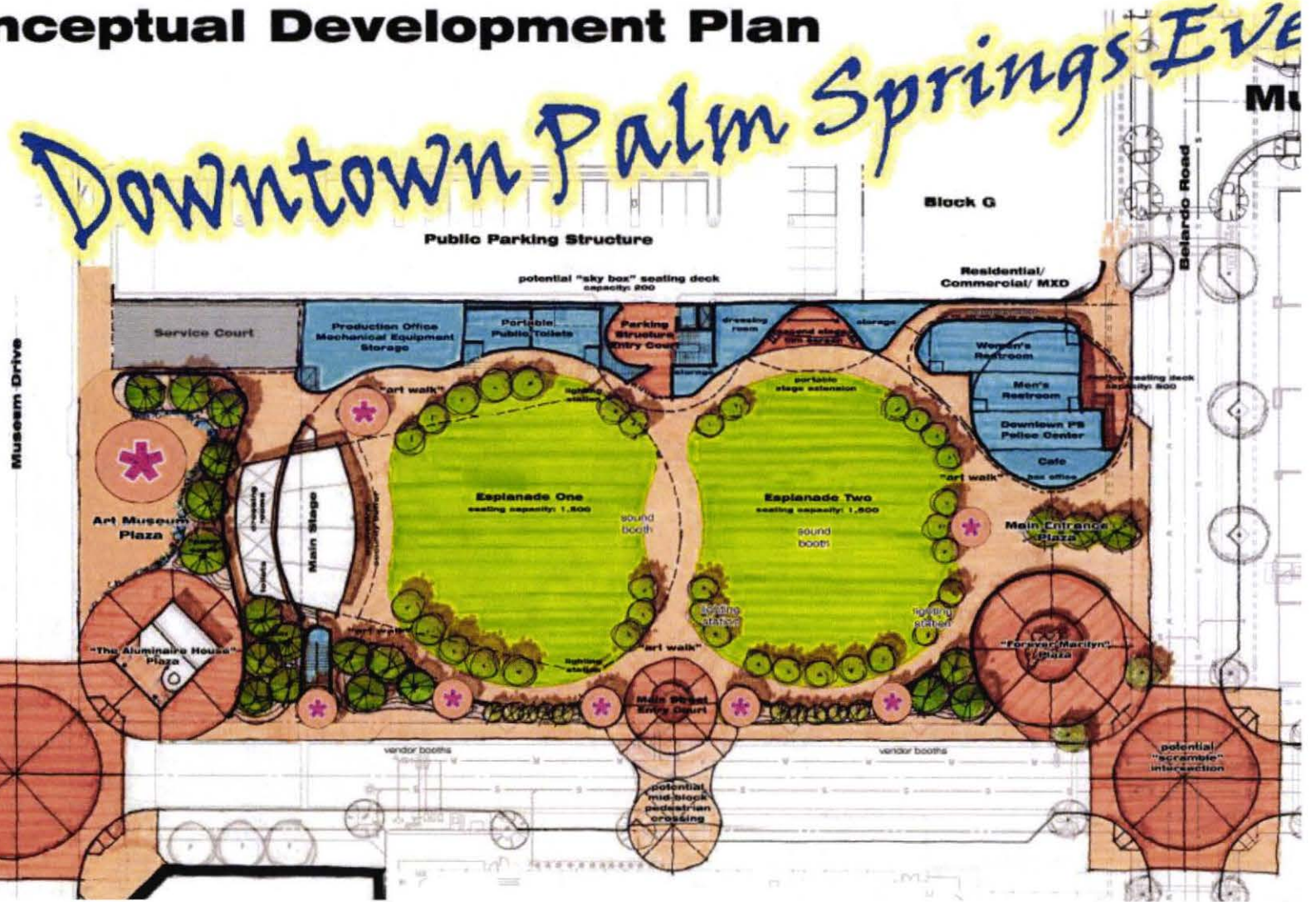
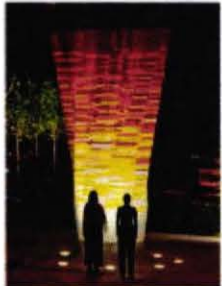
Consultant shall provide bidding support services as may be necessary and required by City.

Consultant shall provide construction administrative support services as may be necessary and required by City.

The Consultant's proposal and scope of services, as referenced in its letter dated June 1, 2015, (revised June 3, 2015), is incorporated herein by reference, and as identified on the following Exhibit "B".

# Conceptual Development Plan

# Downtown Palm Springs Eve





**EXHIBIT "B"**  
**CONSULTANT'S PROPOSAL**



165 Luring Drive  
Palm Springs, CA 92262  
760.327.6800  
760.327.6813 fax

[design@urrutiaarchitects.com](mailto:design@urrutiaarchitects.com)

June 1, 2015 (Revised June 3, 2015)

Mr. Marcus Fuller  
Assistant City Manager  
City of Palm Springs  
Palm Springs, CA. 92262

**RE: Proposal for Professional Design Services – Palm Springs Downtown Events Center,  
Palm Springs, CA.**

Dear Mr. Fuller:

Urrutia Architects is pleased to provide the City of Palm Springs with our proposal for professional architectural and engineering design services for the proposed Palm Springs Downtown Events Center located in Palm Springs, CA.

**Scope of Work**

The following points summarize our understanding of the scope of work. The City is proposing to develop an events center located in the new downtown revitalization area to be located immediately east of the existing Palm Springs Museum, adjacent to the existing parking structure located to the north, adjacent to the new Main Street located to the south, and immediate adjacent to Belardo Road to the east. The proposal is based on the Conceptual Development Plan (Colored exhibit with image shots) prepared by Jerry Ogburn of MSA). The architectural and engineering scope will include the design of all buildings on site, with exception of the Aluminaire House designed by Albert Frey. Architectural elements will include a main stage with back of house support spaces, a secondary smaller stage with back of house support spaces, Production Office and Storage, Service Court, Parking structure Entry Court with elevator and stair core to service three levels, a secondary stair core to service the lower level parking and connect with the main level event areas, an allocated area for portable toilets, men's and women's public restrooms, Police Department sub-station, Café, Box Office area, and a third stair/elevator core adjacent to Belardo Road to access the upper level.

## EXHIBIT "B" CONSULTANT'S PROPOSAL

Palm Springs Downtown Events Center  
City of Palm Springs  
Palm Springs, CA  
June 1, 2015

Urrutia Architects will include the following consultants as an inclusive part of the architectural team:

- Structural Engineering:
  - K.B. Leung Engineering ( Ban Leung)
- Mechanical, Plumbing and Electrical Engineering:
  - MRC Engineering, Inc. (Ralph Raya)
- Acoustical Engineer:
  - Veneklasen Associates (Jerry Christoff)
- Theatrical and Stage Lighting Consultant:
  - The Ruzika Company (Tom Ruzika)
- Cost Estimating:
  - Cumming (Ashok Patel)

Urrutia Architects (UA) will provide all coordination between all consultants under contract with Urrutia Architects as well as provide design input, collaboration, and coordination with all other independent consultants including civil engineering (MSA), and Landscape and Irrigation (RGA). UA will work closely with RGA in designing the perimeter fencing, security gates, and raised planters to integrate with the architectural theme throughout the project.

Not included within the scope of work at this time are the following:

- Structural engineering to support the Aluminaire House.
- MPE design to service the Aluminaire House.
- Architectural design support, including signage, associated with the siting or assembly of the Aluminaire House.
- Structural engineering of the existing underground parking structure to the extent it may include additional loads imposed on the existing structure that may require additional structural support or reinforcement from underneath the existing structure.
- Structural tie into the existing parking structure with the new building elements.
- Restructuring the existing service ramp to the lower level.
- Audio Visual design.
- Optional Shade structures around the Esplanades will be included in the Design Development fees, but not part of the Construction Drawings fees.

## **EXHIBIT "B"** **CONSULTANT'S PROPOSAL**

Palm Springs Downtown Events Center  
City of Palm Springs  
Palm Springs, CA  
June 1, 2015

It is assumed the project will be subject to review by the following agencies/departments:

- o City of Palm Springs City Council
- o City of Palm Springs Architectural Review
- o City of Palm Springs Planning Department
- o City of Palm Springs Building Department
- o Various downtown related committees and interested parties.

### **Scope of Services**

Based on the above Scope of Work, Urrutia Architects will provide Architectural and Engineering Services including Design Development and Construction Documents for the proposed Project to include the following services:

- Architectural
- Structural Engineering
- Mechanical, Plumbing, and Electrical Engineering, including collaboration with the Theatrical Consultant.
- Theatrical Design and Stage Lighting for performances and events.
- Acoustical Engineering for the two stages.
- Cost estimating for the entire project, including civil, hardscape, and landscape/irrigation.

#### **A. Design Development Phase:**

- a, Urrutia Architects shall prepare design development drawings which will consist of the following:
  - Architectural services shall include architectural design schemes that will integrate with the site design concept and to complement the landscape/hardscape design concept. The Architect shall coordinate design elements between all consultants; attend a minimum of (7) seven team design meetings as well as City review meetings.
  - Drawings shall include floor plans, exterior elevations, sections, proposed structural systems, preliminary mechanical, plumbing and electrical systems, color and materials boards, and a cost estimate of the entire project at the completion of Design Development. All design exhibits shall be in color and include 3D drawings through Sketchup.

#### **B. Construction Document Phase:**

- a. Urrutia Architects and their consultants shall prepare detailed construction documents based on the final design development drawings approved by the City of Palm Springs, which will, in general, consist of the following:

## EXHIBIT "B" CONSULTANT'S PROPOSAL

Palm Springs Downtown Events Center  
City of Palm Springs  
Palm Springs, CA  
June 1, 2015

- Title sheet with code analysis and ADA requirements.
- Overall Site Plan to locate building elements and structures and associates Site Details.
- Demolition Plan.
- Building Plans to include:
  - Floor Plans
  - Finish Schedules
  - Exterior Elevations
  - Sections
  - Reflected Ceiling Plans and details
  - Roof Plans and Details
  - Door and glazing schedules and details
  - Interior Elevations
  - Cabinet plans and details
  - Signage plan and details
- Structural drawings including foundation and framing plans and details.
- MPE drawings including mechanical, plumbing, and electrical drawings.
- Acoustical drawings for the two stages and details.
- Theatrical and stage lighting drawings and details.
- Cost estimating at a 50% stage of completion of Construction Drawings and at 100% completion of construction documents.
- Specifications book prepared in CSI format.

### **C. Bidding Phase:**

- a. *Urrutia Architects shall assist the City of Palm Springs in soliciting and obtaining bids from general contractors for this project as an overall single project through the public noticing process. During the course of the bidding process, if requested by the City of Palm Springs, the architect shall prepare and issue addenda, respond to bidders' RFI's, review bids, and make final recommendations.*

## **EXHIBIT "B"**

### **CONSULTANT'S PROPOSAL**

Palm Springs Downtown Events Center  
City of Palm Springs  
Palm Springs, CA  
June 1, 2015

#### **D. Construction Administration Phase:**

a. *Urrutia Architects shall provide professional services during the course of construction that shall include the following:*

- *Provide clarification and interpretive drawings to the contractor.*
- *Review and respond to RFI's from the contractor.*
- *Review submitted changes in construction and (PCO's) Potential Change Orders proposed by the contractor. Process any Change Orders during the construction phase.*
- *Review Applications for Payment from the Contractor and make recommendations for payments.*
- *Visit the job site weekly to meet with the City's Construction Manager to review the progress of work and answer any questions the contractor may have. Document the site visits with photographs and written memos which will be distributed.*
- *Review and process shop drawings and submittals.*
- *Prepare punch lists during substantial completion and final punch lists to close out the project.*
- *Documentation of all warranties, guarantees, and operation manuals.*

## **EXHIBIT "B"** **CONSULTANT'S PROPOSAL**

Palm Springs Downtown Events Center  
City of Palm Springs  
Palm Springs, CA  
June 1, 2015

Exclusions include the following:

- Geotechnical reports or testing.
- Civil Engineering
- Landscape and Irrigation Design

Assumptions include the following:

- MSA shall provide the Architect with an overall site plan in CAD electronic format.
- The City or MSA shall provide the Architect with copies of "as built" drawings of the existing parking structure.
- The City will provide the Architect with the City's "boiler plate" specifications and general conditions requirements for bid and construction purposes.

If our proposal is acceptable, please have the City prepare an agreement for our services. Should you have any questions, please call me. I look forward to hearing from you.

Sincerely,

**Urrutia Architects**

Francisco J. Urrutia, FARA  
President  
California License # C7467

## EXHIBIT "C"

### SCHEDULE OF COMPENSATION

Tasks listed below are identical to tasks identified in the Consultant's Proposal incorporated herein as Exhibit "B" of this Agreement. Payments to Consultant shall be made no more frequently than monthly, and shall be based on directly incurred time and materials costs up to and not exceeding the lump sum budgets established per task item of work as indicated herein. Payments shall be made to Consultant based upon completion of tasks, or pro-rata portions thereof noted below, to a maximum of 75% of the lump sum budget established per task until completion of such task item as determined by the Contract Officer. Each request for payment shall contain Consultant's statement of the work or tasks completed or portion performed, with supporting documentation. The determination of payment due shall be made based upon the reasonable judgment of the Contract Officer.

Phase 1 is completed and not a part of this contract.

Phase 2, Design Development Phase:	\$106,100
Phase 3, Construction Document Phase:	\$187,775
Phase 4, Bidding Phase:	\$8,700
Phase 5, Construction Administration Phase:	\$78,500
Reimbursable Expenses:	\$15,500
<b>Grand Total Not to Exceed:</b>	<b>\$396,575</b>

Note, the budgets identified for each phase are not to exceed amounts identified by Consultant to provide sufficient budget to complete the tasks, and shall not be exceeded. Consultant shall receive payment therefore for actual costs incurred, which shall reflect the final cost for each task, up to and not exceeding the budget therefore.

## EXHIBIT "D"

### SCHEDULE OF PERFORMANCE

The Schedule of Performance was prepared by Consultant and shall bind Consultant to completing required deliverables prior to the dates identified herein this Schedule. This Schedule assumes the City shall follow the standard Major Architectural Review process, however, the City reserves the right to identify alternative review processes to expedite the Schedule in the best interests of the City. The City shall be responsible for complying with the review times identified in the Schedule, and for scheduling meeting dates identified in the Schedule; to the extent that City review times are delayed, or meeting dates are revised, Consultant shall nevertheless remain responsible for complying with the subsequent schedule for completion of the next deliverable item or milestone date.

<b>Phase 2: Design Development</b>		<b>Completion Date</b>
<b>1</b>	Council Approval of Schematic Design/Approval to Proceed with Design	7/1/15
<b>2</b>	Design Development (Consultants)	11 weeks
<b>3</b>	First Submittal (Consultants)	9/14/15
<b>4</b>	AAC Review	9/21/15
<b>5</b>	Design Revisions (Consultants)	2 weeks – 10/5/15
<b>6</b>	AAC Approval	10/12/15
<b>7</b>	Submit for PC Review	10/14/15
<b>8</b>	PC Review	10/28/15
<b>9</b>	Design Revisions (Consultants)	2 weeks
<b>10</b>	PC Approval	11/12/15
<b>11</b>	City Council Approval	12/2/15

<b>Phase 3: Construction Documents</b>		<b>Completion Date</b>
<b>1</b>	Preparation of drawings (grading, architectural [MEP], landscaping, electrical) (Consultants)	21 weeks (NTP date refers to Item 10 under Phase 2)
<b>2</b>	Submittal of drawings for plan check (Consultants)	5/2/16
<b>3</b>	Plan Check	3 weeks
<b>4</b>	Plan Revisions (Consultants)	2 weeks
<b>5</b>	Resubmittal of drawings for plan check (Consultants)	6/6/16
<b>6</b>	2 <sup>nd</sup> Plan Check	2 weeks
<b>7</b>	Corrections and Resubmit	2 weeks
<b>8</b>	Plan Approval	7/6/16
<b>9</b>	City Council approval of plans and authorization to bid	7/22/16



**EXHIBIT "D"**

**SCHEDULE OF PERFORMANCE**

<b>Phase 4: Bid Services</b>		<b>Completion Date</b>
<b>1</b>	<b>Notice to Bid</b>	<b>8/3/16</b> (Date refers to Item 6 under Phase 3)
<b>2</b>	<b>Bidding</b>	<b>30 days</b>
<b>3</b>	<b>End of Bidding Period</b>	<b>9/14/16</b>
<b>4</b>	<b>Contract Award</b>	<b>9/21/16</b>

<b>Phase 5: Construction Administration</b>		<b>Completion Date</b>
<b>1</b>	<b>Executed Contracts – 4 weeks from contract award</b>	<b>10/19/16</b>
<b>2</b>	<b>Pre-Construction Meeting – 2 weeks from contract award</b>	<b>11/2/16</b>
<b>3</b>	<b>Notice to Proceed – 2 weeks from Item 2</b>	<b>11/16/16</b>
<b>4</b>	<b>Construction</b>	<b>228± working days</b>
<b>5</b>	<b>Completion/Opening</b>	<b>10/3/17</b>

ATTACHMENT 2

**PROFESSIONAL SERVICES AGREEMENT  
CIVIL ENGINEERING DESIGN SERVICES  
DOWNTOWN EVENT CENTER  
CITY PROJECT NO. 15-07**

THIS PROFESSIONAL SERVICES AGREEMENT ( "Agreement") is entered into, and effective on \_\_\_\_\_, 2015, between the **CITY OF PALM SPRINGS, a California charter city and municipal corporation, ("City")** and **MSA Consulting, Inc., a California corporation, ("Consultant")**. City and Consultant are individually referred to as "Party" and are collectively referred to as the "Parties".

**RECITALS**

A. City has determined that there is a need for professional civil engineering design services for the Downtown Event Center, City Project No. 15-07, (the "Project").

B. Consultant has submitted to City a proposal to provide professional civil engineering design services to City for the Project under the terms of this Agreement.

C. Consultant is qualified by virtue of its experience, training, education, reputation, and expertise to provide these services and has agreed to provide such services as provided in this Agreement.

D. City desires to retain Consultant to provide such professional services.

In consideration of these promises and mutual obligations, covenants, and conditions, the Parties agree as follows:

**AGREEMENT**

**1. SERVICES OF CONSULTANT**

**1.1 Scope of Services.** In compliance with all terms and conditions of this Agreement, Consultant agrees to perform the professional services set forth in the Scope of Services described in Exhibit "A" (the "Services" or "Work") , which is attached and incorporated by reference. As a material inducement to the City entering into this Agreement, Consultant represents and warrants that Consultant is a provider of first class work and professional services and that Consultant is experienced in performing the Work and Services contemplated and, in light of such status and experience, Consultant covenants that it shall follow the highest professional standards in performing the Work and Services required in this Agreement. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized as high quality among well-qualified and experienced professionals performing similar work under similar circumstances.

**1.2 Contract Documents.** The Agreement between the Parties shall consist of the following: (1) this Agreement; (2) the Scope of Services; (3) the Consultant's signed, original proposal submitted to the City ("Consultant's Proposal"), (collectively referred to as the "Contract Documents"). The Consultant's Proposal is attached as Exhibits "B," and is incorporated by reference and made a part of this Agreement. The Scope of Services shall include the Consultant's Proposal. All provisions of the Scope of Services and the Consultant's Proposal shall be binding on the Parties. Should any conflict or inconsistency exist in the Contract Documents, the conflict or inconsistency shall be resolved by applying the provisions in the highest priority document, which shall be determined in the following order of priority: (1<sup>st</sup>) the provisions of the Scope of Services (Exhibit "A"); (2<sup>nd</sup>) the terms of this Agreement; and, (3<sup>rd</sup>) the provisions of the Consultant's Proposal (Exhibit "B").

**1.3 Compliance with Law.** Consultant warrants that all Services rendered shall be performed in accordance with all applicable federal, state, and local laws, statutes, ordinances lawful orders, rules, and regulations.

**1.4 Licenses, Permits, Fees, and Assessments.** Consultant represents and warrants to City that it has obtained all licenses, permits, qualifications, and approvals of whatever nature that are legally required to practice its profession and perform the Work and Services required by this Agreement. Consultant represents and warrants to City that Consultant shall, at its sole cost and expense, keep in effect at all times during the term of this Agreement, any license, permit, qualification, or approval that is legally required for Consultant to perform the Work and Services under this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments, and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the Work and Services required by this Agreement. Consultant shall indemnify, defend, and hold harmless City against any such fees, assessments, taxes penalties, or interest levied, assessed, or imposed against City to the fullest extent permitted by law.

**1.5 Familiarity with Work.** By executing this Agreement, Consultant warrants that Consultant (a) has thoroughly investigated and considered the Scope of Services to be performed, (b) has carefully considered how the Services should be performed, and (c) fully understands the facilities, difficulties, and restrictions attending performance of the Services under this Agreement. If the Services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of any Services. Should the Consultant discover any latent or unknown conditions that will materially affect the performance of the Services, Consultant shall immediately inform the City of such fact and shall not proceed except at Consultant's risk until written instructions are received from the City.

**1.6 Care of Work.** Consultant shall adopt reasonable methods during the term of the Agreement to furnish continuous protection to the Work and the equipment, materials, papers, documents, plans, studies, and/or other components to prevent

losses or damages. Consultant shall be responsible for all such damages, to persons or property, until acceptance of the Work by the City, except such losses or damages as may be caused by City's own negligence.

**1.7 Further Responsibilities of Parties.** Parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Parties agree to act in good faith to execute all instruments, prepare all documents, and take all actions as may be reasonably necessary to carry out the purposes of this Agreement.

