

# Project Management Agreement

This Agreement is effective \_\_\_\_\_ between the Town of Cave Creek, Arizona (“Client”) and 3D/International, Inc. (“3D/I”) in connection with the Sanitary Sewer System Expansion Project (“Project”) located at Cave Creek, Arizona.

3D/I and the Client agree as follows:

## Article 1 – 3D/I's Services

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1.1 3D/I agrees to perform the services described in **Exhibit A: Scope of Services and Deliverables**, which is attached and made a part of this Agreement, including any and all services which are naturally included and/or reasonably inferable in the described services. Such defined services shall be referred to as the “Services.”

1.2 3D/I shall commence performance of the Services upon execution of this Agreement.

1.3 Services in addition to those described in Exhibit A and services which result from a change in the scope of the Project shall be referred to as “Additional Services” and performed on the basis agreed to in writing between 3D/I and the Client.

## Article 2 – Time of Performance

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2.1 3D/I has prepared and submitted to the Client a project schedule for performance of the Services, which is shown in the attached **Exhibit B: Schedule for Performance of Services**.

2.2 The Schedule in Exhibit B reflects the performance of 3D/I's Services as expeditiously as is consistent with professional care, and is dependent upon the timely performance by others and upon timely review and approval from the Client when required.

## Article 3 – Standard of Performance

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3.1 3D/I shall perform the Services in accordance with the standard of practice generally accepted in its profession at the location of the Project.

3.2 Except as set forth in this Agreement, no warranties, expressed or implied, are made by 3D/I in connection with its performance of Services on this Project.

3.3 Services performed on this Project are based on 3D/I's understanding of applicable laws and regulations as interpreted and applied on the date of this Agreement.

## Article 4 – Compensation

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4.1 The Client agrees to compensate 3D/I as stated in the attached **Exhibit C: Fees and Payments** in return for the performance of Services under this Agreement. 3D/I shall not perform additional services or incur reimbursable expenses without first obtaining the Client's written approval.

4.2 3D/I shall be compensated for Additional Services as agreed to in writing between the parties. Absent such agreement in writing, 3D/I shall be compensated on the hourly basis as stated in **Exhibit C: Fees and Payments**.

4.3 If the project is not completed within twenty one (21) months from the date of this Agreement for reasons beyond the control of 3D/I, compensation under this Agreement shall be equitably adjusted.

## Article 5 – Payment

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5.1 Payments for Services shall be made monthly in accordance with the payment schedule shown in **Exhibit C: Fees and Payments**.

5.2 The Client agrees to pay undisputed amounts within thirty days of the invoice date. Amounts that are disputed by the Client will be brought to 3D/I's attention in writing, along with an explanation of the reasons for such dispute, within thirty days of the invoice date.

5.3 Amounts not reasonably disputed that remain unpaid more than thirty days from the invoice date shall bear interest at the rate of one percent (1%) per month until paid.

5.4 If payment of an undisputed amount is not made within sixty days of the invoice date, 3D/I shall have the right to suspend the performance of Services under this Agreement pending payment. Such suspension of Services shall not be considered a breach of this Agreement.

5.5 No deductions shall be made from 3D/I's compensation on account of penalty, liquidated damages or other sums withheld from payments to other consultants, contractors or suppliers.

## Article 6 – Client's Responsibilities

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6.1 The Client shall provide 3D/I any reasonably requested information within the Client's possession regarding the Project, including the program requirements, available plans, specifications and other documents describing the Project, and budget and schedule limitations.

6.2 3D/I shall be entitled to rely upon the accuracy and completeness of any information furnished by the Client.

6.3 The Client has retained the Design/Build/Operate Contractor, selected by Client with 3D/I's assistance. By performing the Services in the Agreement, 3D/I shall not assume any responsibilities of the architectural and engineering design firms or the construction contractors, nor shall 3D/I be responsible for liability and related expenses that arise from the performance or failure to perform by such other parties except to the extent such performance is under 3D/I's control.

6.4 The Client agrees to provide prompt notice to 3D/I's Chief Operating Officer, in addition to the project manager, if the Client becomes dissatisfied with 3D/I's performance or aware of any deficiency in 3D/I's service.