**1.8 Additional Services.** City shall have the right at any time during the performance of the Services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to, or deducting from such Work. No such extra work may be undertaken unless a written order is first given by the City to the Consultant, incorporating any adjustment in (i) the Maximum Contract Amount, as defined below, and/or (ii) the time to perform this Agreement. Any adjustments must also be approved in writing by the Consultant. Any increase in compensation of up to twenty-five percent (25%) of the Maximum Contract Amount or \$25,000, whichever is less, or in the time to perform of up to thirty (30) days, may be approved by the City Manager, or his designee, as may be needed to perform any extra work. Any greater increases, occurring either separately or cumulatively, must be approved by the Palm Springs City Council. It is expressly understood by Consultant that the provisions of this section shall not apply to the services specifically set forth or reasonably contemplated within the Scope of Services.

## **2. COMPENSATION**

**2.1 Maximum Contract Amount.** For the Services rendered under this Agreement, Consultant shall be compensated by City in accordance with the Schedule of Compensation, which is attached as Exhibit "D" and incorporated in this Agreement by reference. Compensation shall not exceed the maximum contract amount of **One Hundred Seventy Thousand Seven Hundred Dollars, (\$170,700.00)** ("Maximum Contract Amount"), except as may be provided under Section 1.8. The method of compensation shall be as set forth in Exhibit "C." Compensation for necessary expenditures for reproduction costs, telephone expenses, and transportation expenses must be approved in advance by the Contract Officer designated under Section 4.2 and will only be approved if such expenses are also specified in the Schedule of Compensation. The Maximum Contract Amount shall include the attendance of Consultant at all Project meetings reasonably deemed necessary by the City. Consultant shall not be entitled to any increase in the Maximum Contract Amount for attending these meetings. Consultant accepts the risk that the services identified in the Scope of Services may be more costly and/or time-consuming than Consultant anticipates, that Consultant shall not be entitled to additional compensation, and that the provisions of Section 1.8 shall not be applicable to the services identified in the Scope of Services. The maximum amount of city's payment obligation under this section is the amount specified in this Agreement. If the City's maximum payment obligation is reached before the Consultant's Services under this Agreement are completed,

Consultant shall complete the Work and City shall not be liable for payment beyond the Maximum Contract Amount.

**2.2. Method of Payment.** Unless another method of payment is specified in the Schedule of Compensation (Exhibit "C"), in any month in which Consultant wishes to receive payment, Consultant shall submit to the City an invoice for services rendered prior to the date of the invoice. The invoice shall be in a form approved by the City's Finance Director and must be submitted no later than the tenth (10) working day of such month. Such requests shall be based upon the amount and value of the services performed by Consultant and accompanied by such reporting data including an itemized breakdown of all costs incurred and tasks performed during the period covered by the invoice, as may be required by the City. City shall use reasonable efforts to make payments to Consultant within forty-five (45) days after receipt of the invoice or as soon as is reasonably practical. There shall be a maximum of one payment per month.

**2.3 Changes in Scope.** In the event any change or changes in the Scope of Services is requested by City, Parties shall execute a written amendment to this Agreement, specifying all proposed amendments, including, but not limited to, any additional fees. An amendment may be entered into:

A. To provide for revisions or modifications to documents, work product, or work, when required by the enactment or revision of any subsequent law; or

B. To provide for additional services not included in this Agreement or not customarily furnished in accordance with generally accepted practice in Consultant's profession.

**2.4 Appropriations.** This Agreement is subject to and contingent upon funds being appropriated by the City Council for each fiscal year covered by the Agreement. If such appropriations are not made, this Agreement shall automatically terminate without penalty to the City.

### **3. SCHEDULE OF PERFORMANCE**

**3.1 Time of Essence.** Time is of the essence in the performance of this Agreement. The time for completion of the services to be performed by Consultant is an essential condition of this Agreement. Consultant shall prosecute regularly and diligently the Work of this Agreement according to the agreed upon attached Schedule of Performance (Exhibit "D"), incorporated by reference.

**3.2 Schedule of Performance.** Consultant shall commence the Services under this Agreement upon receipt of a written notice to proceed and shall perform all Services within the time period(s) established in the Schedule of Performance. When requested by Consultant, extensions to the time period(s) specified in the Schedule of Performance may be approved in writing by the Contract Officer, but such extensions shall not exceed one hundred eighty (180) days cumulatively; however, the City shall not be obligated to grant such an extension.

**3.3 Force Majeure.** The time period(s) specified in the Schedule of Performance for performance of the Services rendered under this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant (financial inability excepted) if Consultant, within ten (10) days of the commencement of such delay, notifies the Contract Officer in writing of the causes of the delay. Unforeseeable causes include, but are not limited to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, and/or acts of any governmental agency, including the City. The City Manager shall ascertain the facts and the extent of delay, and extend the time for performing the Services for the period of the enforced delay when and if in the judgment of the City Manager such delay is justified. The City Manager's determination shall be final and conclusive upon the Parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement under this section.

**3.4 Term.** Unless earlier terminated under this Agreement, this Agreement shall commence upon the effective date of this Agreement and continue in full force and effect until completion of the Services. However, the term shall not exceed three (3) years from the commencement date, except as otherwise provided in the Schedule of Performance described in Section 3.2 above. Any extension must be through mutual written agreement of the Parties.

**3.5 Termination Prior to Expiration of Term.** City may terminate this Agreement for its convenience at any time, without cause, in whole or in part, upon giving Consultant thirty (30) days written notice. Where termination is due to the fault of Consultant and constitutes an immediate danger to health, safety, and general welfare, the period of notice shall be such shorter time as may be determined by the City. Upon such notice, City shall pay Consultant for Services performed through the date of termination. Upon receipt of such notice, Consultant shall immediately cease all work under this Agreement, unless stated otherwise in the notice or by written authorization of the Contract Officer. After such notice, Consultant shall have no further claims against the City under this Agreement. Upon termination of the Agreement under this section, Consultant shall submit to the City an invoice for work and services performed prior to the date of termination. Consultant may terminate this Agreement, with or without cause, upon sixty (60) days written notice to the City, except that where termination is due to material default by the City, the period of notice may be such shorter time as the Consultant may determine.

#### **4. COORDINATION OF WORK**

**4.1 Representative of Consultant.** The following principal of Consultant is designated as being the principal and representative of Consultant authorized to act in its behalf and make all decisions with respect to the Services to be performed under this

Agreement: **Jerry Ogburn**. It is expressly understood that the experience, knowledge, education, capability, expertise, and reputation of the foregoing principal is a substantial inducement for City to enter into this Agreement. Therefore, the foregoing principal shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services performed hereunder. The foregoing principal may not be changed by Consultant without prior written approval of the Contract Officer.

**4.2 Contract Officer.** The Contract Officer shall be the City Manager or his/her designee ("Contract Officer"). Consultant shall be responsible for keeping the Contract Officer fully informed of the progress of the performance of the services. Consultant shall refer any decisions that must be made by City to the Contract Officer. Unless otherwise specified, any approval of City shall mean the approval of the Contract Officer.

**4.3 Prohibition Against Subcontracting or Assignments.** The experience, knowledge, capability, expertise, and reputation of Consultant, its principals and employees, were a substantial inducement for City to enter into this Agreement. Therefore, Consultant shall not assign full or partial performance of this Agreement, nor any monies due, voluntarily or by operation of law, without the prior written consent of City. Consultant shall not contract with any other entity to perform the Services required under this Agreement without the prior written consent of City. If Consultant is permitted to subcontract any part of this Agreement by City, Consultant shall be responsible to City for the acts and omissions of its subcontractor(s) in the same manner as it is for persons directly employed. Nothing contained in this Agreement shall create any contractual relationships between any subcontractor and City. All persons engaged in the Work will be considered employees of Consultant. City will deal directly with and will make all payments to Consultant. In addition, neither this Agreement nor any interest in this Agreement may be transferred, assigned, conveyed, hypothecated, or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written consent of City. Transfers restricted in this Agreement shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release Consultant or any surety of Consultant from any liability under this Agreement without the express written consent of City.

**4.4 Independent Contractor.** The legal relationship between the Parties is that of an independent contractor, and nothing shall be deemed to make Consultant a City employee.

A. During the performance of this Agreement, Consultant and its officers, employees, and agents shall act in an independent capacity and shall not act or represent themselves as City officers or employees. The personnel performing the Services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither City nor any of its officers,



employees, or agents shall have control over the conduct of Consultant or any of its officers, employees, or agents, except as set forth in this Agreement. Consultant, its officers, employees, or agents shall not maintain an office or any other type of fixed business location at City's offices. City shall have no voice in the selection, discharge, supervision, or control of Consultant's employees, servants, representatives, or agents, or in fixing their number, compensation, or hours of service. Consultant shall pay all wages, salaries, and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, including but not limited to social security income tax withholding, unemployment compensation, workers' compensation, and other similar matters. City shall not in any way or for any purpose be deemed to be a partner of Consultant in its business or otherwise a joint venturer or a member of any joint enterprise with Consultant.

B. Consultant shall not have any authority to bind City in any manner. This includes the power to incur any debt, obligation, or liability against City.

C. No City benefits shall be available to Consultant, its officers, employees, or agents in connection with any performance under this Agreement. Except for professional fees paid to Consultant as provided for in this Agreement, City shall not pay salaries, wages, or other compensation to Consultant for the performance of Services under this Agreement. City shall not be liable for compensation or indemnification to Consultant, its officers, employees, or agents, for injury or sickness arising out of performing Services. If for any reason any court or governmental agency determines that the City has financial obligations, other than under Section 2 and Subsection 1.8 in this Agreement, of any nature relating to salary, taxes, or benefits of Consultant's officers, employees, servants, representatives, subcontractors, or agents, Consultant shall indemnify City for all such financial obligations.

## **5. INSURANCE**

**5.1 Types of Insurance.** Consultant shall procure and maintain, at its sole cost and expense, the insurance described below. The insurance shall be for the duration of this Agreement and includes any extensions, unless otherwise specified in this Agreement. The insurance shall be procured in a form and content satisfactory to City. The insurance shall apply against claims which may arise from the Consultant's performance of Work under this Agreement, including Consultant's agents, representatives, or employees. In the event the City Manager determines that the Work or Services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the City Manager or his designee. Consultant shall immediately substitute any insurer whose A.M. Best rating drops below the levels specified in this Agreement. Except as otherwise authorized below for professional liability (errors and omissions) insurance, all insurance provided under this Agreement shall be on an occurrence basis. The minimum amount of insurance required shall be as follows:

A. Errors and Omissions Insurance. Consultant shall obtain and maintain in full force and effect throughout the term of this Agreement, standard industry form professional liability (errors and omissions) insurance coverage in an amount of not less than one million dollars (\$1,000,000.00) per occurrence and two-million dollars (\$2,000,000.00) annual aggregate, in accordance with the provisions of this section.

(1) Consultant shall either: (a) certify in writing to the City that Consultant is unaware of any professional liability claims made against Consultant and is unaware of any facts which may lead to such a claim against Consultant; or (b) if Consultant does not provide the certification under (a), Consultant shall procure from the professional liability insurer an endorsement providing that the required limits of the policy shall apply separately to claims arising from errors and omissions in the rendition of services under this Agreement.

(2) If the policy of insurance is written on a "claims made" basis, the policy shall be continued in full force and effect at all times during the term of this Agreement, and for a period of three (3) years from the date of the completion of the Services provided hereunder. In the event of termination of the policy during this period, Consultant shall obtain continuing insurance coverage for the prior acts or omissions of Consultant during the course of performing Services under the terms of this Agreement. The coverage shall be evidenced by either a new policy evidencing no gap in coverage, or by obtaining separate extended "tail" coverage with the present or new carrier or other insurance arrangements providing for complete coverage, either of which shall be subject to the written approval by the City Manager.

(3) In the event the policy of insurance is written on an "occurrence" basis, the policy shall be continued in full force and effect during the term of this Agreement, or until completion of the Services provided for in this Agreement, whichever is later. In the event of termination of the policy during this period, new coverage shall immediately be obtained to ensure coverage during the entire course of performing the Services under the terms of this Agreement.

B. Workers' Compensation Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, workers' compensation insurance in at least the minimum statutory amounts, and in compliance with all other statutory requirements, as required by the State of California. Consultant agrees to waive and obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies. If Consultant has no employees, Consultant shall complete the City's Request for Waiver of Workers' Compensation Insurance Requirement form.

C. Commercial General Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of commercial general liability insurance written on a per occurrence basis with a

combined single limit of at least one million dollars (\$1,000,000.00) and two million dollars (\$2,000,000.00) general aggregate for bodily injury and property damage including coverages for contractual liability, personal injury, independent contractors, broad form property damage, products and completed operations.

D. Business Automobile Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of business automobile liability insurance written on a per occurrence basis with a single limit liability in the amount of one million dollars (\$1,000,000.00) bodily injury and property damage. The policy shall include coverage for owned, non-owned, leased, and hired cars.

E. Employer Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of employer liability insurance written on a per occurrence basis with a policy limit of at least one million dollars (\$1,000,000.00) for bodily injury or disease.

**5.2 Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to and approved by the City Manager or his/her designee prior to commencing any work or services under this Agreement. Consultant guarantees payment of all deductibles and self-insured retentions. City reserves the right to reject deductibles or self-insured retentions in excess of \$10,000, and the City Manager or his/her designee may require evidence of pending claims and claims history as well as evidence of Consultant's ability to pay claims for all deductible amounts and self-insured retentions proposed in excess of \$10,000.

**5.3 Other Insurance Requirements.** The following provisions shall apply to the insurance policies required of Consultant under this Agreement:

5.3.1 For any claims related to this Agreement, Consultant's coverage shall be primary insurance with respect to the City and its officers, council members, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City and its officers, council members, officials, employees, agents, and volunteers shall be in excess of Consultant's insurance and shall not contribute with it.

5.3.2 Any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to City and its officers, council members, officials, employees, agents, and volunteers.

5.3.3 All insurance coverage and limits provided by Consultant and available or applicable to this Agreement are intended to apply to each insured, including additional insureds, against whom a claim is made or suit is brought to the full extent of the policies. Nothing

contained in this Agreement or any other agreement relating to the City or its operations shall limit the application of such insurance coverage.

- 5.3.4 No required insurance coverages may include any limiting endorsement which substantially impairs the coverages set forth in this Agreement (e.g., elimination of contractual liability or reduction of discovery period), unless the endorsement has first been submitted to the City Manager and approved in writing.
- 5.3.5 Consultant agrees to require its insurer to modify insurance endorsements to delete any exculpatory wording stating that failure of the insurer to mail written notice of cancellation imposes no obligation, or that any party will "endeavor" (as opposed to being required) to comply with the requirements of the endorsements. Certificates of insurance will not be accepted in lieu of required endorsements, and submittal of certificates without required endorsements may delay commencement of the Project. It is Consultant's obligation to ensure timely compliance with all insurance submittal requirements as provided in this Agreement.
- 5.3.6 Consultant agrees to ensure that subcontractors, and any other parties involved with the Project who are brought onto or involved in the Project by Consultant, provide the same minimum insurance coverage required of Consultant. Consultant agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this section. Consultant agrees that upon request, all agreements with subcontractors and others engaged in the Project will be submitted to the City for review.
- 5.3.7 Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any insurance requirement in no way imposes any additional obligations on the City nor does it waive any rights in this or any other regard.
- 5.3.8 Consultant shall provide proof that policies of insurance required in this Agreement, expiring during the term of this Agreement, have been renewed or replaced with other policies providing at least the same coverage. Proof that such coverage has been ordered shall be submitted prior to expiration. Endorsements as required in this Agreement applicable to the renewing or new coverage shall be provided to City no later than ten (10) days prior to expiration of the lapsing coverage.

- 5.3.9 Requirements of specific insurance coverage features or limits contained in this section are not intended as limitations on coverage, limits, or other requirements, or as a waiver of any coverage normally provided by any given policy. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue, and is not intended by any party or insured to be limiting or all-inclusive.
- 5.3.10 The requirements in this section supersede all other sections and provisions of this Agreement to the extent that any other section or provision conflicts with or impair the provisions of this section.
- 5.3.11 Consultant agrees to provide immediate notice to City of any claim or loss against Consultant arising out of the Work performed under this Agreement and for any other claim or loss which may reduce the insurance available to pay claims arising out of this Agreement. City assumes no obligation or liability by such notice, but has the right (but not the duty) to monitor the handling of any such claim or claims if they are likely to involve City, or to reduce or dilute insurance available for payment of potential claims.
- 5.3.12 Consultant agrees that the provisions of this section shall not be construed as limiting in any way the extent to which the Consultant may be held responsible for the payment of damages resulting from the Consultant's activities or the activities of any person or person for which the Consultant is otherwise responsible.

**5.4 Sufficiency of Insurers.** Insurance required in this Agreement shall be provided by authorized insurers in good standing with the State of California. Coverage shall be provided by insurers admitted in the State of California with an A.M. Best's Key Rating of B++, Class VII, or better, unless such requirements are waived in writing by the City Manager or his designee due to unique circumstances.

**5.5 Verification of Coverage.** Consultant shall furnish City with both certificates of insurance and endorsements, including additional insured endorsements, affecting all of the coverages required by this Agreement. The certificates and endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All proof of insurance is to be received and approved by the City before work commences. City reserves the right to require Consultant's insurers to provide complete, certified copies of all required insurance policies at any time. Additional insured endorsements are not required for Errors and Omissions and Workers' Compensation policies.

Verification of Insurance coverage may be provided by: (1) an approved General and/or Auto Liability Endorsement Form for the City of Palm Springs or (2) an

acceptable Certificate of Liability Insurance Coverage with an approved Additional Insured Endorsement with the following endorsements stated on the certificate:

1. *"The City of Palm Springs, its officials, employees, and agents are named as an additional insured..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

2. *"This insurance is primary and non-contributory over any insurance or self-insurance the City may have..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

3. *"Should any of the above described policies be canceled before the expiration date thereof, the issuing company will mail 30 days written notice to the Certificate Holder named." Language such as, "endeavor to" mail and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representative" is not acceptable and must be crossed out.*

4. Both the Workers' Compensation and Employers' Liability policies shall contain the insurer's waiver of subrogation in favor of City, its elected officials, officers, employees, agents, and volunteers.

In addition to the endorsements listed above, the City of Palm Springs shall be named the certificate holder on the policies. All certificates of insurance and endorsements are to be received and approved by the City before work commences. All certificates of insurance must be authorized by a person with authority to bind coverage, whether that is the authorized agent/broker or insurance underwriter. Failure to obtain the required documents prior to the commencement of work shall not waive the Consultant's obligation to provide them.

## 6. INDEMNIFICATION

**6.1 Indemnification and Reimbursement.** To the fullest extent permitted by law, Consultant shall defend (at Consultant's sole cost and expense), indemnify, protect, and hold harmless City, its elected officials, officers, employees, agents, and volunteers (collectively the "Indemnified Parties"), from and against any and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards, settlements, damages, demands, orders, penalties, and expenses including legal costs and attorney fees (collectively "Claims"), including but not limited to Claims arising from injuries to or death of persons (Consultant's employees included), for damage to property, including property owned by City, from any violation of any federal, state, or local law or ordinance, and from errors and omissions committed by Consultant, its officers, employees, representatives, and agents, that arise out of or relate to Consultant's performance under this Agreement. This indemnification clause excludes Claims arising from the sole negligence or willful misconduct of the City, its elected officials, officers, employees, agents, and volunteers. Under no circumstances shall the insurance requirements and limits set forth in this Agreement be construed to limit

Consultant's indemnification obligation or other liability under this Agreement. Consultant's indemnification obligation shall survive the expiration or earlier termination of this Agreement until all actions against the Indemnified Parties for such matters indemnified are fully and finally barred by the applicable statute of limitations or, if an action is timely filed, until such action is final. This provision is intended for the benefit of third party Indemnified Parties not otherwise a party to this Agreement.

**6.2 Design Professional Services Indemnification and Reimbursement.** If the Agreement is determined to be a "design professional services agreement" and Consultant is a "design professional" under California Civil Code Section 2782.8, then:

A. To the fullest extent permitted by law, Consultant shall indemnify, defend (at Consultant's sole cost and expense), protect and hold harmless City and its elected officials, officers, employees, agents and volunteers and all other public agencies whose approval of the project is required, (individually "Indemnified Party"; collectively "Indemnified Parties") against any and all liabilities, claims, judgments, arbitration awards, settlements, costs, demands, orders and penalties (collectively "Claims"), including but not limited to Claims arising from injuries or death of persons (Consultant's employees included) and damage to property, which Claims arise out of, pertain to, or are related to the negligence, recklessness or willful misconduct of Consultant, its agents, employees, or subcontractors, or arise from Consultant's negligent, reckless or willful performance of or failure to perform any term, provision, covenant or condition of this Agreement ("Indemnified Claims"), but Consultant's liability for Indemnified Claims shall be reduced to the extent such Claims arise from the negligence, recklessness or willful misconduct of the City and its elected officials, officers, employees, agents and volunteers.

B. The Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to execute an Indemnification Agreement adopting the indemnity provisions in sub-section 6.1 in favor of the Indemnified Parties. In addition, Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to obtain insurance that is consistent with the Insurance provisions as set forth in this Agreement, as well as any other insurance that may be required by Contract Officer.

## **7. REPORTS AND RECORDS**

**7.1 Accounting Records.** Consultant shall keep complete, accurate, and detailed accounts of all time, costs, expenses, and expenditures pertaining in any way to this Agreement. Consultant shall keep such books and records as shall be necessary to properly perform the Services required by this Agreement and to enable the Contract Officer to evaluate the performance of such Services. The Contract Officer shall have full and free access to such books and records at all reasonable times, including the right to inspect, copy, audit, and make records and transcripts from such records.

**7.2 Reports.** Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the Services required by this Agreement, or as the Contract Officer shall require. Consultant acknowledges that the City is greatly concerned about the cost of the Work and Services to be performed under this Agreement. For this reason, Consultant agrees that Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the contemplated Work or Services. If Consultant is providing design services, Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost for the project being designed if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the design services.

**7.3 Ownership of Documents.** All drawings, specifications, reports, records, documents, memoranda, correspondence, computations, and other materials prepared by Consultant, its employees, subcontractors, and agents in the performance of this Agreement shall be the property of City and shall be promptly delivered to City upon request of the Contract Officer or upon the termination of this Agreement. Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership of the documents and materials. Any use of such completed documents for other projects and/or use of incomplete documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and the City shall indemnify the Consultant for all resulting damages. Consultant may retain copies of such documents for their own use. Consultant shall have an unrestricted right to use the concepts embodied in this Agreement. Consultant shall ensure that all its subcontractors shall provide for assignment to City of any documents or materials prepared by them. In the event Consultant fails to secure such assignment, Consultant shall indemnify City for all resulting damages.

**7.4 Release of Documents.** All drawings, specifications, reports, records, documents, and other materials prepared by Consultant in the performance of services under this Agreement shall not be released publicly without the prior written approval of the Contract Officer. All information gained by Consultant in the performance of this Agreement shall be considered confidential and shall not be released by Consultant without City's prior written authorization.

**7.5 Audit and Inspection of Records.** After receipt of reasonable notice and during the regular business hours of City, Consultant shall provide City, or other agents of City, such access to Consultant's books, records, payroll documents, and facilities as City deems necessary to examine, copy, audit, and inspect all accounting books, records, work data, documents, and activities directly related to Consultant's performance under this Agreement. Consultant shall maintain such books, records, data, and documents in accordance with generally accepted accounting principles and shall clearly identify and make such items readily accessible to such parties during the



term of this Agreement and for a period of three (3) years from the date of final payment by City hereunder.

## **8. ENFORCEMENT OF AGREEMENT**

**8.1 California Law and Venue.** This Agreement shall be construed and interpreted both as to validity and as to performance of the Parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such County, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

**8.2 Interpretation.** This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties. The terms of this Agreement are contractual and the result of negotiation between the Parties. Accordingly, any rule of construction of contracts (including, without limitation, California Civil Code Section 1654) that ambiguities are to be construed against the drafting party, shall not be employed in the interpretation of this Agreement. The caption headings of the various sections and paragraphs of this Agreement are for convenience and identification purposes only and shall not be deemed to limit, expand, or define the contents of the respective sections or paragraphs.

**8.3 Default of Consultant.** Consultant's failure to comply with any provision of this Agreement shall constitute a default.

A. If the City Manager, or his designee, determines that Consultant is in default in the performance of any of the terms or conditions of this Agreement, he/she shall notify Consultant in writing of such default. Consultant shall have ten (10) days, or such longer period as City may designate, to cure the default by rendering satisfactory performance. In the event Consultant fails to cure its default within such period of time, City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice of any remedy to which City may be entitled at law, in equity, or under this Agreement. Consultant shall be liable for all reasonable costs incurred by City as a result of such default. Compliance with the provisions of this section shall not constitute a waiver of any City right to take legal action in the event that the dispute is not cured, provided that nothing shall limit City's right to terminate this Agreement without cause under Section 3.5.

B. If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 8.3A, take over the work and prosecute the same to completion by contract or otherwise. The Consultant shall be liable to the extent that the total cost for completion of the Services required hereunder exceeds the Maximum Contract Amount (provided that the City shall use reasonable efforts to mitigate such damages). The City may

withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated. The withholding or failure to withhold payments to Consultant shall not limit Consultant's liability for completion of the Services as provided in this Agreement.

**8.4 Waiver.** No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought. Any waiver by the Parties of any default or breach of any covenant, condition, or term contained in this Agreement, shall not be construed to be a waiver of any subsequent or other default or breach, nor shall failure by the Parties to require exact, full, and complete compliance with any of the covenants, conditions, or terms contained in this Agreement be construed as changing the terms of this Agreement in any manner or preventing the Parties from enforcing the full provisions.

**8.5 Rights and Remedies Cumulative.** Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

**8.6 Legal Action.** In addition to any other rights or remedies, either Party may take legal action, in law or in equity, to cure, correct, remedy or recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement.

**8.7 Attorney Fees.** In the event any dispute between the Parties with respect to this Agreement results in litigation or any non-judicial proceeding, the prevailing Party shall be entitled, in addition to such other relief as may be granted, to recover from the non-prevailing Party all reasonable costs and expenses. These include but are not limited to reasonable attorney fees, expert consultant fees, court costs and all fees, costs, and expenses incurred in any appeal or in collection of any judgment entered in such proceeding. To the extent authorized by law, in the event of a dismissal by the plaintiff or petitioner of the litigation or non-judicial proceeding within thirty (30) days of the date set for trial or hearing, the other Party shall be deemed to be the prevailing Party in such litigation or proceeding.

## 9. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION

**9.1 Non-liability of City Officers and Employees.** No officer or employee of the City shall be personally liable to the Consultant, or any successor-in-interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

**9.2 Conflict of Interest.** No officer or employee of the City shall have any direct or indirect financial interest in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects their financial interest or the financial interest of any corporation, partnership, or association in which he/she is, directly or indirectly, interested in violation of any state statute or regulation. Consultant warrants that Consultant has not paid or given, and will not pay or give, any third party any money or other consideration in exchange for obtaining this Agreement.

**9.3 Covenant Against Discrimination.** In connection with its performance under this Agreement, Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, marital status, ancestry, or national origin. Consultant shall ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, age, marital status, ancestry, or national origin. Such actions 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.

## 10. MISCELLANEOUS PROVISIONS

**10.1 Patent and Copyright Infringement.** To the fullest extent permissible under law, and in lieu of any other warranty by City or Consultant against patent or copyright infringement, statutory or otherwise:

A. It is agreed that Consultant shall defend at its expense any claim or suit against City on account of any allegation that any item furnished under this Agreement, or the normal use or sale arising out of the performance of this Agreement, infringes upon any presently existing U.S. letters patent or copyright and Consultant shall pay all costs and damages finally awarded in any such suit or claim, provided that Consultant is promptly notified in writing of the suit or claim and given authority, information and assistance at Consultant's expense for the defense of same, and provided such suit or claim arises out of, pertains to, or is related to the negligence, recklessness or willful misconduct of Consultant. However, Consultant will not indemnify City if the suit or claim results from: (1) City's alteration of a deliverable, such that City's alteration of such deliverable created the infringement upon any presently existing U.S. letters patent or copyright; or (2) the use of a deliverable in combination with other material not provided by Consultant when it is such use in combination which

infringes upon an existing U.S. letters patent or copyright.

B. Consultant shall have sole control of the defense of any such claim or suit and all negotiations for settlement in the event City fails to cooperate in the defense of any suit or claim, provided, however, that such defense shall be at Consultant's expense. Consultant shall not be obligated to indemnify City under any settlement that is made without Consultant's consent, which shall not be unreasonably withheld. If the use or sale of such item is enjoined as a result of the suit or claim, Consultant, at no expense to City, shall obtain for City the right to use and sell the item, or shall substitute an equivalent item acceptable to City and extend this patent and copyright indemnity thereto.

**10.2 Notice.** Any notice, demand, request, consent, approval, or communication that either party desires, or is required to give to the other party or any other person shall be in writing. All notices shall be personally delivered, sent by pre-paid First Class U.S. Mail, registered or certified mail, postage prepaid, return receipt requested, or delivered or sent by facsimile with attached evidence of completed transmission. All notices shall be deemed received upon the earlier of (i) the date of delivery to the address of the person to receive such notice if delivered personally or by messenger or overnight courier; (ii) five (5) business days after the date of posting by the United States Post Office if by mail; or (iii) when sent if given by facsimile. Any notice, request, demand, direction, or other communication sent by facsimile must be confirmed within forty-eight (48) hours by letter mailed or delivered. Other forms of electronic transmission such as e-mails, text messages, and instant messages are not acceptable manners of notice required hereunder. Notices or other communications shall be addressed as follows:

To City: City of Palm springs  
Attention: City Manager & City Clerk  
3200 E. Tahquitz Canyon Way  
Palm springs, California 92262  
Telephone: (760) 323-8204  
Facsimile: (760) 323-8332

To Consultant: MSA Consulting, Inc.  
34200 Bob Hope Drive  
Rancho Mirage, CA 92270  
Attention: Jerry Ogburn  
Telephone: (760) 320-9811  
Facsimile: (760) 323-7893

**10.3 Integrated Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior negotiations, arrangements, agreements, representations, and understandings, if any, made by or among the Parties with respect to the subject matter in this Agreement.

**10.4 Amendment.** No amendments or other modifications of this Agreement shall be binding unless through written agreement by all Parties.

**10.5 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Agreement shall be determined to be invalid by a final judgment or decree of a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of that provision, or the remaining provisions of this Agreement unless the invalid provision is so material that its invalidity deprives either Party of the basic benefit of their bargain or renders this Agreement meaningless.

**10.5 Successors in Interest.** This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assignees.

**10.6 Third Party Beneficiary.** Except as may be expressly provided for in this Agreement, nothing contained in this Agreement is intended to confer, nor shall this Agreement be construed as conferring, any rights, including, without limitation, any rights as a third-party beneficiary or otherwise, upon any entity or person not a party to this Agreement.

**10.7 Recitals.** The above-referenced Recitals are hereby incorporated into the Agreement as though fully set forth in this Agreement and each Party acknowledges and agrees that such Party is bound, for purposes of this Agreement, by the same.

**10.8. Corporate Authority.** Each of the undersigned represents and warrants that (i) the Party for which he or she is executing this Agreement is duly authorized and existing, (ii) he or she is duly authorized to execute and deliver this Agreement on behalf of the Party for which he or she is signing, (iii) by so executing this Agreement, the Party for which he or she is signing is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which the Party for which he or she is signing is bound.

***[SIGNATURES ON NEXT PAGE]***

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the dates stated below.

**"CITY"**  
**City of Palm Springs**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
David H. Ready  
City Manager

**APPROVED AS TO FORM:**

**ATTEST**

By: \_\_\_\_\_  
Douglas C. Holland,  
City Attorney

By: \_\_\_\_\_  
James Thompson,  
City Clerk

**APPROVED BY CITY COUNCIL:**

**Date:** \_\_\_\_\_ **Agreement No.** \_\_\_\_\_

Corporations require two notarized signatures. One signature must be from Chairman of Board, President, or any Vice President. The second signature must be from the Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, or Chief Financial Officer.

**CONSULTANT NAME:**

MSA Consulting, Inc.  
34200 Bob Hope Drive  
Rancho Mirage, CA 92270

By \_\_\_\_\_  
Signature (Notarized)

By \_\_\_\_\_  
Signature (Notarized)

## **EXHIBIT "A"**

### **SCOPE OF SERVICES**

Consultant shall provide all required civil engineering design services, including project management and coordinating with the various other consultants engaged by City, necessary to complete the development of a final design for the Downtown Event Center space with maximum capacity of 3,000 as identified on the schematic design included herein this Exhibit "A". Such civil engineering elements generally include:

- Revisions to and refinement of the conceptual design
- Preliminary grading and drainage plan
- Preliminary utility plans
- Preliminary cost estimates

Following City's approval of the final design, Consultant shall prepare full and complete construction drawings (plans, specifications and estimates) of the civil engineering elements identified on the final design, with plan and elevation views and associated technical details to facilitate City's bidding for construction.

Consultant shall provide bidding support services as may be necessary and required by City.

Consultant shall provide construction administrative support services as may be necessary and required by City.

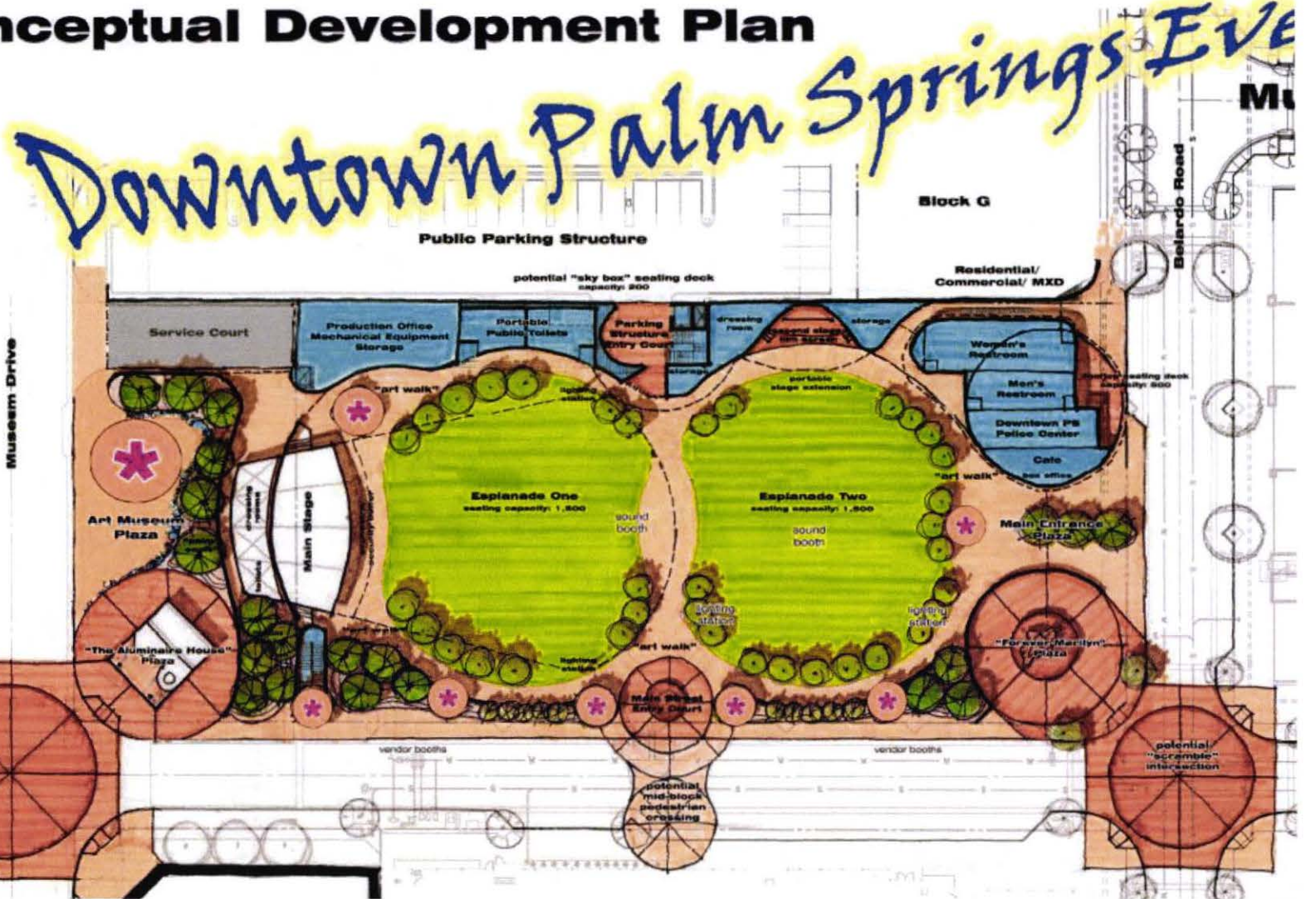
The Consultant's proposal and scope of services, as referenced in its letter dated June 5, 2015, is incorporated herein by reference, and as identified on the following Exhibit "B".

# Conceptual Development Plan

# Downtown Palm Springs Eve



Palm Springs Art Museum





**EXHIBIT "B"**  
**CONSULTANT'S PROPOSAL**



**MSA CONSULTING, INC.**  
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**CONTRACT AMENDMENT**

<b>Project:</b> City of Palm Springs Downtown Event Center Phases 2 - 5: Design Development; Construction Documents; Bid Services; Construction Support	<b>MSA Job #:</b> 2182	<b>MSA RFP #:</b> 6153
<b>Initiated for:</b> Marcus Fuller – City of Palm Springs	<b>Client Reference:</b> Agreement dated November 18, 2013	
<b>Date:</b> June 5, 2015	<b>MSA Project Manager:</b> Jerry Ogburn	

The following change is proposed for the above referenced project and is a request to amend the previous established and contracted relationship between MSA Consulting, Inc. and Client and is to act as an addendum to the existing contract established between the two parties (Authorized changes may also impact delivery dates and milestones). The undersigned party desires MSA Consulting, Inc. to provide the following additional goods and services:

**ADDITIONAL SCOPE OF WORK REQUEST:**

**Phase 2 Design Development – Downtown Event Center**

1. Refine Conceptual Design of Phase 1 to reflect consensus input from Palm Springs Art Museum, Wessman Development, and City Council and staff project committee and include design input from Project Landscape Architect (RGA), Architect (Urrutia Architects) and Lighting Designer (MRC Engineering) to further refine and detail Conceptual Design and update 3D Model.
2. Make public outreach presentations to the Palm Springs Planning Commission, Architectural Review Committee and other groups as identified by the City, with a maximum of five presentations total.
3. Final Site Development Plan (CADD), including refinements from public outreach process (MSA).
4. Design Development Phase Project Management to include:
  - i. Overall and ongoing coordination and integration of design team's work efforts and deliverables;
  - ii. Scheduling, agenda preparation and design team coordination for bi-weekly meetings with Owner's Representative; attend bi-weekly meetings;
  - iii. Preparation of bi-weekly design team progress reports; and
  - iv. Provide single point of contact with Owner's Representative throughout the Project.
5. Develop Preliminary Grading and Drainage Plan based on approved Conceptual Plan, including:
  - i. Preliminary storm drain layout, including coordination with Engineer developing area Storm Drain Plan to establish location and configuration of connections(s) to proposed facilities;
  - ii. Three (3) site sections;
  - iii. Typical retaining/seating wall sections;
  - iv. Preliminary demolition plan.

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## EXHIBIT "B" CONSULTANT'S PROPOSAL



**MSA CONSULTING, INC.**

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6. Perform Preliminary Earthwork Calculations to estimate a pre-balanced target pad elevation for current contractor to leave when hauling away existing soil.
7. Prepare Preliminary Water Quality Management Plan (PWQMP) based on preliminary Civil, Architectural, Landscaping and MEP plans.
8. Prepare Master Water/Sewer Exhibit, identifying anticipated layouts of domestic and fire protection water lines and sewer lines, including coordination with Engineer developing area Water and Sewer Plans to establish number and location of new meters and laterals, coordination with Architect and MEP Engineer to establish point of connection for irrigation system, and coordination with Fire Department as needed.
9. Provide input for preliminary Project Budget based on developed preliminary civil plans and input from other design entities.

### **Phase 3 Construction Documents – Downtown Event Center**

10. Construction Document phase project technical coordination to include:
  - i. Overall and ongoing coordination and integration of design team's work efforts and deliverables;
  - ii. Scheduling, agenda preparation and design team coordination for bi-weekly meetings with Owner's Representative;
  - iii. Preparation of bi-weekly design team progress reports; and
  - iv. Provide single point of contact with Owner's Representative throughout project.
11. Perform a Pre-Design Survey to field-verify proposed tie-ins to existing improvements and update AutoCAD drawing of existing topography accordingly.
12. Prepare and process Precise Grading and Drainage Plan through City for approval, based on approved Preliminary Grading and Drainage Plan, including:
  - i. Storm Drain plan, with final layout, elevations, materials, details of structures and appurtenances, and coordinated tie-in(s) to proposed area Storm Drain facilities (designed by others);
  - ii. Verification of earthwork calculations;
  - iii. Letter detailing hydrologic approach.
13. Prepare Water Quality Management Plan (WQMP) based on final Precise Grading and Drainage Plan and final Architectural, Landscaping and MEP plan; process through City for approval.
14. Prepare Storm Water Pollution Prevention Plan (SWPPP); process through State for approval.
15. Prepare Fugitive Dust Control Plan (PM-10); process through City for approval.
16. Prepare Private Domestic Water and Sewer Improvement Plan, including coordinated points of connection to building water and sewer lines within 5 feet of buildings where indicated on Architectural and MEP plans, and coordinated point(s) of connection for irrigation; process through City for approval.

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## EXHIBIT "B" CONSULTANT'S PROPOSAL



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17. Prepare Private Fire Protection Water Improvement Plan; process through City and Fire Department for approval.
18. Provide input for Construction Cost Estimate based on final improvement plans and input from other design entities.

*Note: Services may be provided for Bid Phase and Construction Administration Phase under separate agreement at request of the City of Palm Springs.*

### **Phase 4 Bid Services – Downtown Event Center**

19. Attend one Pre-Bid Meeting.
20. As requested and coordinated by bidding coordinator, provide responses to prospective bidders' questions (RFIs) regarding MSA plans; submit to designated bidding coordinator.
21. Prepare Addenda as needed; submit to designated bidding coordinator.
22. Review bids and provide input on bid selection, as requested by City.

### **Phase 5 Construction Support Services – Downtown Event Center**

23. Consult with Construction Manager, Contractor, Architect and/or other consultants during construction phase of Project.
24. As requested and coordinated by Construction Manager, provide responses to construction-related questions (RFIs) regarding MSA plans and prepare supplemental instructions as needed to support construction documents; submit to Construction Manager.
25. As requested and coordinated by Construction Manager, review shop drawings and submittals associated with MSA plans; submit to Construction Manager.
26. Review proposed changes to or variances from design as necessary; document findings and provide input to City regarding Change Order requests.
27. Provide periodic site visits as necessary to verify general conformity of the construction work to the intent of MSA plans; prepare site visit reports to document observations.