## Article 7 – Ownership of Documentation of Services

7.1 Drawings, plans, specifications, studies, reports, memoranda, computation sheets or other documents prepared by 3D/I or its consultants in connection with Services performed under this Agreement shall become the property of the Client. 3D/I may retain and use copies for reference, documentation of its experience and capabilities, and other purposes not specifically related to other projects.

## Article 8 – Proprietary Information

8.1 3D/I understands and agrees that, in the performance of the work or Services under this Agreement, 3D/I may have access to private or confidential information that may contain proprietary details, the disclosure of which to third parties may be damaging to the Client. 3D/I agrees that all information disclosed by Client to 3D/I and identified in writing by the Client as proprietary shall be held in confidence and used only as reasonably necessary in the performance of this Agreement. 3D/I shall exercise the same standard of care to protect such information as is used to protect its own proprietary data.

## Article 9 – General Provisions

9.1 The Client acknowledges that the discovery, presence, handling or removal of asbestos, asbestos products, polychlorinated biphenyl (PCB) or other hazardous substances that may presently exist at the job site is outside of 3D/I's expertise, and is not included in the Services 3D/I is to perform nor covered by 3D/I's insurance. The Client therefore agrees to hire a qualified consultant in this field to deal with hazardous materials. 3D/I shall not be responsible or be involved in any way nor have any liability for the discovery, presence, handling or removal of such materials.

9.2 All notices to be given by the parties hereto shall be in writing and served by depositing same in the United States Post Office, postage prepaid and registered as follows:

To Client:

Client of Cave Creek  
37622 North Cave Creek Road  
Cave Creek, AZ 85331

Attn: Jessica Marlow, PE, Utilities Manager

To 3D/I:

3D/International, Inc.  
2111 East Highland Avenue, Suite 402B  
Phoenix, AZ 85016

Attn: Ward Simpson, Sr. Vice President

AND:

3D/International, Inc.  
1900 West Loop South Suite 600  
Houston, TX 77027  
Attn: William Turner

9.3 Nothing contained in this Agreement or its companion documents shall create a contractual relationship with or cause of action in favor of a third party against either Client or 3D/I.

9.4 3D/I shall have the right, with Client's prior written approval, to include representations of the Project, including photographs, among 3D/I's promotional and professional materials. 3D/I's materials shall not include information that the Client has notified 3D/I is confidential or proprietary.

9.5 If any term or provision of this Agreement shall be found to be illegal or unenforceable, such term or provision shall be deemed stricken and all other terms and provisions of this Agreement shall remain in full force and effect.

9.6 This Agreement shall be made in, and shall be construed in accordance with the laws of the State of Arizona.

9.7 The failure by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants or provisions hereof by the other party at the time designated, shall not be a waiver of any such default or right to which the party is entitled, nor shall it in any way affect the right of the party to enforce such provisions thereafter.

9.8 3D/I agrees to make available to the Client, within five days of written request, accounting records specifically related to reimbursable expenses and hourly fees billed to Client on this Project.

9.9 This Agreement represents the entire agreement between 3D/I and the Client and may be amended only in writing with the signature of both parties. The Client and 3D/I bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither the Client nor 3D/I shall assign this Agreement without the written consent of the other.

9.10 Resolution of Claims and Disputes

1. **Mediation:** Any and all disputes and/or claims arising under or related to the Contract shall be first submitted to mediation before a single mediator selected by the parties.

a. The mediation shall be commenced by written demand upon the other party for mediation. The mediation shall be held in accordance with the Construction Industry Mediation Rules of the American Arbitration Association (“AAA”) currently in effect, but not administered or conducted by the AAA. If the parties cannot agree upon a mediator within ten (10) days of the written demand, either party may submit the mediation to the AAA, the AAA shall select the mediator, and thereafter the mediation shall be administered by the AAA. The mediation shall occur within thirty (30) days of the written demand for mediation, unless the parties agree, in writing, to a longer period of time.

b. The qualifications for the mediator, whether selected by the Parties or the AAA, shall be that they be: (a) an experienced mediator, arbitrator or litigator of construction disputes; and (b) having engaged a significant portion of their time involving and/or resolving construction disputes for at least the past five (5) years.