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## EXHIBIT "B" CONSULTANT'S PROPOSAL



**MSA CONSULTING, INC.**  
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### DELIVERABLES:

#### Phase 2 Design Development

- Bi-weekly design team progress reports
- Preliminary Grading and Drainage Plan
- Preliminary Water Quality Management Plan (PWQMP)
- Master Water/Sewer Exhibit
- Preliminary construction quantity data (delivered to Budget Estimator)

#### Phase 3 Construction Documents

- Bi-weekly design team progress reports
- Precise Grading and Drainage Plan
- Water Quality Management Plan (WQMP)
- Storm Water Pollution Prevention Plan (SWPPP)
- Fugitive Dust Control Plan (PM-10)
- Private Domestic Water and Sewer Improvement Plan
- Private Fire Protection Water Improvement Plan
- Construction quantity data (delivered to Cost Estimator)

### CLIENT RESPONSIBILITIES and ASSUMPTIONS:

The following has been taken into consideration in the preparation of this proposal:

1. Client shall provide access to the project site.
2. It is assumed that services performed under this Contract are limited to the Design Development and Construction Documents phases of development, concluding with the delivery of approved Construction Documents, and that all further services, such as those supporting the Bid and Construction phases, are subject to separate agreement.
3. It is assumed that the area subject to design services under this Contract extends to the proposed and/or existing adjacent curbs on the west, south and east, and to existing improvements on the north. Any necessary improvements beyond these limits are considered offsite improvements and are understood to be designed by others. Client shall facilitate and ensure coordination efforts by the designers of offsite improvements for all necessary tie-ins, laterals, services, etc., including modification or revision of offsite improvement plans as necessary.

## EXHIBIT "B" CONSULTANT'S PROPOSAL



**MSA CONSULTING, INC.**

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4. The southwest corner of the site, designated for Museum exhibition use, lies atop the deck of an existing underground parking structure and design of this area will provide only a finished grade surface, referencing the Landscape Plan for details of final dressing and finishing. Proposed water, sewer and drainage lines serving the future use of this area will terminate within five feet of the east wall of the existing underground parking structure.
5. It is assumed that all onsite utilities, specifically sewer, water (domestic and fire protection) and storm drain, to be designed under this Contract are private. Individual utility lines shall terminate at indicated connections to building facilities within 5' of buildings at locations established through coordination with MEP design engineer.
6. Improvement plans are assumed to be based on a single phase of construction.
7. Client shall provide or direct the provision of any and all relevant improvement plans produced by others, including Architectural, Landscape, MEP, offsite Improvements and other relevant plans in pdf and AutoCAD format.
8. It is understood that a cost estimator will be contracted separately by others and MSA will provide relevant quantities to this entity rather than produce separate cost estimates.
9. Client shall provide a current or updated geotechnical report.

### EXCLUSIONS:

Consulting services relating to any of the following tasks are presently specifically excluded from the agreement. Some items, if required, may be provided by Consultant by separate written proposal with additional fees approved by the Client:

1. Special studies, including additional environmental studies, traffic, etc., not otherwise itemized in the Scope of Services above.
2. Geotechnical or soils investigations.
3. Structural engineering design services.
4. Landscaping and irrigation plans.
5. Separate mass or rough grading plans.
6. Dry utility plans and/or coordination.
7. Offsite improvement plans.
8. Design of public sewer or water mains.
9. Separation of improvement plans into multiple construction phases.
10. Re-design or additional production of improvement plans due to changes to the Client-approved Construction Documents.
11. Preparation of easements, including legal descriptions and exhibits.
12. Construction staking.

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## EXHIBIT "C"

### SCHEDULE OF COMPENSATION

Tasks listed below are identical to tasks identified in the Consultant's Proposal incorporated herein as Exhibit "B" of this Agreement. Payments to Consultant shall be made no more frequently than monthly, and shall be based on directly incurred time and materials costs up to and not exceeding the lump sum budgets established per task item of work as indicated herein. Payments shall be made to Consultant based upon completion of tasks, or pro-rata portions thereof noted below, to a maximum of 75% of the lump sum budget established per task until completion of such task item as determined by the Contract Officer. Each request for payment shall contain Consultant's statement of the work or tasks completed or portion performed, with supporting documentation. The determination of payment due shall be made based upon the reasonable judgment of the Contract Officer.

Phase 1 is completed and not a part of this contract.

#### **Phase 2, Design Development Phase**

Task 1, Conceptual Design Refinement	\$25,200
Task 2, Public Outreach Presentations (5 max)	\$4,000
Task 3, Final Site Development Plan	\$3,800
Task 4, Project Management	\$22,200
Task 5, Preliminary Grading and Drainage Plan	\$4,600
Task 6, Preliminary Earthwork Calculations	\$1,200
Task 7, PWQMP	\$4,500
Task 8, Master Water/Sewer Exhibit	\$3,200
Task 9, Preliminary Project Budget	<u>\$1,100</u>
<b>Phase 2 Subtotal</b>	<b>\$69,800</b>

#### **Phase 3, Construction Document Phase**

Task 10, Project Technical Coordination/Meetings	\$22,200
Task 11, Pre-Design Survey	\$3,500
Task 12, Precise Grading and Drainage Plan	\$9,800
Task 13, WQMP	\$1,500
Task 14, SWPPP	\$3,300
Task 15, PM-10	\$2,900
Task 16, Water/Sewer Plans	\$4,800
Task 17, Fire Protection Improvement Plan	\$4,200
Task 18, Construction Cost Estimate	<u>\$700</u>
<b>Phase 3 Subtotal</b>	<b>\$52,900</b>

#### **Phase 4, Bidding Phase**

**\$4,000**

#### **Phase 5, Construction Administration Phase**

**\$44,000**

#### **Grand Total Not to Exceed:**

**\$170,700**

Note, the budgets identified for each phase are not to exceed amounts identified by Consultant to provide sufficient budget to complete the tasks, and shall not be exceeded. Consultant shall receive payment therefore for actual costs incurred, which shall reflect the final cost for each task, up to and not exceeding the budget therefore.

## EXHIBIT "D"

### SCHEDULE OF PERFORMANCE

The Schedule of Performance was prepared by Consultant and shall bind Consultant to completing required deliverables prior to the dates identified herein this Schedule. This Schedule assumes the City shall follow the standard Major Architectural Review process, however, the City reserves the right to identify alternative review processes to expedite the Schedule in the best interests of the City. The City shall be responsible for complying with the review times identified in the Schedule, and for scheduling meeting dates identified in the Schedule; to the extent that City review times are delayed, or meeting dates are revised, Consultant shall nevertheless remain responsible for complying with the subsequent schedule for completion of the next deliverable item or milestone date.

<b>Phase 2: Design Development</b>		<b>Completion Date</b>
<b>1</b>	Council Approval of Schematic Design/Approval to Proceed with Design	7/1/15
<b>2</b>	Design Development (Consultants)	11 weeks
<b>3</b>	First Submittal (Consultants)	9/14/15
<b>4</b>	AAC Review	9/21/15
<b>5</b>	Design Revisions (Consultants)	2 weeks – 10/5/15
<b>6</b>	AAC Approval	10/12/15
<b>7</b>	Submit for PC Review	10/14/15
<b>8</b>	PC Review	10/28/15
<b>9</b>	Design Revisions (Consultants)	2 weeks
<b>10</b>	PC Approval	11/12/15
<b>11</b>	City Council Approval	12/2/15

<b>Phase 3: Construction Documents</b>		<b>Completion Date</b>
<b>1</b>	Preparation of drawings (grading, architectural [MEP], landscaping, electrical) (Consultants)	21 weeks (NTP date refers to Item 10 under Phase 2)
<b>2</b>	Submittal of drawings for plan check (Consultants)	5/2/16
<b>3</b>	Plan Check	3 weeks
<b>4</b>	Plan Revisions (Consultants)	2 weeks
<b>5</b>	Resubmittal of drawings for plan check (Consultants)	6/6/16
<b>6</b>	2 <sup>nd</sup> Plan Check	2 weeks
<b>7</b>	Corrections and Resubmit	2 weeks
<b>8</b>	Plan Approval	7/6/16
<b>9</b>	City Council approval of plans and authorization to bid	7/22/16

## EXHIBIT "D"

### SCHEDULE OF PERFORMANCE

<b>Phase 4: Bid Services</b>		<b>Completion Date</b>
<b>1</b>	<b>Notice to Bid</b>	<b>8/3/16</b> (Date refers to Item 6 under Phase 3)
<b>2</b>	<b>Bidding</b>	<b>30 days</b>
<b>3</b>	<b>End of Bidding Period</b>	<b>9/14/16</b>
<b>4</b>	<b>Contract Award</b>	<b>9/21/16</b>

<b>Phase 5: Construction Administration</b>		<b>Completion Date</b>
<b>1</b>	<b>Executed Contracts – 4 weeks from contract award</b>	<b>10/19/16</b>
<b>2</b>	<b>Pre-Construction Meeting – 2 weeks from contract award</b>	<b>11/2/16</b>
<b>3</b>	<b>Notice to Proceed – 2 weeks from Item 2</b>	<b>11/16/16</b>
<b>4</b>	<b>Construction</b>	<b>228± working days</b>
<b>5</b>	<b>Completion/Opening</b>	<b>10/3/17</b>



ATTACHMENT 3

**PROFESSIONAL SERVICES AGREEMENT  
LANDSCAPE ARCHITECTURAL DESIGN SERVICES  
DOWNTOWN EVENT CENTER  
CITY PROJECT NO. 15-07**

THIS PROFESSIONAL SERVICES AGREEMENT ( "Agreement") is entered into, and effective on \_\_\_\_\_, 2015, between the **CITY OF PALM SPRINGS, a California charter city and municipal corporation, ("City")** and **RGA Landscape Architects, Inc., a California corporation, ("Consultant")**. City and Consultant are individually referred to as "Party" and are collectively referred to as the "Parties".

**RECITALS**

A. City has determined that there is a need for professional landscape architectural design services for the Downtown Event Center, City Project No. 15-07, (the "Project").

B. Consultant has submitted to City a proposal to provide professional landscape architectural design services to City for the Project under the terms of this Agreement.

C. Consultant is qualified by virtue of its experience, training, education, reputation, and expertise to provide these services and has agreed to provide such services as provided in this Agreement.

D. City desires to retain Consultant to provide such professional services.

In consideration of these promises and mutual obligations, covenants, and conditions, the Parties agree as follows:

**AGREEMENT**

**1. SERVICES OF CONSULTANT**

**1.1 Scope of Services.** In compliance with all terms and conditions of this Agreement, Consultant agrees to perform the professional services set forth in the Scope of Services described in Exhibit "A" (the "Services" or "Work") , which is attached and incorporated by reference. As a material inducement to the City entering into this Agreement, Consultant represents and warrants that Consultant is a provider of first class work and professional services and that Consultant is experienced in performing the Work and Services contemplated and, in light of such status and experience, Consultant covenants that it shall follow the highest professional standards in performing the Work and Services required in this Agreement. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized as high quality among well-qualified and experienced professionals performing similar work under similar circumstances.

**1.2 Contract Documents.** The Agreement between the Parties shall consist of the following: (1) this Agreement; (2) the Scope of Services; (3) the Consultant's signed, original proposal submitted to the City ("Consultant's Proposal"), (collectively referred to as the "Contract Documents"). The Consultant's Proposal is attached as Exhibits "B," and is incorporated by reference and made a part of this Agreement. The Scope of Services shall include the Consultant's Proposal. All provisions of the Scope of Services and the Consultant's Proposal shall be binding on the Parties. Should any conflict or inconsistency exist in the Contract Documents, the conflict or inconsistency shall be resolved by applying the provisions in the highest priority document, which shall be determined in the following order of priority: (1<sup>st</sup>) the provisions of the Scope of Services (Exhibit "A"); (2<sup>nd</sup>) the terms of this Agreement; and, (3<sup>rd</sup>) the provisions of the Consultant's Proposal (Exhibit "B").

**1.3 Compliance with Law.** Consultant warrants that all Services rendered shall be performed in accordance with all applicable federal, state, and local laws, statutes, ordinances lawful orders, rules, and regulations.

**1.4 Licenses, Permits, Fees, and Assessments.** Consultant represents and warrants to City that it has obtained all licenses, permits, qualifications, and approvals of whatever nature that are legally required to practice its profession and perform the Work and Services required by this Agreement. Consultant represents and warrants to City that Consultant shall, at its sole cost and expense, keep in effect at all times during the term of this Agreement, any license, permit, qualification, or approval that is legally required for Consultant to perform the Work and Services under this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments, and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the Work and Services required by this Agreement. Consultant shall indemnify, defend, and hold harmless City against any such fees, assessments, taxes penalties, or interest levied, assessed, or imposed against City to the fullest extent permitted by law.

**1.5 Familiarity with Work.** By executing this Agreement, Consultant warrants that Consultant (a) has thoroughly investigated and considered the Scope of Services to be performed, (b) has carefully considered how the Services should be performed, and (c) fully understands the facilities, difficulties, and restrictions attending performance of the Services under this Agreement. If the Services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of any Services. Should the Consultant discover any latent or unknown conditions that will materially affect the performance of the Services, Consultant shall immediately inform the City of such fact and shall not proceed except at Consultant's risk until written instructions are received from the City.

**1.6 Care of Work.** Consultant shall adopt reasonable methods during the term of the Agreement to furnish continuous protection to the Work and the equipment,

materials, papers, documents, plans, studies, and/or other components to prevent losses or damages. Consultant shall be responsible for all such damages, to persons or property, until acceptance of the Work by the City, except such losses or damages as may be caused by City's own negligence.

**1.7 Further Responsibilities of Parties.** Parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Parties agree to act in good faith to execute all instruments, prepare all documents, and take all actions as may be reasonably necessary to carry out the purposes of this Agreement.

**1.8 Additional Services.** City shall have the right at any time during the performance of the Services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to, or deducting from such Work. No such extra work may be undertaken unless a written order is first given by the City to the Consultant, incorporating any adjustment in (i) the Maximum Contract Amount, as defined below, and/or (ii) the time to perform this Agreement. Any adjustments must also be approved in writing by the Consultant. Any increase in compensation of up to twenty-five percent (25%) of the Maximum Contract Amount or \$25,000, whichever is less, or in the time to perform of up to thirty (30) days, may be approved by the City Manager, or his designee, as may be needed to perform any extra work. Any greater increases, occurring either separately or cumulatively, must be approved by the Palm Springs City Council. It is expressly understood by Consultant that the provisions of this section shall not apply to the services specifically set forth or reasonably contemplated within the Scope of Services.

## **2. COMPENSATION**

**2.1 Maximum Contract Amount.** For the Services rendered under this Agreement, Consultant shall be compensated by City in accordance with the Schedule of Compensation, which is attached as Exhibit "D" and incorporated in this Agreement by reference. Compensation shall not exceed the maximum contract amount of **Eighty Six Thousand Eight Hundred Dollars, (\$86,800.00)** ("Maximum Contract Amount"), except as may be provided under Section 1.8. The method of compensation shall be as set forth in Exhibit "C." Compensation for necessary expenditures for reproduction costs, telephone expenses, and transportation expenses must be approved in advance by the Contract Officer designated under Section 4.2 and will only be approved if such expenses are also specified in the Schedule of Compensation. The Maximum Contract Amount shall include the attendance of Consultant at all Project meetings reasonably deemed necessary by the City. Consultant shall not be entitled to any increase in the Maximum Contract Amount for attending these meetings. Consultant accepts the risk that the services identified in the Scope of Services may be more costly and/or time-consuming than Consultant anticipates, that Consultant shall not be entitled to additional compensation, and that the provisions of Section 1.8 shall not be applicable to the services identified in the Scope of Services. The maximum amount of city's payment obligation under this section is the amount specified in this Agreement. If the City's maximum payment obligation is reached before the Consultant's Services under

this Agreement are completed, Consultant shall complete the Work and City shall not be liable for payment beyond the Maximum Contract Amount.

**2.2. Method of Payment.** Unless another method of payment is specified in the Schedule of Compensation (Exhibit "C"), in any month in which Consultant wishes to receive payment, Consultant shall submit to the City an invoice for services rendered prior to the date of the invoice. The invoice shall be in a form approved by the City's Finance Director and must be submitted no later than the tenth (10) working day of such month. Such requests shall be based upon the amount and value of the services performed by Consultant and accompanied by such reporting data including an itemized breakdown of all costs incurred and tasks performed during the period covered by the invoice, as may be required by the City. City shall use reasonable efforts to make payments to Consultant within forty-five (45) days after receipt of the invoice or as soon as is reasonably practical. There shall be a maximum of one payment per month.

**2.3 Changes in Scope.** In the event any change or changes in the Scope of Services is requested by City, Parties shall execute a written amendment to this Agreement, specifying all proposed amendments, including, but not limited to, any additional fees. An amendment may be entered into:

A. To provide for revisions or modifications to documents, work product, or work, when required by the enactment or revision of any subsequent law; or

B. To provide for additional services not included in this Agreement or not customarily furnished in accordance with generally accepted practice in Consultant's profession.

**2.4 Appropriations.** This Agreement is subject to and contingent upon funds being appropriated by the City Council for each fiscal year covered by the Agreement. If such appropriations are not made, this Agreement shall automatically terminate without penalty to the City.

### **3. SCHEDULE OF PERFORMANCE**

**3.1 Time of Essence.** Time is of the essence in the performance of this Agreement. The time for completion of the services to be performed by Consultant is an essential condition of this Agreement. Consultant shall prosecute regularly and diligently the Work of this Agreement according to the agreed upon attached Schedule of Performance (Exhibit "D"), incorporated by reference.

**3.2 Schedule of Performance.** Consultant shall commence the Services under this Agreement upon receipt of a written notice to proceed and shall perform all Services within the time period(s) established in the Schedule of Performance. When requested by Consultant, extensions to the time period(s) specified in the Schedule of Performance may be approved in writing by the Contract Officer, but such extensions shall not exceed one hundred eighty (180) days cumulatively; however, the City shall not be obligated to grant such an extension.

**3.3 Force Majeure.** The time period(s) specified in the Schedule of Performance for performance of the Services rendered under this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant (financial inability excepted) if Consultant, within ten (10) days of the commencement of such delay, notifies the Contract Officer in writing of the causes of the delay. Unforeseeable causes include, but are not limited to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, and/or acts of any governmental agency, including the City. The City Manager shall ascertain the facts and the extent of delay, and extend the time for performing the Services for the period of the enforced delay when and if in the judgment of the City Manager such delay is justified. The City Manager's determination shall be final and conclusive upon the Parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement under this section.

**3.4 Term.** Unless earlier terminated under this Agreement, this Agreement shall commence upon the effective date of this Agreement and continue in full force and effect until completion of the Services. However, the term shall not exceed three (3) years from the commencement date, except as otherwise provided in the Schedule of Performance described in Section 3.2 above. Any extension must be through mutual written agreement of the Parties.

**3.5 Termination Prior to Expiration of Term.** City may terminate this Agreement for its convenience at any time, without cause, in whole or in part, upon giving Consultant thirty (30) days written notice. Where termination is due to the fault of Consultant and constitutes an immediate danger to health, safety, and general welfare, the period of notice shall be such shorter time as may be determined by the City. Upon such notice, City shall pay Consultant for Services performed through the date of termination. Upon receipt of such notice, Consultant shall immediately cease all work under this Agreement, unless stated otherwise in the notice or by written authorization of the Contract Officer. After such notice, Consultant shall have no further claims against the City under this Agreement. Upon termination of the Agreement under this section, Consultant shall submit to the City an invoice for work and services performed prior to the date of termination. Consultant may terminate this Agreement, with or without cause, upon sixty (60) days written notice to the City, except that where termination is due to material default by the City, the period of notice may be such shorter time as the Consultant may determine.

#### **4. COORDINATION OF WORK**

**4.1 Representative of Consultant.** The following principal of Consultant is designated as being the principal and representative of Consultant authorized to act in its behalf and make all decisions with respect to the Services to be performed under this

Agreement: **Ron Gregory**. It is expressly understood that the experience, knowledge, education, capability, expertise, and reputation of the foregoing principal is a substantial inducement for City to enter into this Agreement. Therefore, the foregoing principal shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services performed hereunder. The foregoing principal may not be changed by Consultant without prior written approval of the Contract Officer.

**4.2 Contract Officer.** The Contract Officer shall be the City Manager or his/her designee ("Contract Officer"). Consultant shall be responsible for keeping the Contract Officer fully informed of the progress of the performance of the services. Consultant shall refer any decisions that must be made by City to the Contract Officer. Unless otherwise specified, any approval of City shall mean the approval of the Contract Officer.

**4.3 Prohibition Against Subcontracting or Assignments.** The experience, knowledge, capability, expertise, and reputation of Consultant, its principals and employees, were a substantial inducement for City to enter into this Agreement. Therefore, Consultant shall not assign full or partial performance of this Agreement, nor any monies due, voluntarily or by operation of law, without the prior written consent of City. Consultant shall not contract with any other entity to perform the Services required under this Agreement without the prior written consent of City. If Consultant is permitted to subcontract any part of this Agreement by City, Consultant shall be responsible to City for the acts and omissions of its subcontractor(s) in the same manner as it is for persons directly employed. Nothing contained in this Agreement shall create any contractual relationships between any subcontractor and City. All persons engaged in the Work will be considered employees of Consultant. City will deal directly with and will make all payments to Consultant. In addition, neither this Agreement nor any interest in this Agreement may be transferred, assigned, conveyed, hypothecated, or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written consent of City. Transfers restricted in this Agreement shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release Consultant or any surety of Consultant from any liability under this Agreement without the express written consent of City.

**4.4 Independent Contractor.** The legal relationship between the Parties is that of an independent contractor, and nothing shall be deemed to make Consultant a City employee.

A. During the performance of this Agreement, Consultant and its officers, employees, and agents shall act in an independent capacity and shall not act or represent themselves as City officers or employees. The personnel performing the Services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither City nor any of its officers,

employees, or agents shall have control over the conduct of Consultant or any of its officers, employees, or agents, except as set forth in this Agreement. Consultant, its officers, employees, or agents shall not maintain an office or any other type of fixed business location at City's offices. City shall have no voice in the selection, discharge, supervision, or control of Consultant's employees, servants, representatives, or agents, or in fixing their number, compensation, or hours of service. Consultant shall pay all wages, salaries, and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, including but not limited to social security income tax withholding, unemployment compensation, workers' compensation, and other similar matters. City shall not in any way or for any purpose be deemed to be a partner of Consultant in its business or otherwise a joint venturer or a member of any joint enterprise with Consultant.

B. Consultant shall not have any authority to bind City in any manner. This includes the power to incur any debt, obligation, or liability against City.

C. No City benefits shall be available to Consultant, its officers, employees, or agents in connection with any performance under this Agreement. Except for professional fees paid to Consultant as provided for in this Agreement, City shall not pay salaries, wages, or other compensation to Consultant for the performance of Services under this Agreement. City shall not be liable for compensation or indemnification to Consultant, its officers, employees, or agents, for injury or sickness arising out of performing Services. If for any reason any court or governmental agency determines that the City has financial obligations, other than under Section 2 and Subsection 1.8 in this Agreement, of any nature relating to salary, taxes, or benefits of Consultant's officers, employees, servants, representatives, subcontractors, or agents, Consultant shall indemnify City for all such financial obligations.

## **5. INSURANCE**

**5.1 Types of Insurance.** Consultant shall procure and maintain, at its sole cost and expense, the insurance described below. The insurance shall be for the duration of this Agreement and includes any extensions, unless otherwise specified in this Agreement. The insurance shall be procured in a form and content satisfactory to City. The insurance shall apply against claims which may arise from the Consultant's performance of Work under this Agreement, including Consultant's agents, representatives, or employees. In the event the City Manager determines that the Work or Services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the City Manager or his designee. Consultant shall immediately substitute any insurer whose A.M. Best rating drops below the levels specified in this Agreement. Except as otherwise authorized below for professional liability (errors and omissions) insurance, all insurance provided under this Agreement shall be on an occurrence basis. The minimum amount of insurance required shall be as follows:



A. Errors and Omissions Insurance. Consultant shall obtain and maintain in full force and effect throughout the term of this Agreement, standard industry form professional liability (errors and omissions) insurance coverage in an amount of not less than one million dollars (\$1,000,000.00) per occurrence and two-million dollars (\$2,000,000.00) annual aggregate, in accordance with the provisions of this section.

(1) Consultant shall either: (a) certify in writing to the City that Consultant is unaware of any professional liability claims made against Consultant and is unaware of any facts which may lead to such a claim against Consultant; or (b) if Consultant does not provide the certification under (a), Consultant shall procure from the professional liability insurer an endorsement providing that the required limits of the policy shall apply separately to claims arising from errors and omissions in the rendition of services under this Agreement.

(2) If the policy of insurance is written on a "claims made" basis, the policy shall be continued in full force and effect at all times during the term of this Agreement, and for a period of three (3) years from the date of the completion of the Services provided hereunder. In the event of termination of the policy during this period, Consultant shall obtain continuing insurance coverage for the prior acts or omissions of Consultant during the course of performing Services under the terms of this Agreement. The coverage shall be evidenced by either a new policy evidencing no gap in coverage, or by obtaining separate extended "tail" coverage with the present or new carrier or other insurance arrangements providing for complete coverage, either of which shall be subject to the written approval by the City Manager.

(3) In the event the policy of insurance is written on an "occurrence" basis, the policy shall be continued in full force and effect during the term of this Agreement, or until completion of the Services provided for in this Agreement, whichever is later. In the event of termination of the policy during this period, new coverage shall immediately be obtained to ensure coverage during the entire course of performing the Services under the terms of this Agreement.

B. Workers' Compensation Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, workers' compensation insurance in at least the minimum statutory amounts, and in compliance with all other statutory requirements, as required by the State of California. Consultant agrees to waive and obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies. If Consultant has no employees, Consultant shall complete the City's Request for Waiver of Workers' Compensation Insurance Requirement form.

C. Commercial General Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of commercial general liability insurance written on a per occurrence basis with a

combined single limit of at least one million dollars (\$1,000,000.00) and two million dollars (\$2,000,000.00) general aggregate for bodily injury and property damage including coverages for contractual liability, personal injury, independent contractors, broad form property damage, products and completed operations.

D. Business Automobile Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of business automobile liability insurance written on a per occurrence basis with a single limit liability in the amount of one million dollars (\$1,000,000.00) bodily injury and property damage. The policy shall include coverage for owned, non-owned, leased, and hired cars.

E. Employer Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of employer liability insurance written on a per occurrence basis with a policy limit of at least one million dollars (\$1,000,000.00) for bodily injury or disease.

**5.2 Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to and approved by the City Manager or his/her designee prior to commencing any work or services under this Agreement. Consultant guarantees payment of all deductibles and self-insured retentions. City reserves the right to reject deductibles or self-insured retentions in excess of \$10,000, and the City Manager or his/her designee may require evidence of pending claims and claims history as well as evidence of Consultant's ability to pay claims for all deductible amounts and self-insured retentions proposed in excess of \$10,000.

**5.3 Other Insurance Requirements.** The following provisions shall apply to the insurance policies required of Consultant under this Agreement:

5.3.1 For any claims related to this Agreement, Consultant's coverage shall be primary insurance with respect to the City and its officers, council members, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City and its officers, council members, officials, employees, agents, and volunteers shall be in excess of Consultant's insurance and shall not contribute with it.

5.3.2 Any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to City and its officers, council members, officials, employees, agents, and volunteers.

5.3.3 All insurance coverage and limits provided by Consultant and available or applicable to this Agreement are intended to apply to each insured, including additional insureds, against whom a claim is made or suit is brought to the full extent of the policies. Nothing

contained in this Agreement or any other agreement relating to the City or its operations shall limit the application of such insurance coverage.

- 5.3.4 No required insurance coverages may include any limiting endorsement which substantially impairs the coverages set forth in this Agreement (e.g., elimination of contractual liability or reduction of discovery period), unless the endorsement has first been submitted to the City Manager and approved in writing.
- 5.3.5 Consultant agrees to require its insurer to modify insurance endorsements to delete any exculpatory wording stating that failure of the insurer to mail written notice of cancellation imposes no obligation, or that any party will "endeavor" (as opposed to being required) to comply with the requirements of the endorsements. Certificates of insurance will not be accepted in lieu of required endorsements, and submittal of certificates without required endorsements may delay commencement of the Project. It is Consultant's obligation to ensure timely compliance with all insurance submittal requirements as provided in this Agreement.
- 5.3.6 Consultant agrees to ensure that subcontractors, and any other parties involved with the Project who are brought onto or involved in the Project by Consultant, provide the same minimum insurance coverage required of Consultant. Consultant agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this section. Consultant agrees that upon request, all agreements with subcontractors and others engaged in the Project will be submitted to the City for review.
- 5.3.7 Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any insurance requirement in no way imposes any additional obligations on the City nor does it waive any rights in this or any other regard.
- 5.3.8 Consultant shall provide proof that policies of insurance required in this Agreement, expiring during the term of this Agreement, have been renewed or replaced with other policies providing at least the same coverage. Proof that such coverage has been ordered shall be submitted prior to expiration. Endorsements as required in this Agreement applicable to the renewing or new coverage shall be provided to City no later than ten (10) days prior to expiration of the lapsing coverage.

- 5.3.9 Requirements of specific insurance coverage features or limits contained in this section are not intended as limitations on coverage, limits, or other requirements, or as a waiver of any coverage normally provided by any given policy. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue, and is not intended by any party or insured to be limiting or all-inclusive.
- 5.3.10 The requirements in this section supersede all other sections and provisions of this Agreement to the extent that any other section or provision conflicts with or impair the provisions of this section.
- 5.3.11 Consultant agrees to provide immediate notice to City of any claim or loss against Consultant arising out of the Work performed under this Agreement and for any other claim or loss which may reduce the insurance available to pay claims arising out of this Agreement. City assumes no obligation or liability by such notice, but has the right (but not the duty) to monitor the handling of any such claim or claims if they are likely to involve City, or to reduce or dilute insurance available for payment of potential claims.
- 5.3.12 Consultant agrees that the provisions of this section shall not be construed as limiting in any way the extent to which the Consultant may be held responsible for the payment of damages resulting from the Consultant's activities or the activities of any person or person for which the Consultant is otherwise responsible.

**5.4 Sufficiency of Insurers.** Insurance required in this Agreement shall be provided by authorized insurers in good standing with the State of California. Coverage shall be provided by insurers admitted in the State of California with an A.M. Best's Key Rating of B++, Class VII, or better, unless such requirements are waived in writing by the City Manager or his designee due to unique circumstances.

**5.5 Verification of Coverage.** Consultant shall furnish City with both certificates of insurance and endorsements, including additional insured endorsements, affecting all of the coverages required by this Agreement. The certificates and endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All proof of insurance is to be received and approved by the City before work commences. City reserves the right to require Consultant's insurers to provide complete, certified copies of all required insurance policies at any time. Additional insured endorsements are not required for Errors and Omissions and Workers' Compensation policies.

Verification of Insurance coverage may be provided by: (1) an approved General and/or Auto Liability Endorsement Form for the City of Palm Springs or (2) an

acceptable Certificate of Liability Insurance Coverage with an approved Additional Insured Endorsement with the following endorsements stated on the certificate:

1. *"The City of Palm Springs, its officials, employees, and agents are named as an additional insured..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

2. *"This insurance is primary and non-contributory over any insurance or self-insurance the City may have..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

3. *"Should any of the above described policies be canceled before the expiration date thereof, the issuing company will mail 30 days written notice to the Certificate Holder named." Language such as, "endeavor to" mail and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representative" is not acceptable and must be crossed out.*

4. Both the Workers' Compensation and Employers' Liability policies shall contain the insurer's waiver of subrogation in favor of City, its elected officials, officers, employees, agents, and volunteers.

In addition to the endorsements listed above, the City of Palm Springs shall be named the certificate holder on the policies. All certificates of insurance and endorsements are to be received and approved by the City before work commences. All certificates of insurance must be authorized by a person with authority to bind coverage, whether that is the authorized agent/broker or insurance underwriter. Failure to obtain the required documents prior to the commencement of work shall not waive the Consultant's obligation to provide them.

## 6. **INDEMNIFICATION**

**6.1 Indemnification and Reimbursement.** To the fullest extent permitted by law, Consultant shall defend (at Consultant's sole cost and expense), indemnify, protect, and hold harmless City, its elected officials, officers, employees, agents, and volunteers (collectively the "Indemnified Parties"), from and against any and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards, settlements, damages, demands, orders, penalties, and expenses including legal costs and attorney fees (collectively "Claims"), including but not limited to Claims arising from injuries to or death of persons (Consultant's employees included), for damage to property, including property owned by City, from any violation of any federal, state, or local law or ordinance, and from errors and omissions committed by Consultant, its officers, employees, representatives, and agents, that arise out of or relate to Consultant's performance under this Agreement. This indemnification clause excludes Claims arising from the sole negligence or willful misconduct of the City, its elected officials, officers, employees, agents, and volunteers. Under no circumstances shall the insurance requirements and limits set forth in this Agreement be construed to limit

Consultant's indemnification obligation or other liability under this Agreement. Consultant's indemnification obligation shall survive the expiration or earlier termination of this Agreement until all actions against the Indemnified Parties for such matters indemnified are fully and finally barred by the applicable statute of limitations or, if an action is timely filed, until such action is final. This provision is intended for the benefit of third party Indemnified Parties not otherwise a party to this Agreement.

**6.2 Design Professional Services Indemnification and Reimbursement.** If the Agreement is determined to be a "design professional services agreement" and Consultant is a "design professional" under California Civil Code Section 2782.8, then:

A. To the fullest extent permitted by law, Consultant shall indemnify, defend (at Consultant's sole cost and expense), protect and hold harmless City and its elected officials, officers, employees, agents and volunteers and all other public agencies whose approval of the project is required, (individually "Indemnified Party"; collectively "Indemnified Parties") against any and all liabilities, claims, judgments, arbitration awards, settlements, costs, demands, orders and penalties (collectively "Claims"), including but not limited to Claims arising from injuries or death of persons (Consultant's employees included) and damage to property, which Claims arise out of, pertain to, or are related to the negligence, recklessness or willful misconduct of Consultant, its agents, employees, or subcontractors, or arise from Consultant's negligent, reckless or willful performance of or failure to perform any term, provision, covenant or condition of this Agreement ("Indemnified Claims"), but Consultant's liability for Indemnified Claims shall be reduced to the extent such Claims arise from the negligence, recklessness or willful misconduct of the City and its elected officials, officers, employees, agents and volunteers.

B. The Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to execute an Indemnification Agreement adopting the indemnity provisions in sub-section 6.1 in favor of the Indemnified Parties. In addition, Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to obtain insurance that is consistent with the Insurance provisions as set forth in this Agreement, as well as any other insurance that may be required by Contract Officer.

## **7. REPORTS AND RECORDS**

**7.1 Accounting Records.** Consultant shall keep complete, accurate, and detailed accounts of all time, costs, expenses, and expenditures pertaining in any way to this Agreement. Consultant shall keep such books and records as shall be necessary to properly perform the Services required by this Agreement and to enable the Contract Officer to evaluate the performance of such Services. The Contract Officer shall have full and free access to such books and records at all reasonable times, including the right to inspect, copy, audit, and make records and transcripts from such records.

**7.2 Reports.** Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the Services required by this Agreement, or as the Contract Officer shall require. Consultant acknowledges that the City is greatly concerned about the cost of the Work and Services to be performed under this Agreement. For this reason, Consultant agrees that Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the contemplated Work or Services. If Consultant is providing design services, Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost for the project being designed if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the design services.

**7.3 Ownership of Documents.** All drawings, specifications, reports, records, documents, memoranda, correspondence, computations, and other materials prepared by Consultant, its employees, subcontractors, and agents in the performance of this Agreement shall be the property of City and shall be promptly delivered to City upon request of the Contract Officer or upon the termination of this Agreement. Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership of the documents and materials. Any use of such completed documents for other projects and/or use of incomplete documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and the City shall indemnify the Consultant for all resulting damages. Consultant may retain copies of such documents for their own use. Consultant shall have an unrestricted right to use the concepts embodied in this Agreement. Consultant shall ensure that all its subcontractors shall provide for assignment to City of any documents or materials prepared by them. In the event Consultant fails to secure such assignment, Consultant shall indemnify City for all resulting damages.

**7.4 Release of Documents.** All drawings, specifications, reports, records, documents, and other materials prepared by Consultant in the performance of services under this Agreement shall not be released publicly without the prior written approval of the Contract Officer. All information gained by Consultant in the performance of this Agreement shall be considered confidential and shall not be released by Consultant without City's prior written authorization.

**7.5 Audit and Inspection of Records.** After receipt of reasonable notice and during the regular business hours of City, Consultant shall provide City, or other agents of City, such access to Consultant's books, records, payroll documents, and facilities as City deems necessary to examine, copy, audit, and inspect all accounting books, records, work data, documents, and activities directly related to Consultant's performance under this Agreement. Consultant shall maintain such books, records, data, and documents in accordance with generally accepted accounting principles and shall clearly identify and make such items readily accessible to such parties during the

term of this Agreement and for a period of three (3) years from the date of final payment by City hereunder.

## **8. ENFORCEMENT OF AGREEMENT**

**8.1 California Law and Venue.** This Agreement shall be construed and interpreted both as to validity and as to performance of the Parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such County, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

**8.2 Interpretation.** This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties. The terms of this Agreement are contractual and the result of negotiation between the Parties. Accordingly, any rule of construction of contracts (including, without limitation, California Civil Code Section 1654) that ambiguities are to be construed against the drafting party, shall not be employed in the interpretation of this Agreement. The caption headings of the various sections and paragraphs of this Agreement are for convenience and identification purposes only and shall not be deemed to limit, expand, or define the contents of the respective sections or paragraphs.

**8.3 Default of Consultant.** Consultant's failure to comply with any provision of this Agreement shall constitute a default.

A. If the City Manager, or his designee, determines that Consultant is in default in the performance of any of the terms or conditions of this Agreement, he/she shall notify Consultant in writing of such default. Consultant shall have ten (10) days, or such longer period as City may designate, to cure the default by rendering satisfactory performance. In the event Consultant fails to cure its default within such period of time, City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice of any remedy to which City may be entitled at law, in equity, or under this Agreement. Consultant shall be liable for all reasonable costs incurred by City as a result of such default. Compliance with the provisions of this section shall not constitute a waiver of any City right to take legal action in the event that the dispute is not cured, provided that nothing shall limit City's right to terminate this Agreement without cause under Section 3.5.

B. If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 8.3A, take over the work and prosecute the same to completion by contract or otherwise. The Consultant shall be liable to the extent that the total cost for completion of the Services required hereunder exceeds the Maximum Contract Amount (provided that the City shall use reasonable efforts to mitigate such damages). The City may



withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated. The withholding or failure to withhold payments to Consultant shall not limit Consultant's liability for completion of the Services as provided in this Agreement.

**8.4 Waiver.** No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought. Any waiver by the Parties of any default or breach of any covenant, condition, or term contained in this Agreement, shall not be construed to be a waiver of any subsequent or other default or breach, nor shall failure by the Parties to require exact, full, and complete compliance with any of the covenants, conditions, or terms contained in this Agreement be construed as changing the terms of this Agreement in any manner or preventing the Parties from enforcing the full provisions.

**8.5 Rights and Remedies Cumulative.** Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

**8.6 Legal Action.** In addition to any other rights or remedies, either Party may take legal action, in law or in equity, to cure, correct, remedy or recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement.

**8.7 Attorney Fees.** In the event any dispute between the Parties with respect to this Agreement results in litigation or any non-judicial proceeding, the prevailing Party shall be entitled, in addition to such other relief as may be granted, to recover from the non-prevailing Party all reasonable costs and expenses. These include but are not limited to reasonable attorney fees, expert consultant fees, court costs and all fees, costs, and expenses incurred in any appeal or in collection of any judgment entered in such proceeding. To the extent authorized by law, in the event of a dismissal by the plaintiff or petitioner of the litigation or non-judicial proceeding within thirty (30) days of the date set for trial or hearing, the other Party shall be deemed to be the prevailing Party in such litigation or proceeding.

## 9. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION

**9.1 Non-liability of City Officers and Employees.** No officer or employee of the City shall be personally liable to the Consultant, or any successor-in-interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

**9.2 Conflict of Interest.** No officer or employee of the City shall have any direct or indirect financial interest in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects their financial interest or the financial interest of any corporation, partnership, or association in which he/she is, directly or indirectly, interested in violation of any state statute or regulation. Consultant warrants that Consultant has not paid or given, and will not pay or give, any third party any money or other consideration in exchange for obtaining this Agreement.

**9.3 Covenant Against Discrimination.** In connection with its performance under this Agreement, Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, marital status, ancestry, or national origin. Consultant shall ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, age, marital status, ancestry, or national origin. Such actions 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.

## 10. MISCELLANEOUS PROVISIONS

**10.1 Patent and Copyright Infringement.** To the fullest extent permissible under law, and in lieu of any other warranty by City or Consultant against patent or copyright infringement, statutory or otherwise:

A. It is agreed that Consultant shall defend at its expense any claim or suit against City on account of any allegation that any item furnished under this Agreement, or the normal use or sale arising out of the performance of this Agreement, infringes upon any presently existing U.S. letters patent or copyright and Consultant shall pay all costs and damages finally awarded in any such suit or claim, provided that Consultant is promptly notified in writing of the suit or claim and given authority, information and assistance at Consultant's expense for the defense of same, and provided such suit or claim arises out of, pertains to, or is related to the negligence, recklessness or willful misconduct of Consultant. However, Consultant will not indemnify City if the suit or claim results from: (1) City's alteration of a deliverable, such that City's alteration of such deliverable created the infringement upon any presently existing U.S. letters patent or copyright; or (2) the use of a deliverable in combination with other material not provided by Consultant when it is such use in combination which

infringes upon an existing U.S. letters patent or copyright.

B. Consultant shall have sole control of the defense of any such claim or suit and all negotiations for settlement in the event City fails to cooperate in the defense of any suit or claim, provided, however, that such defense shall be at Consultant's expense. Consultant shall not be obligated to indemnify City under any settlement that is made without Consultant's consent, which shall not be unreasonably withheld. If the use or sale of such item is enjoined as a result of the suit or claim, Consultant, at no expense to City, shall obtain for City the right to use and sell the item, or shall substitute an equivalent item acceptable to City and extend this patent and copyright indemnity thereto.

**10.2 Notice.** Any notice, demand, request, consent, approval, or communication that either party desires, or is required to give to the other party or any other person shall be in writing. All notices shall be personally delivered, sent by pre-paid First Class U.S. Mail, registered or certified mail, postage prepaid, return receipt requested, or delivered or sent by facsimile with attached evidence of completed transmission. All notices shall be deemed received upon the earlier of (i) the date of delivery to the address of the person to receive such notice if delivered personally or by messenger or overnight courier; (ii) five (5) business days after the date of posting by the United States Post Office if by mail; or (iii) when sent if given by facsimile. Any notice, request, demand, direction, or other communication sent by facsimile must be confirmed within forty-eight (48) hours by letter mailed or delivered. Other forms of electronic transmission such as e-mails, text messages, and instant messages are not acceptable manners of notice required hereunder. Notices or other communications shall be addressed as follows:

To City: City of Palm springs  
Attention: City Manager & City Clerk  
3200 E. Tahquitz Canyon Way  
Palm springs, California 92262  
Telephone: (760) 323-8204  
Facsimile: (760) 323-8332

To Consultant: RGA Landscape Architects, Inc.  
73061 El Paseo, Suite 210  
Palm Desert, CA 92260  
Attention: Ron Gregory  
Telephone: (760) 568-3624  
Facsimile: (760) 773-5615

**10.3 Integrated Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior negotiations, arrangements, agreements, representations, and understandings, if any, made by or among the Parties with respect to the subject matter in this Agreement.

**10.4 Amendment.** No amendments or other modifications of this Agreement shall be binding unless through written agreement by all Parties.

**10.5 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Agreement shall be determined to be invalid by a final judgment or decree of a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of that provision, or the remaining provisions of this Agreement unless the invalid provision is so material that its invalidity deprives either Party of the basic benefit of their bargain or renders this Agreement meaningless.

**10.5 Successors in Interest.** This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assignees.

**10.6 Third Party Beneficiary.** Except as may be expressly provided for in this Agreement, nothing contained in this Agreement is intended to confer, nor shall this Agreement be construed as conferring, any rights, including, without limitation, any rights as a third-party beneficiary or otherwise, upon any entity or person not a party to this Agreement.

**10.7 Recitals.** The above-referenced Recitals are hereby incorporated into the Agreement as though fully set forth in this Agreement and each Party acknowledges and agrees that such Party is bound, for purposes of this Agreement, by the same.

**10.8. Corporate Authority.** Each of the undersigned represents and warrants that (i) the Party for which he or she is executing this Agreement is duly authorized and existing, (ii) he or she is duly authorized to execute and deliver this Agreement on behalf of the Party for which he or she is signing, (iii) by so executing this Agreement, the Party for which he or she is signing is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which the Party for which he or she is signing is bound.

***[SIGNATURES ON NEXT PAGE]***

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the dates stated below.

**"CITY"**  
**City of Palm Springs**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
David H. Ready  
City Manager

**APPROVED AS TO FORM:**

**ATTEST**

By: \_\_\_\_\_  
Douglas C. Holland,  
City Attorney

By: \_\_\_\_\_  
James Thompson,  
City Clerk

**APPROVED BY CITY COUNCIL:**

**Date:** \_\_\_\_\_ **Agreement No.** \_\_\_\_\_

Corporations require two notarized signatures. One signature must be from Chairman of Board, President, or any Vice President. The second signature must be from the Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, or Chief Financial Officer.

**CONSULTANT NAME:**

RGA Landscape Architects, Inc.  
73061 El Paseo, Suite 210  
Palm Desert, CA 92260

By \_\_\_\_\_  
Signature (Notarized)

By \_\_\_\_\_  
Signature (Notarized)

## **EXHIBIT "A"**

### **SCOPE OF SERVICES**

Consultant shall provide all required landscape architectural design services, including project management and coordinating with the various other consultants engaged by City, necessary to complete the development of a final design for the Downtown Event Center space with maximum capacity of 3,000 as identified on the schematic design included herein this Exhibit "A". Such landscape architectural elements generally include:

- Revisions to and refinement of the conceptual landscape design
- Preliminary landscape/hardscape plan
- Preliminary cost estimates

Following City's approval of the final design, Consultant shall prepare full and complete construction drawings (plans, specifications and estimates) of the landscape architectural elements identified on the final design, with plan and elevation views and associated technical details to facilitate City's bidding for construction.

Consultant shall provide bidding support services as may be necessary and required by City.

Consultant shall provide construction administrative support services as may be necessary and required by City.

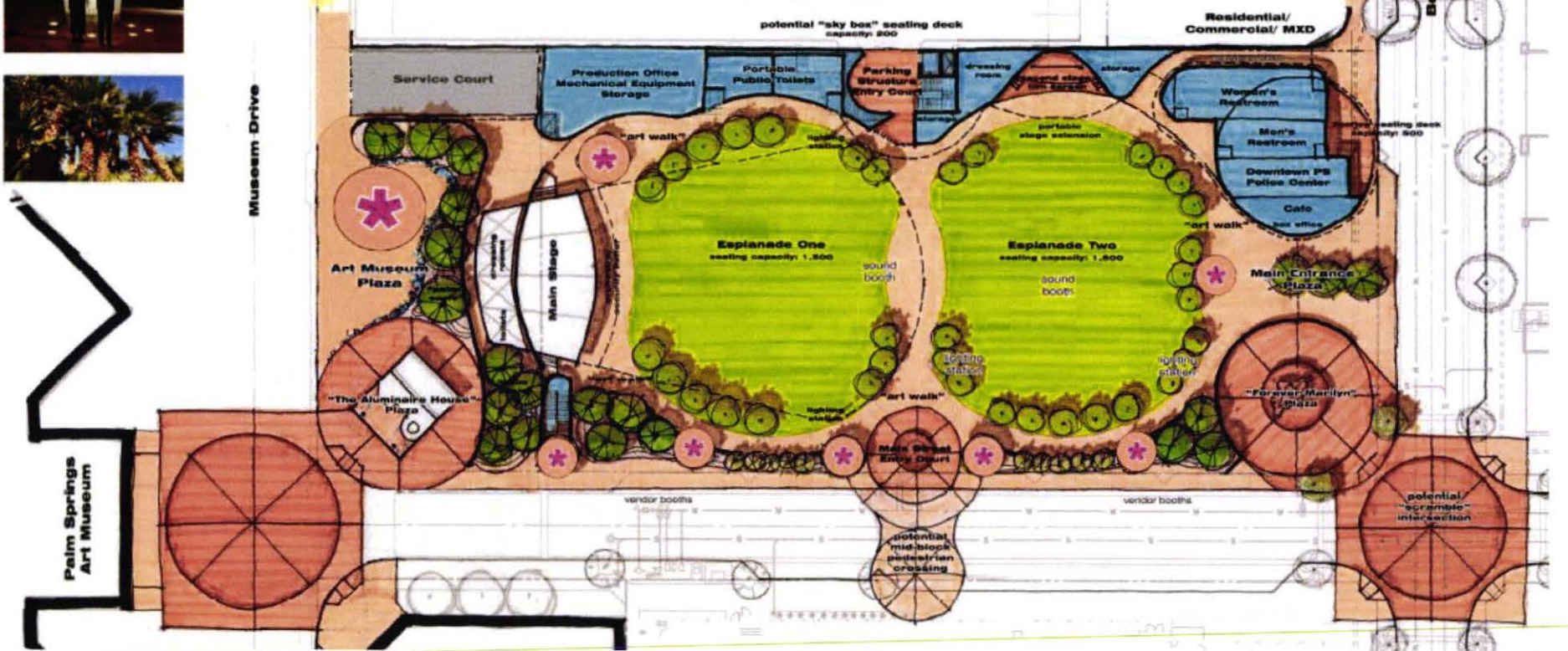
The Consultant's proposal and scope of services, as referenced in its letter dated June 5, 2015, is incorporated herein by reference, and as identified on the following Exhibit "B".



# Conceptual Development Plan



# Downtown Palm Springs *EVE*



**EXHIBIT "B"**  
**CONSULTANT'S PROPOSAL**



**AUTHORIZATION FOR SERVICES**

**DATE:** June 5, 2015

**PROJECT:** Palm Springs Downtown Event Center

**SUBJECT:** Design Development & Construction Documents

**FROM:** Ron Gregory

**TO:** Marcus Fuller  
Assistant City Manager/City Engineer  
City of Palm Springs  
3200 E. Tahquitz Canyon Way  
Palm Springs, CA 92262  
(760) 322-8380 / Marcus.Fuller@palmspringsca.gov

**C:** Rob Parker, RGA Landscape Architects, Inc.  
Tom Miller, RGA Landscape Architects, Inc.

We are pleased to submit our proposal for landscape architectural design services. After reviewing our proposal, should you wish to discuss it further, please feel free to give me a call. If everything is satisfactory, to authorize commencement of work, please sign and return. We will then sign and return a fully executed copy of the agreement to you.

**Scope of Services and Process:**

RGA will provide landscape architectural design services as part of the Phase 2 design team for the City of Palm Springs Downtown Event Center. Our scope of services will be coordinated through the design team and will include:

**A. Design Development:**

1. Refine Conceptual Design of Phase 1 to reflect consensus input from Palm Springs Art Museum, Weesman Development, City Council and staff project committee, with up to 2 alternates for public presentation.
2. Includes design input from Project Landscape Architect (RGA), Architect (Urrutia Architects) and Lighting Designer (MCR Engineering) to further refine and detail Conceptual Design and alternates and Update 3D Model.
3. Participate in public outreach presentations to the Palm Springs Planning Commission, Architectural Review Committee and other groups as identified by the City, with a maximum of five presentations total.



**EXHIBIT "B"**  
**CONSULTANT'S PROPOSAL**

4. Prepare landscape exhibits for Final Site Development Plan, including refinements from public outreach process, including:
    - a. Hardscape plan and materials images (in coordination with MSA)
    - b. Planting plan, plant palette and plant images
    - c. Irrigation water use budget
    - d. Photo simulations of selected landscape elements – total of 4
    - e. Outline specifications
    - f. Participation in preliminary budget preparation
    - g. Presentation to Planning Commission and City Council
  5. Bi-weekly coordination meetings with the design team and Mike Fontana.
- B. Construction Documents, based on the approved Design Development submittal, to include:**
1. Hardscape plan indicating finishes, details and site furniture
  2. Irrigation plan and water use calculations
  3. Planting plan and plant palette
  4. Images, specifications, details and assistance with budgets and scheduling
  5. Coordination with city review and DWA as needed.
  6. Bi-weekly coordination meetings with the design team and Mike Fontana.
- C. Bid Coordination and Construction Administration:**
1. Assistance with bidding, including response to questions and attendance at a pre-bid meeting. Bid advertisement and distribution of documents will be by the City.
  2. Attendance at a pre-construction meeting with the successful bidder and the City.
  3. Response to RFI's and general office support during construction.
  4. Submittal reviews.
  5. Site observations and site meetings during construction. Each observation to be followed by a written report.
  6. Final review and maintenance check.

## EXHIBIT "C"

### SCHEDULE OF COMPENSATION

Tasks listed below are identical to tasks identified in the Consultant's Proposal incorporated herein as Exhibit "B" of this Agreement. Payments to Consultant shall be made no more frequently than monthly, and shall be based on directly incurred time and materials costs up to and not exceeding the lump sum budgets established per task item of work as indicated herein. Payments shall be made to Consultant based upon completion of tasks, or pro-rata portions thereof noted below, to a maximum of 75% of the lump sum budget established per task until completion of such task item as determined by the Contract Officer. Each request for payment shall contain Consultant's statement of the work or tasks completed or portion performed, with supporting documentation. The determination of payment due shall be made based upon the reasonable judgment of the Contract Officer.

Design Development Phase:	\$26,000
Construction Document Phase:	\$19,800
Bi-Weekly Coordination Meetings:	\$8,000
Bidding Phase:	\$8,000
Construction Administration Phase:	\$20,000
Reimbursable Expenses:	\$5,000
<b>Grand Total Not to Exceed:</b>	<b>\$86,800</b>

Note, the budgets identified for each phase are not to exceed amounts identified by Consultant to provide sufficient budget to complete the tasks, and shall not be exceeded. Consultant shall receive payment therefore for actual costs incurred, which shall reflect the final cost for each task, up to and not exceeding the budget therefore.

## EXHIBIT "D"

### SCHEDULE OF PERFORMANCE

The Schedule of Performance was prepared by Consultant and shall bind Consultant to completing required deliverables prior to the dates identified herein this Schedule. This Schedule assumes the City shall follow the standard Major Architectural Review process, however, the City reserves the right to identify alternative review processes to expedite the Schedule in the best interests of the City. The City shall be responsible for complying with the review times identified in the Schedule, and for scheduling meeting dates identified in the Schedule; to the extent that City review times are delayed, or meeting dates are revised, Consultant shall nevertheless remain responsible for complying with the subsequent schedule for completion of the next deliverable item or milestone date.

<b>Phase 2: Design Development</b>		<b>Completion Date</b>
<b>1</b>	Council Approval of Schematic Design/Approval to Proceed with Design	7/1/15
<b>2</b>	Design Development (Consultants)	11 weeks
<b>3</b>	First Submittal (Consultants)	9/14/15
<b>4</b>	AAC Review	9/21/15
<b>5</b>	Design Revisions (Consultants)	2 weeks – 10/5/15
<b>6</b>	AAC Approval	10/12/15
<b>7</b>	Submit for PC Review	10/14/15
<b>8</b>	PC Review	10/28/15
<b>9</b>	Design Revisions (Consultants)	2 weeks
<b>10</b>	PC Approval	11/12/15
<b>11</b>	City Council Approval	12/2/15

<b>Phase 3: Construction Documents</b>		<b>Completion Date</b>
<b>1</b>	Preparation of drawings (grading, architectural [MEP], landscaping, electrical) (Consultants)	21 weeks (NTP date refers to Item 10 under Phase 2)
<b>2</b>	Submittal of drawings for plan check (Consultants)	5/2/16
<b>3</b>	Plan Check	3 weeks
<b>4</b>	Plan Revisions (Consultants)	2 weeks
<b>5</b>	Resubmittal of drawings for plan check (Consultants)	6/6/16
<b>6</b>	2 <sup>nd</sup> Plan Check	2 weeks
<b>7</b>	Corrections and Resubmit	2 weeks
<b>8</b>	Plan Approval	7/6/16
<b>9</b>	City Council approval of plans and authorization to bid	7/22/16

**EXHIBIT "D"**

**SCHEDULE OF PERFORMANCE**

<b>Phase 4: Bid Services</b>		<b>Completion Date</b>
<b>1</b>	<b>Notice to Bid</b>	<b>8/3/16</b> (Date refers to Item 6 under Phase 3)
<b>2</b>	<b>Bidding</b>	<b>30 days</b>
<b>3</b>	<b>End of Bidding Period</b>	<b>9/14/16</b>
<b>4</b>	<b>Contract Award</b>	<b>9/21/16</b>

<b>Phase 5: Construction Administration</b>		<b>Completion Date</b>
<b>1</b>	<b>Executed Contracts – 4 weeks from contract award</b>	<b>10/19/16</b>
<b>2</b>	<b>Pre-Construction Meeting – 2 weeks from contract award</b>	<b>11/2/16</b>
<b>3</b>	<b>Notice to Proceed – 2 weeks from Item 2</b>	<b>11/16/16</b>
<b>4</b>	<b>Construction</b>	<b>228± working days</b>
<b>5</b>	<b>Completion/Opening</b>	<b>10/3/17</b>

ATTACHMENT 4

**PROFESSIONAL SERVICES AGREEMENT  
ELECTRICAL ENGINEERING DESIGN SERVICES  
DOWNTOWN EVENT CENTER  
CITY PROJECT NO. 15-07**

THIS PROFESSIONAL SERVICES AGREEMENT ( "Agreement") is entered into, and effective on \_\_\_\_\_, 2015, between the **CITY OF PALM SPRINGS, a California charter city and municipal corporation, ("City")** and **MRC Engineering, Inc., a California corporation, ("Consultant")**. City and Consultant are individually referred to as "Party" and are collectively referred to as the "Parties".

**RECITALS**

A. City has determined that there is a need for professional electrical engineering design services for the Downtown Event Center, City Project No. 15-07, (the "Project").

B. Consultant has submitted to City a proposal to provide professional electrical engineering design services to City for the Project under the terms of this Agreement.

C. Consultant is qualified by virtue of its experience, training, education, reputation, and expertise to provide these services and has agreed to provide such services as provided in this Agreement.

D. City desires to retain Consultant to provide such professional services.

In consideration of these promises and mutual obligations, covenants, and conditions, the Parties agree as follows:

**AGREEMENT**

**1. SERVICES OF CONSULTANT**

**1.1 Scope of Services.** In compliance with all terms and conditions of this Agreement, Consultant agrees to perform the professional services set forth in the Scope of Services described in Exhibit "A" (the "Services" or "Work") , which is attached and incorporated by reference. As a material inducement to the City entering into this Agreement, Consultant represents and warrants that Consultant is a provider of first class work and professional services and that Consultant is experienced in performing the Work and Services contemplated and, in light of such status and experience, Consultant covenants that it shall follow the highest professional standards in performing the Work and Services required in this Agreement. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized as high quality among well-qualified and experienced professionals performing similar work under similar circumstances.

**1.2 Contract Documents.** The Agreement between the Parties shall consist of the following: (1) this Agreement; (2) the Scope of Services; (3) the Consultant's signed, original proposal submitted to the City ("Consultant's Proposal"), (collectively referred to as the "Contract Documents"). The Consultant's Proposal is attached as Exhibits "B," and is incorporated by reference and made a part of this Agreement. The Scope of Services shall include the Consultant's Proposal. All provisions of the Scope of Services and the Consultant's Proposal shall be binding on the Parties. Should any conflict or inconsistency exist in the Contract Documents, the conflict or inconsistency shall be resolved by applying the provisions in the highest priority document, which shall be determined in the following order of priority: (1<sup>st</sup>) the provisions of the Scope of Services (Exhibit "A"); (2<sup>nd</sup>) the terms of this Agreement; and, (3<sup>rd</sup>) the provisions of the Consultant's Proposal (Exhibit "B").

**1.3 Compliance with Law.** Consultant warrants that all Services rendered shall be performed in accordance with all applicable federal, state, and local laws, statutes, ordinances lawful orders, rules, and regulations.

**1.4 Licenses, Permits, Fees, and Assessments.** Consultant represents and warrants to City that it has obtained all licenses, permits, qualifications, and approvals of whatever nature that are legally required to practice its profession and perform the Work and Services required by this Agreement. Consultant represents and warrants to City that Consultant shall, at its sole cost and expense, keep in effect at all times during the term of this Agreement, any license, permit, qualification, or approval that is legally required for Consultant to perform the Work and Services under this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments, and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the Work and Services required by this Agreement. Consultant shall indemnify, defend, and hold harmless City against any such fees, assessments, taxes penalties, or interest levied, assessed, or imposed against City to the fullest extent permitted by law.

**1.5 Familiarity with Work.** By executing this Agreement, Consultant warrants that Consultant (a) has thoroughly investigated and considered the Scope of Services to be performed, (b) has carefully considered how the Services should be performed, and (c) fully understands the facilities, difficulties, and restrictions attending performance of the Services under this Agreement. If the Services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of any Services. Should the Consultant discover any latent or unknown conditions that will materially affect the performance of the Services, Consultant shall immediately inform the City of such fact and shall not proceed except at Consultant's risk until written instructions are received from the City.

**1.6 Care of Work.** Consultant shall adopt reasonable methods during the term of the Agreement to furnish continuous protection to the Work and the equipment,

materials, papers, documents, plans, studies, and/or other components to prevent losses or damages. Consultant shall be responsible for all such damages, to persons or property, until acceptance of the Work by the City, except such losses or damages as may be caused by City's own negligence.

**1.7 Further Responsibilities of Parties.** Parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Parties agree to act in good faith to execute all instruments, prepare all documents, and take all actions as may be reasonably necessary to carry out the purposes of this Agreement.

**1.8 Additional Services.** City shall have the right at any time during the performance of the Services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to, or deducting from such Work. No such extra work may be undertaken unless a written order is first given by the City to the Consultant, incorporating any adjustment in (i) the Maximum Contract Amount, as defined below, and/or (ii) the time to perform this Agreement. Any adjustments must also be approved in writing by the Consultant. Any increase in compensation of up to twenty-five percent (25%) of the Maximum Contract Amount or \$25,000, whichever is less, or in the time to perform of up to thirty (30) days, may be approved by the City Manager, or his designee, as may be needed to perform any extra work. Any greater increases, occurring either separately or cumulatively, must be approved by the Palm Springs City Council. It is expressly understood by Consultant that the provisions of this section shall not apply to the services specifically set forth or reasonably contemplated within the Scope of Services.

## **2. COMPENSATION**

**2.1 Maximum Contract Amount.** For the Services rendered under this Agreement, Consultant shall be compensated by City in accordance with the Schedule of Compensation, which is attached as Exhibit "D" and incorporated in this Agreement by reference. Compensation shall not exceed the maximum contract amount of **Thirty Thousand Dollars, (\$30,000.00)** ("Maximum Contract Amount"), except as may be provided under Section 1.8. The method of compensation shall be as set forth in Exhibit "C." Compensation for necessary expenditures for reproduction costs, telephone expenses, and transportation expenses must be approved in advance by the Contract Officer designated under Section 4.2 and will only be approved if such expenses are also specified in the Schedule of Compensation. The Maximum Contract Amount shall include the attendance of Consultant at all Project meetings reasonably deemed necessary by the City. Consultant shall not be entitled to any increase in the Maximum Contract Amount for attending these meetings. Consultant accepts the risk that the services identified in the Scope of Services may be more costly and/or time-consuming than Consultant anticipates, that Consultant shall not be entitled to additional compensation, and that the provisions of Section 1.8 shall not be applicable to the services identified in the Scope of Services. The maximum amount of city's payment obligation under this section is the amount specified in this Agreement. If the City's maximum payment obligation is reached before the Consultant's Services under



this Agreement are completed, Consultant shall complete the Work and City shall not be liable for payment beyond the Maximum Contract Amount.

**2.2. Method of Payment.** Unless another method of payment is specified in the Schedule of Compensation (Exhibit "C"), in any month in which Consultant wishes to receive payment, Consultant shall submit to the City an invoice for services rendered prior to the date of the invoice. The invoice shall be in a form approved by the City's Finance Director and must be submitted no later than the tenth (10) working day of such month. Such requests shall be based upon the amount and value of the services performed by Consultant and accompanied by such reporting data including an itemized breakdown of all costs incurred and tasks performed during the period covered by the invoice, as may be required by the City. City shall use reasonable efforts to make payments to Consultant within forty-five (45) days after receipt of the invoice or as soon as is reasonably practical. There shall be a maximum of one payment per month.

**2.3 Changes in Scope.** In the event any change or changes in the Scope of Services is requested by City, Parties shall execute a written amendment to this Agreement, specifying all proposed amendments, including, but not limited to, any additional fees. An amendment may be entered into:

A. To provide for revisions or modifications to documents, work product, or work, when required by the enactment or revision of any subsequent law; or

B. To provide for additional services not included in this Agreement or not customarily furnished in accordance with generally accepted practice in Consultant's profession.

**2.4 Appropriations.** This Agreement is subject to and contingent upon funds being appropriated by the City Council for each fiscal year covered by the Agreement. If such appropriations are not made, this Agreement shall automatically terminate without penalty to the City.

### **3. SCHEDULE OF PERFORMANCE**

**3.1 Time of Essence.** Time is of the essence in the performance of this Agreement. The time for completion of the services to be performed by Consultant is an essential condition of this Agreement. Consultant shall prosecute regularly and diligently the Work of this Agreement according to the agreed upon attached Schedule of Performance (Exhibit "D"), incorporated by reference.

**3.2 Schedule of Performance.** Consultant shall commence the Services under this Agreement upon receipt of a written notice to proceed and shall perform all Services within the time period(s) established in the Schedule of Performance. When requested by Consultant, extensions to the time period(s) specified in the Schedule of Performance may be approved in writing by the Contract Officer, but such extensions shall not exceed one hundred eighty (180) days cumulatively; however, the City shall not be obligated to grant such an extension.

**3.3 Force Majeure.** The time period(s) specified in the Schedule of Performance for performance of the Services rendered under this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant (financial inability excepted) if Consultant, within ten (10) days of the commencement of such delay, notifies the Contract Officer in writing of the causes of the delay. Unforeseeable causes include, but are not limited to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, and/or acts of any governmental agency, including the City. The City Manager shall ascertain the facts and the extent of delay, and extend the time for performing the Services for the period of the enforced delay when and if in the judgment of the City Manager such delay is justified. The City Manager's determination shall be final and conclusive upon the Parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement under this section.

**3.4 Term.** Unless earlier terminated under this Agreement, this Agreement shall commence upon the effective date of this Agreement and continue in full force and effect until completion of the Services. However, the term shall not exceed three (3) years from the commencement date, except as otherwise provided in the Schedule of Performance described in Section 3.2 above. Any extension must be through mutual written agreement of the Parties.

**3.5 Termination Prior to Expiration of Term.** City may terminate this Agreement for its convenience at any time, without cause, in whole or in part, upon giving Consultant thirty (30) days written notice. Where termination is due to the fault of Consultant and constitutes an immediate danger to health, safety, and general welfare, the period of notice shall be such shorter time as may be determined by the City. Upon such notice, City shall pay Consultant for Services performed through the date of termination. Upon receipt of such notice, Consultant shall immediately cease all work under this Agreement, unless stated otherwise in the notice or by written authorization of the Contract Officer. After such notice, Consultant shall have no further claims against the City under this Agreement. Upon termination of the Agreement under this section, Consultant shall submit to the City an invoice for work and services performed prior to the date of termination. Consultant may terminate this Agreement, with or without cause, upon sixty (60) days written notice to the City, except that where termination is due to material default by the City, the period of notice may be such shorter time as the Consultant may determine.

#### **4. COORDINATION OF WORK**

**4.1 Representative of Consultant.** The following principal of Consultant is designated as being the principal and representative of Consultant authorized to act in its behalf and make all decisions with respect to the Services to be performed under this

Agreement: **Ralph Raya**. It is expressly understood that the experience, knowledge, education, capability, expertise, and reputation of the foregoing principal is a substantial inducement for City to enter into this Agreement. Therefore, the foregoing principal shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services performed hereunder. The foregoing principal may not be changed by Consultant without prior written approval of the Contract Officer.

**4.2 Contract Officer.** The Contract Officer shall be the City Manager or his/her designee ("Contract Officer"). Consultant shall be responsible for keeping the Contract Officer fully informed of the progress of the performance of the services. Consultant shall refer any decisions that must be made by City to the Contract Officer. Unless otherwise specified, any approval of City shall mean the approval of the Contract Officer.

**4.3 Prohibition Against Subcontracting or Assignments.** The experience, knowledge, capability, expertise, and reputation of Consultant, its principals and employees, were a substantial inducement for City to enter into this Agreement. Therefore, Consultant shall not assign full or partial performance of this Agreement, nor any monies due, voluntarily or by operation of law, without the prior written consent of City. Consultant shall not contract with any other entity to perform the Services required under this Agreement without the prior written consent of City. If Consultant is permitted to subcontract any part of this Agreement by City, Consultant shall be responsible to City for the acts and omissions of its subcontractor(s) in the same manner as it is for persons directly employed. Nothing contained in this Agreement shall create any contractual relationships between any subcontractor and City. All persons engaged in the Work will be considered employees of Consultant. City will deal directly with and will make all payments to Consultant. In addition, neither this Agreement nor any interest in this Agreement may be transferred, assigned, conveyed, hypothecated, or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written consent of City. Transfers restricted in this Agreement shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release Consultant or any surety of Consultant from any liability under this Agreement without the express written consent of City.

**4.4 Independent Contractor.** The legal relationship between the Parties is that of an independent contractor, and nothing shall be deemed to make Consultant a City employee.

A. During the performance of this Agreement, Consultant and its officers, employees, and agents shall act in an independent capacity and shall not act or represent themselves as City officers or employees. The personnel performing the Services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither City nor any of its officers,

employees, or agents shall have control over the conduct of Consultant or any of its officers, employees, or agents, except as set forth in this Agreement. Consultant, its officers, employees, or agents shall not maintain an office or any other type of fixed business location at City's offices. City shall have no voice in the selection, discharge, supervision, or control of Consultant's employees, servants, representatives, or agents, or in fixing their number, compensation, or hours of service. Consultant shall pay all wages, salaries, and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, including but not limited to social security income tax withholding, unemployment compensation, workers' compensation, and other similar matters. City shall not in any way or for any purpose be deemed to be a partner of Consultant in its business or otherwise a joint venturer or a member of any joint enterprise with Consultant.

B. Consultant shall not have any authority to bind City in any manner. This includes the power to incur any debt, obligation, or liability against City.

C. No City benefits shall be available to Consultant, its officers, employees, or agents in connection with any performance under this Agreement. Except for professional fees paid to Consultant as provided for in this Agreement, City shall not pay salaries, wages, or other compensation to Consultant for the performance of Services under this Agreement. City shall not be liable for compensation or indemnification to Consultant, its officers, employees, or agents, for injury or sickness arising out of performing Services. If for any reason any court or governmental agency determines that the City has financial obligations, other than under Section 2 and Subsection 1.8 in this Agreement, of any nature relating to salary, taxes, or benefits of Consultant's officers, employees, servants, representatives, subcontractors, or agents, Consultant shall indemnify City for all such financial obligations.

## **5. INSURANCE**

**5.1 Types of Insurance.** Consultant shall procure and maintain, at its sole cost and expense, the insurance described below. The insurance shall be for the duration of this Agreement and includes any extensions, unless otherwise specified in this Agreement. The insurance shall be procured in a form and content satisfactory to City. The insurance shall apply against claims which may arise from the Consultant's performance of Work under this Agreement, including Consultant's agents, representatives, or employees. In the event the City Manager determines that the Work or Services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the City Manager or his designee. Consultant shall immediately substitute any insurer whose A.M. Best rating drops below the levels specified in this Agreement. Except as otherwise authorized below for professional liability (errors and omissions) insurance, all insurance provided under this Agreement shall be on an occurrence basis. The minimum amount of insurance required shall be as follows:

A. Errors and Omissions Insurance. Consultant shall obtain and maintain in full force and effect throughout the term of this Agreement, standard industry form professional liability (errors and omissions) insurance coverage in an amount of not less than one million dollars (\$1,000,000.00) per occurrence and two-million dollars (\$2,000,000.00) annual aggregate, in accordance with the provisions of this section.

(1) Consultant shall either: (a) certify in writing to the City that Consultant is unaware of any professional liability claims made against Consultant and is unaware of any facts which may lead to such a claim against Consultant; or (b) if Consultant does not provide the certification under (a), Consultant shall procure from the professional liability insurer an endorsement providing that the required limits of the policy shall apply separately to claims arising from errors and omissions in the rendition of services under this Agreement.

(2) If the policy of insurance is written on a "claims made" basis, the policy shall be continued in full force and effect at all times during the term of this Agreement, and for a period of three (3) years from the date of the completion of the Services provided hereunder. In the event of termination of the policy during this period, Consultant shall obtain continuing insurance coverage for the prior acts or omissions of Consultant during the course of performing Services under the terms of this Agreement. The coverage shall be evidenced by either a new policy evidencing no gap in coverage, or by obtaining separate extended "tail" coverage with the present or new carrier or other insurance arrangements providing for complete coverage, either of which shall be subject to the written approval by the City Manager.

(3) In the event the policy of insurance is written on an "occurrence" basis, the policy shall be continued in full force and effect during the term of this Agreement, or until completion of the Services provided for in this Agreement, whichever is later. In the event of termination of the policy during this period, new coverage shall immediately be obtained to ensure coverage during the entire course of performing the Services under the terms of this Agreement.

B. Workers' Compensation Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, workers' compensation insurance in at least the minimum statutory amounts, and in compliance with all other statutory requirements, as required by the State of California. Consultant agrees to waive and obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies. If Consultant has no employees, Consultant shall complete the City's Request for Waiver of Workers' Compensation Insurance Requirement form.

C. Commercial General Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of commercial general liability insurance written on a per occurrence basis with a

combined single limit of at least one million dollars (\$1,000,000.00) and two million dollars (\$2,000,000.00) general aggregate for bodily injury and property damage including coverages for contractual liability, personal injury, independent contractors, broad form property damage, products and completed operations.

D. Business Automobile Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of business automobile liability insurance written on a per occurrence basis with a single limit liability in the amount of one million dollars (\$1,000,000.00) bodily injury and property damage. The policy shall include coverage for owned, non-owned, leased, and hired cars.

E. Employer Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of employer liability insurance written on a per occurrence basis with a policy limit of at least one million dollars (\$1,000,000.00) for bodily injury or disease.

**5.2 Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to and approved by the City Manager or his/her designee prior to commencing any work or services under this Agreement. Consultant guarantees payment of all deductibles and self-insured retentions. City reserves the right to reject deductibles or self-insured retentions in excess of \$10,000, and the City Manager or his/her designee may require evidence of pending claims and claims history as well as evidence of Consultant's ability to pay claims for all deductible amounts and self-insured retentions proposed in excess of \$10,000.

**5.3 Other Insurance Requirements.** The following provisions shall apply to the insurance policies required of Consultant under this Agreement:

5.3.1 For any claims related to this Agreement, Consultant's coverage shall be primary insurance with respect to the City and its officers, council members, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City and its officers, council members, officials, employees, agents, and volunteers shall be in excess of Consultant's insurance and shall not contribute with it.

5.3.2 Any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to City and its officers, council members, officials, employees, agents, and volunteers.

5.3.3 All insurance coverage and limits provided by Consultant and available or applicable to this Agreement are intended to apply to each insured, including additional insureds, against whom a claim is made or suit is brought to the full extent of the policies. Nothing

contained in this Agreement or any other agreement relating to the City or its operations shall limit the application of such insurance coverage.

- 5.3.4 No required insurance coverages may include any limiting endorsement which substantially impairs the coverages set forth in this Agreement (e.g., elimination of contractual liability or reduction of discovery period), unless the endorsement has first been submitted to the City Manager and approved in writing.
- 5.3.5 Consultant agrees to require its insurer to modify insurance endorsements to delete any exculpatory wording stating that failure of the insurer to mail written notice of cancellation imposes no obligation, or that any party will "endeavor" (as opposed to being required) to comply with the requirements of the endorsements. Certificates of insurance will not be accepted in lieu of required endorsements, and submittal of certificates without required endorsements may delay commencement of the Project. It is Consultant's obligation to ensure timely compliance with all insurance submittal requirements as provided in this Agreement.
- 5.3.6 Consultant agrees to ensure that subcontractors, and any other parties involved with the Project who are brought onto or involved in the Project by Consultant, provide the same minimum insurance coverage required of Consultant. Consultant agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this section. Consultant agrees that upon request, all agreements with subcontractors and others engaged in the Project will be submitted to the City for review.
- 5.3.7 Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any insurance requirement in no way imposes any additional obligations on the City nor does it waive any rights in this or any other regard.
- 5.3.8 Consultant shall provide proof that policies of insurance required in this Agreement, expiring during the term of this Agreement, have been renewed or replaced with other policies providing at least the same coverage. Proof that such coverage has been ordered shall be submitted prior to expiration. Endorsements as required in this Agreement applicable to the renewing or new coverage shall be provided to City no later than ten (10) days prior to expiration of the lapsing coverage.

- 5.3.9 Requirements of specific insurance coverage features or limits contained in this section are not intended as limitations on coverage, limits, or other requirements, or as a waiver of any coverage normally provided by any given policy. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue, and is not intended by any party or insured to be limiting or all-inclusive.
- 5.3.10 The requirements in this section supersede all other sections and provisions of this Agreement to the extent that any other section or provision conflicts with or impair the provisions of this section.
- 5.3.11 Consultant agrees to provide immediate notice to City of any claim or loss against Consultant arising out of the Work performed under this Agreement and for any other claim or loss which may reduce the insurance available to pay claims arising out of this Agreement. City assumes no obligation or liability by such notice, but has the right (but not the duty) to monitor the handling of any such claim or claims if they are likely to involve City, or to reduce or dilute insurance available for payment of potential claims.
- 5.3.12 Consultant agrees that the provisions of this section shall not be construed as limiting in any way the extent to which the Consultant may be held responsible for the payment of damages resulting from the Consultant's activities or the activities of any person or person for which the Consultant is otherwise responsible.

**5.4 Sufficiency of Insurers.** Insurance required in this Agreement shall be provided by authorized insurers in good standing with the State of California. Coverage shall be provided by insurers admitted in the State of California with an A.M. Best's Key Rating of B++, Class VII, or better, unless such requirements are waived in writing by the City Manager or his designee due to unique circumstances.

**5.5 Verification of Coverage.** Consultant shall furnish City with both certificates of insurance and endorsements, including additional insured endorsements, affecting all of the coverages required by this Agreement. The certificates and endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All proof of insurance is to be received and approved by the City before work commences. City reserves the right to require Consultant's insurers to provide complete, certified copies of all required insurance policies at any time. Additional insured endorsements are not required for Errors and Omissions and Workers' Compensation policies.

Verification of Insurance coverage may be provided by: (1) an approved General and/or Auto Liability Endorsement Form for the City of Palm Springs or (2) an



acceptable Certificate of Liability Insurance Coverage with an approved Additional Insured Endorsement with the following endorsements stated on the certificate:

1. *"The City of Palm Springs, its officials, employees, and agents are named as an additional insured..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

2. *"This insurance is primary and non-contributory over any insurance or self-insurance the City may have..." ("as respects City of Palm Springs Contract No. \_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

3. *"Should any of the above described policies be canceled before the expiration date thereof, the issuing company will mail 30 days written notice to the Certificate Holder named." Language such as, "endeavor to" mail and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representative" is not acceptable and must be crossed out.*

4. Both the Workers' Compensation and Employers' Liability policies shall contain the insurer's waiver of subrogation in favor of City, its elected officials, officers, employees, agents, and volunteers.

In addition to the endorsements listed above, the City of Palm Springs shall be named the certificate holder on the policies. All certificates of insurance and endorsements are to be received and approved by the City before work commences. All certificates of insurance must be authorized by a person with authority to bind coverage, whether that is the authorized agent/broker or insurance underwriter. Failure to obtain the required documents prior to the commencement of work shall not waive the Consultant's obligation to provide them.

## **6. INDEMNIFICATION**

**6.1 Indemnification and Reimbursement.** To the fullest extent permitted by law, Consultant shall defend (at Consultant's sole cost and expense), indemnify, protect, and hold harmless City, its elected officials, officers, employees, agents, and volunteers (collectively the "Indemnified Parties"), from and against any and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards, settlements, damages, demands, orders, penalties, and expenses including legal costs and attorney fees (collectively "Claims"), including but not limited to Claims arising from injuries to or death of persons (Consultant's employees included), for damage to property, including property owned by City, from any violation of any federal, state, or local law or ordinance, and from errors and omissions committed by Consultant, its officers, employees, representatives, and agents, that arise out of or relate to Consultant's performance under this Agreement. This indemnification clause excludes Claims arising from the sole negligence or willful misconduct of the City, its elected officials, officers, employees, agents, and volunteers. Under no circumstances shall the insurance requirements and limits set forth in this Agreement be construed to limit

Consultant's indemnification obligation or other liability under this Agreement. Consultant's indemnification obligation shall survive the expiration or earlier termination of this Agreement until all actions against the Indemnified Parties for such matters indemnified are fully and finally barred by the applicable statute of limitations or, if an action is timely filed, until such action is final. This provision is intended for the benefit of third party Indemnified Parties not otherwise a party to this Agreement.

**6.2 Design Professional Services Indemnification and Reimbursement.** If the Agreement is determined to be a "design professional services agreement" and Consultant is a "design professional" under California Electrical Code Section 2782.8, then:

A. To the fullest extent permitted by law, Consultant shall indemnify, defend (at Consultant's sole cost and expense), protect and hold harmless City and its elected officials, officers, employees, agents and volunteers and all other public agencies whose approval of the project is required, (individually "Indemnified Party"; collectively "Indemnified Parties") against any and all liabilities, claims, judgments, arbitration awards, settlements, costs, demands, orders and penalties (collectively "Claims"), including but not limited to Claims arising from injuries or death of persons (Consultant's employees included) and damage to property, which Claims arise out of, pertain to, or are related to the negligence, recklessness or willful misconduct of Consultant, its agents, employees, or subcontractors, or arise from Consultant's negligent, reckless or willful performance of or failure to perform any term, provision, covenant or condition of this Agreement ("Indemnified Claims"), but Consultant's liability for Indemnified Claims shall be reduced to the extent such Claims arise from the negligence, recklessness or willful misconduct of the City and its elected officials, officers, employees, agents and volunteers.

B. The Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to execute an Indemnification Agreement adopting the indemnity provisions in sub-section 6.1 in favor of the Indemnified Parties. In addition, Consultant shall require all non-design-professional sub-contractors, used or sub-contracted by Consultant to perform the Services or Work required under this Agreement, to obtain insurance that is consistent with the Insurance provisions as set forth in this Agreement, as well as any other insurance that may be required by Contract Officer.

## **7. REPORTS AND RECORDS**

**7.1 Accounting Records.** Consultant shall keep complete, accurate, and detailed accounts of all time, costs, expenses, and expenditures pertaining in any way to this Agreement. Consultant shall keep such books and records as shall be necessary to properly perform the Services required by this Agreement and to enable the Contract Officer to evaluate the performance of such Services. The Contract Officer shall have full and free access to such books and records at all reasonable times, including the right to inspect, copy, audit, and make records and transcripts from such

records.

**7.2 Reports.** Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the Services required by this Agreement, or as the Contract Officer shall require. Consultant acknowledges that the City is greatly concerned about the cost of the Work and Services to be performed under this Agreement. For this reason, Consultant agrees that Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the contemplated Work or Services. If Consultant is providing design services, Consultant shall promptly notify the Contract Officer the estimated increased or decreased cost for the project being designed if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the design services.

**7.3 Ownership of Documents.** All drawings, specifications, reports, records, documents, memoranda, correspondence, computations, and other materials prepared by Consultant, its employees, subcontractors, and agents in the performance of this Agreement shall be the property of City and shall be promptly delivered to City upon request of the Contract Officer or upon the termination of this Agreement. Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership of the documents and materials. Any use of such completed documents for other projects and/or use of incomplete documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and the City shall indemnify the Consultant for all resulting damages. Consultant may retain copies of such documents for their own use. Consultant shall have an unrestricted right to use the concepts embodied in this Agreement. Consultant shall ensure that all its subcontractors shall provide for assignment to City of any documents or materials prepared by them. In the event Consultant fails to secure such assignment, Consultant shall indemnify City for all resulting damages.

**7.4 Release of Documents.** All drawings, specifications, reports, records, documents, and other materials prepared by Consultant in the performance of services under this Agreement shall not be released publicly without the prior written approval of the Contract Officer. All information gained by Consultant in the performance of this Agreement shall be considered confidential and shall not be released by Consultant without City's prior written authorization.

**7.5 Audit and Inspection of Records.** After receipt of reasonable notice and during the regular business hours of City, Consultant shall provide City, or other agents of City, such access to Consultant's books, records, payroll documents, and facilities as City deems necessary to examine, copy, audit, and inspect all accounting books, records, work data, documents, and activities directly related to Consultant's performance under this Agreement. Consultant shall maintain such books, records, data, and documents in accordance with generally accepted accounting principles and

shall clearly identify and make such items readily accessible to such parties during the term of this Agreement and for a period of three (3) years from the date of final payment by City hereunder.

## **8. ENFORCEMENT OF AGREEMENT**

**8.1 California Law and Venue.** This Agreement shall be construed and interpreted both as to validity and as to performance of the Parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such County, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

**8.2 Interpretation.** This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties. The terms of this Agreement are contractual and the result of negotiation between the Parties. Accordingly, any rule of construction of contracts (including, without limitation, California Electrical Code Section 1654) that ambiguities are to be construed against the drafting party, shall not be employed in the interpretation of this Agreement. The caption headings of the various sections and paragraphs of this Agreement are for convenience and identification purposes only and shall not be deemed to limit, expand, or define the contents of the respective sections or paragraphs.

**8.3 Default of Consultant.** Consultant's failure to comply with any provision of this Agreement shall constitute a default.

A. If the City Manager, or his designee, determines that Consultant is in default in the performance of any of the terms or conditions of this Agreement, he/she shall notify Consultant in writing of such default. Consultant shall have ten (10) days, or such longer period as City may designate, to cure the default by rendering satisfactory performance. In the event Consultant fails to cure its default within such period of time, City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice of any remedy to which City may be entitled at law, in equity, or under this Agreement. Consultant shall be liable for all reasonable costs incurred by City as a result of such default. Compliance with the provisions of this section shall not constitute a waiver of any City right to take legal action in the event that the dispute is not cured, provided that nothing shall limit City's right to terminate this Agreement without cause under Section 3.5.

B. If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 8.3A, take over the work and prosecute the same to completion by contract or otherwise. The Consultant shall be liable to the extent that the total cost for completion of the Services required hereunder exceeds the Maximum Contract Amount (provided

that the City shall use reasonable efforts to mitigate such damages). The City may withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated. The withholding or failure to withhold payments to Consultant shall not limit Consultant's liability for completion of the Services as provided in this Agreement.

**8.4 Waiver.** No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought. Any waiver by the Parties of any default or breach of any covenant, condition, or term contained in this Agreement, shall not be construed to be a waiver of any subsequent or other default or breach, nor shall failure by the Parties to require exact, full, and complete compliance with any of the covenants, conditions, or terms contained in this Agreement be construed as changing the terms of this Agreement in any manner or preventing the Parties from enforcing the full provisions.

**8.5 Rights and Remedies Cumulative.** Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

**8.6 Legal Action.** In addition to any other rights or remedies, either Party may take legal action, in law or in equity, to cure, correct, remedy or recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement.

**8.7 Attorney Fees.** In the event any dispute between the Parties with respect to this Agreement results in litigation or any non-judicial proceeding, the prevailing Party shall be entitled, in addition to such other relief as may be granted, to recover from the non-prevailing Party all reasonable costs and expenses. These include but are not limited to reasonable attorney fees, expert consultant fees, court costs and all fees, costs, and expenses incurred in any appeal or in collection of any judgment entered in such proceeding. To the extent authorized by law, in the event of a dismissal by the plaintiff or petitioner of the litigation or non-judicial proceeding within thirty (30) days of the date set for trial or hearing, the other Party shall be deemed to be the prevailing Party in such litigation or proceeding.

## 9. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION

**9.1 Non-liability of City Officers and Employees.** No officer or employee of the City shall be personally liable to the Consultant, or any successor-in-interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

**9.2 Conflict of Interest.** No officer or employee of the City shall have any direct or indirect financial interest in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects their financial interest or the financial interest of any corporation, partnership, or association in which he/she is, directly or indirectly, interested in violation of any state statute or regulation. Consultant warrants that Consultant has not paid or given, and will not pay or give, any third party any money or other consideration in exchange for obtaining this Agreement.

**9.3 Covenant Against Discrimination.** In connection with its performance under this Agreement, Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, marital status, ancestry, or national origin. Consultant shall ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, age, marital status, ancestry, or national origin. Such actions 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.

## 10. MISCELLANEOUS PROVISIONS

**10.1 Patent and Copyright Infringement.** To the fullest extent permissible under law, and in lieu of any other warranty by City or Consultant against patent or copyright infringement, statutory or otherwise:

A. It is agreed that Consultant shall defend at its expense any claim or suit against City on account of any allegation that any item furnished under this Agreement, or the normal use or sale arising out of the performance of this Agreement, infringes upon any presently existing U.S. letters patent or copyright and Consultant shall pay all costs and damages finally awarded in any such suit or claim, provided that Consultant is promptly notified in writing of the suit or claim and given authority, information and assistance at Consultant's expense for the defense of same, and provided such suit or claim arises out of, pertains to, or is related to the negligence, recklessness or willful misconduct of Consultant. However, Consultant will not indemnify City if the suit or claim results from: (1) City's alteration of a deliverable, such that City's alteration of such deliverable created the infringement upon any presently existing U.S. letters patent or copyright; or (2) the use of a deliverable in combination with other material not provided by Consultant when it is such use in combination which

infringes upon an existing U.S. letters patent or copyright.

B. Consultant shall have sole control of the defense of any such claim or suit and all negotiations for settlement in the event City fails to cooperate in the defense of any suit or claim, provided, however, that such defense shall be at Consultant's expense. Consultant shall not be obligated to indemnify City under any settlement that is made without Consultant's consent, which shall not be unreasonably withheld. If the use or sale of such item is enjoined as a result of the suit or claim, Consultant, at no expense to City, shall obtain for City the right to use and sell the item, or shall substitute an equivalent item acceptable to City and extend this patent and copyright indemnity thereto.

**10.2 Notice.** Any notice, demand, request, consent, approval, or communication that either party desires, or is required to give to the other party or any other person shall be in writing. All notices shall be personally delivered, sent by pre-paid First Class U.S. Mail, registered or certified mail, postage prepaid, return receipt requested, or delivered or sent by facsimile with attached evidence of completed transmission. All notices shall be deemed received upon the earlier of (i) the date of delivery to the address of the person to receive such notice if delivered personally or by messenger or overnight courier; (ii) five (5) business days after the date of posting by the United States Post Office if by mail; or (iii) when sent if given by facsimile. Any notice, request, demand, direction, or other communication sent by facsimile must be confirmed within forty-eight (48) hours by letter mailed or delivered. Other forms of electronic transmission such as e-mails, text messages, and instant messages are not acceptable manners of notice required hereunder. Notices or other communications shall be addressed as follows:

To City: City of Palm springs  
Attention: City Manager & City Clerk  
3200 E. Tahquitz Canyon Way  
Palm springs, California 92262  
Telephone: (760) 323-8204  
Facsimile: (760) 323-8332

To Consultant: MRC Engineering, Inc.  
34300 Gateway Drive, Suite 120  
Palm Desert, CA 92211  
Attention: Ralph Raya  
Telephone: (760) 340-9005  
Facsimile: (760) 340-9400

**10.3 Integrated Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior negotiations, arrangements, agreements, representations, and understandings, if any, made by or among the Parties with respect to the subject matter in this Agreement.

**10.4 Amendment.** No amendments or other modifications of this Agreement shall be binding unless through written agreement by all Parties.

**10.5 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Agreement shall be determined to be invalid by a final judgment or decree of a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of that provision, or the remaining provisions of this Agreement unless the invalid provision is so material that its invalidity deprives either Party of the basic benefit of their bargain or renders this Agreement meaningless.

**10.5 Successors in Interest.** This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assignees.

**10.6 Third Party Beneficiary.** Except as may be expressly provided for in this Agreement, nothing contained in this Agreement is intended to confer, nor shall this Agreement be construed as conferring, any rights, including, without limitation, any rights as a third-party beneficiary or otherwise, upon any entity or person not a party to this Agreement.

**10.7 Recitals.** The above-referenced Recitals are hereby incorporated into the Agreement as though fully set forth in this Agreement and each Party acknowledges and agrees that such Party is bound, for purposes of this Agreement, by the same.

**10.8. Corporate Authority.** Each of the undersigned represents and warrants that (i) the Party for which he or she is executing this Agreement is duly authorized and existing, (ii) he or she is duly authorized to execute and deliver this Agreement on behalf of the Party for which he or she is signing, (iii) by so executing this Agreement, the Party for which he or she is signing is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which the Party for which he or she is signing is bound.

***[SIGNATURES ON NEXT PAGE]***



**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the dates stated below.

**"CITY"**  
**City of Palm Springs**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
David H. Ready  
City Manager

**APPROVED AS TO FORM:**

**ATTEST**

By: \_\_\_\_\_  
Douglas C. Holland,  
City Attorney

By: \_\_\_\_\_  
James Thompson,  
City Clerk

**APPROVED BY CITY COUNCIL:**

**Date: \_\_\_\_\_ Agreement No. \_\_\_\_\_**

Corporations require two notarized signatures. One signature must be from Chairman of Board, President, or any Vice President. The second signature must be from the Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, or Chief Financial Officer.

**CONSULTANT NAME:**

MRC Engineering, Inc.  
34300 Gateway Drive, Suite 120  
Palm Desert, CA 92211

By \_\_\_\_\_  
Signature (Notarized)

By \_\_\_\_\_  
Signature (Notarized)

## **EXHIBIT "A"**

### **SCOPE OF SERVICES**

Consultant shall provide all required electrical engineering design services, including project management and coordinating with the various other consultants engaged by City, necessary to complement the final design for the Downtown Event Center space with maximum capacity of 3,000 as identified on the schematic design included herein this Exhibit "A". Such electrical engineering elements generally include:

- Electrical systems to support various architectural elements, including performance stages, buildings, restrooms, concession, public art lighting, accent lighting, area lighting, etc.
- Communication and security systems and power for special events

Following City's approval of the final design, Consultant shall prepare full and complete construction drawings (plans, specifications and estimates) of the electrical engineering elements identified on the final design, with plan and elevation views and associated technical details to facilitate City's bidding for construction.

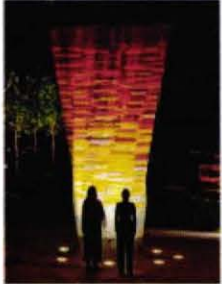
Consultant shall provide bidding support services as may be necessary and required by City.

Consultant shall provide construction administrative support services as may be necessary and required by City.

The Consultant's proposal and scope of services, as referenced in its letter dated June 5, 2015, is incorporated herein by reference, and as identified on the following Exhibit "B".

# Conceptual Development Plan

# Downtown Palm Springs, EV



Palm Springs Art Museum

Museum Drive

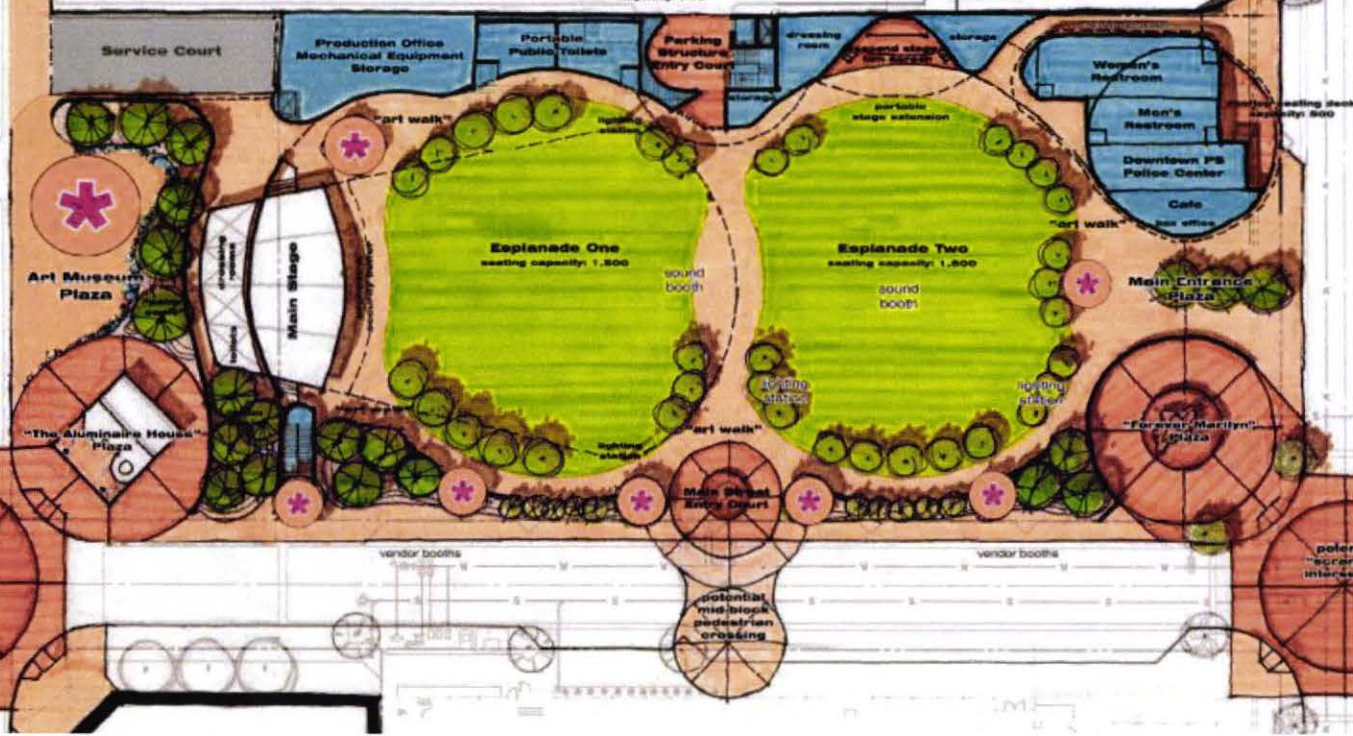
Belardo Road

Block G

Public Parking Structure

potential "sky box" seating deck capacity: 500

Residential/ Commercial/ MXD



**EXHIBIT "B"**  
**CONSULTANT'S PROPOSAL**



**Project Proposal & Authorization**

June 5, 2015

**Project Name:** City of Palm Springs Downtown Event Center Site  
**Client:** City of Palm Springs  
**Contact:** Marcus Fuller  
**Address:** 3200 Tahquitz Canyon Way, Palm Springs, CA. 92262  
**Phone:** 760-323-8380

**A. Construction Documents Scope of Services:**

1. Provide electrical engineering and lighting consulting services for the Downtown Event Center site electrical, art, accent and area lighting, conduits for communication & security systems and power for special events based on the current project design shown on Exhibit 1 attached.
2. Attend design coordination meetings with the design team as required.
3. Coordinate all site electrical with the building design team, Urrutia Architects, RGA Landscape Architects, event center consultant (Golden Voice) and MSA Consulting.
4. Coordinate the project utility point of connections with the utility maps being generated under the Wessman Development project.
5. Electrical - design power for event requirements, provide points of connections to facilitate event lighting & sound requirements, design power to area lighting, accent lighting, art lighting and general site lighting systems, design a lighting control system that meets event center requirements and Title 24 energy requirements, design all power for general site requirements.
6. Lighting Design & Consulting - provide schematic and design development lighting plans complete with product specifications for the project site and coordinate with the building lighting systems. Meet with the owner and team members to review various lighting options for general lighting, accent lighting and theatrical lighting systems.
7. Provide investigation and opportunities to include photovoltaic solar and/or wind energy into the project.
8. Provide Title 24 compliance reports and documentation for the electrical site lighting as required for submittal with the construction documents to the Building Department. Title 24 reports will be generated for the site and the buildings.
9. Provide design development and construction documents.

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Professional Engineers & Lighting Consultants

Palm Desert | Santa Ana | San Diego

34300 Gateway Drive, Suite 120, Palm Desert, CA. 92211 | o: 760-340-9005 f: 760-340-9100 | [www.mrc-e.com](http://www.mrc-e.com)

## EXHIBIT "B" CONSULTANT'S PROPOSAL



Project Proposal & Authorization  
Page 12

10. Provide electrical engineers cost estimate for the work being provided under this scope of work.
  11. Provide a complete set electrical construction documents that includes all plans, details, diagrams, notes, specifications and calculations needed for building department submittal, bidding and construction.
  12. Lighting pole base structural foundations as required for parking lot lighting, bollards and post lighting.
  13. Provide an engineer's cost estimate for the work described in this scope of work.
- B. Bidding Phase:**
1. Attend the contractor pre-bid meeting.
  2. Provide responses to Request for Information (RFI) during the bidding phase.
  3. Provide SK drawing as required.
  4. Review the electrical bids and provide questions as required to insure the bids account for all electrical & lighting requirements.
- C. Construction Support Services:**
1. Provide responses to Request for Information (RFI) during the construction phase.
  2. Provide construction site visits as required.
  3. Review all construction shop drawings and product submittals for compliance with the construction documents and specifications.
- D. Work not Included:**
1. Solar photovoltaic engineering to be additional services as required.
  2. Wind energy engineering to be additional services as required.
  3. Mechanical, electrical and plumbing engineering services for the Event Center Buildings.

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## EXHIBIT "C"

### SCHEDULE OF COMPENSATION

Tasks listed below are identical to tasks identified in the Consultant's Proposal incorporated herein as Exhibit "B" of this Agreement. Payments to Consultant shall be made no more frequently than monthly, and shall be based on directly incurred time and materials costs up to and not exceeding the lump sum budgets established per task item of work as indicated herein. Payments shall be made to Consultant based upon completion of tasks, or pro-rata portions thereof noted below, to a maximum of 75% of the lump sum budget established per task until completion of such task item as determined by the Contract Officer. Each request for payment shall contain Consultant's statement of the work or tasks completed or portion performed, with supporting documentation. The determination of payment due shall be made based upon the reasonable judgment of the Contract Officer.

Task A, Construction Documents:	\$16,300
Task B, Bidding Phase:	\$2,200
Task C, Construction Support Services:	\$5,000
Structural Engineering:	\$3,000
Reimbursable Expenses:	\$3,500
<b>Grand Total Not to Exceed:</b>	<b>\$30,000</b>

Note, the budgets identified for each phase are not to exceed amounts identified by Consultant to provide sufficient budget to complete the tasks, and shall not be exceeded. Consultant shall receive payment therefore for actual costs incurred, which shall reflect the final cost for each task, up to and not exceeding the budget therefore.

## EXHIBIT "D"

### SCHEDULE OF PERFORMANCE

The Schedule of Performance was prepared by Consultant and shall bind Consultant to completing required deliverables prior to the dates identified herein this Schedule. This Schedule assumes the City shall follow the standard Major Architectural Review process, however, the City reserves the right to identify alternative review processes to expedite the Schedule in the best interests of the City. The City shall be responsible for complying with the review times identified in the Schedule, and for scheduling meeting dates identified in the Schedule; to the extent that City review times are delayed, or meeting dates are revised, Consultant shall nevertheless remain responsible for complying with the subsequent schedule for completion of the next deliverable item or milestone date.

<b>Phase 2: Design Development</b>		<b>Completion Date</b>
<b>1</b>	Council Approval of Schematic Design/Approval to Proceed with Design	7/1/15
<b>2</b>	Design Development (Consultants)	11 weeks
<b>3</b>	First Submittal (Consultants)	9/14/15
<b>4</b>	AAC Review	9/21/15
<b>5</b>	Design Revisions (Consultants)	2 weeks – 10/5/15
<b>6</b>	AAC Approval	10/12/15
<b>7</b>	Submit for PC Review	10/14/15
<b>8</b>	PC Review	10/28/15
<b>9</b>	Design Revisions (Consultants)	2 weeks
<b>10</b>	PC Approval	11/12/15
<b>11</b>	City Council Approval	12/2/15

<b>Phase 3: Construction Documents</b>		<b>Completion Date</b>
<b>1</b>	Preparation of drawings (grading, architectural [MEP], landscaping, electrical) (Consultants)	21 weeks (NTP date refers to Item 10 under Phase 2)
<b>2</b>	Submittal of drawings for plan check (Consultants)	5/2/16
<b>3</b>	Plan Check	3 weeks
<b>4</b>	Plan Revisions (Consultants)	2 weeks
<b>5</b>	Resubmittal of drawings for plan check (Consultants)	6/6/16
<b>6</b>	2 <sup>nd</sup> Plan Check	2 weeks
<b>7</b>	Corrections and Resubmit	2 weeks
<b>8</b>	Plan Approval	7/6/16
<b>9</b>	City Council approval of plans and authorization to bid	7/22/16

## EXHIBIT "D"

### SCHEDULE OF PERFORMANCE

<b>Phase 4: Bid Services</b>		<b>Completion Date</b>
<b>1</b>	<b>Notice to Bid</b>	8/3/16 (Date refers to Item 6 under Phase 3)
<b>2</b>	<b>Bidding</b>	30 days
<b>3</b>	<b>End of Bidding Period</b>	9/14/16
<b>4</b>	<b>Contract Award</b>	9/21/16

<b>Phase 5: Construction Administration</b>		<b>Completion Date</b>
<b>1</b>	<b>Executed Contracts – 4 weeks from contract award</b>	10/19/16
<b>2</b>	<b>Pre-Construction Meeting – 2 weeks from contract award</b>	11/2/16
<b>3</b>	<b>Notice to Proceed – 2 weeks from Item 2</b>	11/16/16
<b>4</b>	<b>Construction</b>	228± working days
<b>5</b>	<b>Completion/Opening</b>	10/3/17