c. Each party shall provide to the other party and the mediator, in writing, the following information and documentation, in detail: (i) the basis for the Claim; (ii) the effect of the Claim upon the construction of, and/or Project Schedule for, the Project; (iii) the specific relief requested, the amount thereof, and how such was calculated; (iv) the parties involved in the Claim, and how they are involved; (v) the specific contract provisions in the Contract Documents (including, if applicable, drawings and specifications) which apply; and (vi) efforts made to date to resolve the Claim, together with any additional information and documentation which the party believes relevant. In addition, the parties shall exchange, and provide to the mediator such additional memoranda, information and /or documentation, as the mediator may request, and in the form and at such times, as the mediator may direct.

d. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be specifically enforceable in any court having jurisdiction thereof.

2. **Arbitration:** If the mediation is unsuccessful, the parties shall submit the dispute and/or claim to be resolved through binding arbitration conducted according to the then current Construction Industry Arbitration Rules of the AAA, but not administrated or conducted by the AAA, which arbitration shall be held in Phoenix, Arizona, utilizing a single arbitrator selected by the parties, unless the parties agree, in writing, to an alternative arbitration procedure.

a. If: (a) the parties cannot agree on a single arbitrator within two (2) weeks of the demand for arbitration; or (b) the parties at any time prior to the arbitrator being appointed and the arbitrator has accepted the appointment, cannot agree upon any significant aspect of the arbitration, not already addressed herein, either party may submit the Claim directly to the AAA to select the Arbitrator, and thereafter the arbitration shall be administered by the AAA.

b. The arbitrator shall be an attorney with at least fifteen (15) years of experience in construction related practice, and whose practice, for at least the last five (5) years, consists of at least 50% construction law.

c. At the request of either party, the arbitration may include as parties, through joinder, consolidation or otherwise, additional persons or entities involved in the Project, involving claims and/or disputes with common issues and/or facts. The arbitrator shall promptly rule upon any request for joinder or consolidation.

d. In relation to claims in which the amount in controversy is less than \$250,000, no discovery other than exchange of documents, designation of witnesses and detailed disclosure of claims and defenses (including specifically a detailed basis for calculating all claims), and no more than 3 depositions and 1 expert per side, shall be allowed, subject to disclosure of such other information as approved by the arbitrator. Otherwise, discovery shall be allowed and/or limited as decided by the arbitrator.

e. The prevailing party in any arbitration or court proceeding under this Agreement shall be entitled to an award of its attorneys' fees, costs, and expenses (including expert witness fees) incurred.

f. A demand for arbitration shall be made within the time limits specified in the Contract Documents as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations.

g. The Parties agree to participate as a party, by joinder and/or consolidation, in any arbitration, litigation, or other dispute resolution involving as an issue, claim, or defense, any action, inaction, or service provided under this Contract or in relation to the Project or the Work, or any defect or deficiency in the Work.

h. The party filing a notice of demand for arbitration, or a counterclaim, must assert in the demand or counterclaim all Claims then known to that party on which arbitration is permitted to be demanded.

i. Any award by the arbitrator shall not include any consequential or punitive damages.

j. The award entered by the arbitrator shall be a reasoned award.

k. The award entered by the arbitrator shall be final and judgment may be entered thereon in the Maricopa County, Arizona Superior Court.

9.11 The Client agrees not to solicit or hire 3D/I employees until one year after completion of the Project. Should the Client hire a 3D/I employee during this period, the Client agrees to pay 3D/I a sum equal to that employee's annual salary or wages.

9.12 The Parties have the right to terminate this Agreement or abandon any portion of the project for which services have not been performed by the 3D/I as provided below:

Termination for Convenience: Client reserves the right to terminate this Agreement or any part hereof for its sole convenience with thirty (30) days written notice. In the event of such termination, 3D/I shall immediately stop all work hereunder, and shall immediately cause any of its Consultants, Suppliers and Subcontractors to cease such work. . In such event, Client shall

pay 3D/I only the direct value of its completed and partially completed Work in process, and materials supplied as of the date of termination and the reasonable costs and expenses attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with Subcontractors and/or Sub consultants and a proportionate amount of 3D/I's fee. 3D/I shall be entitled to profit and overhead on completed and partially completed Work only, but shall not be entitled to anticipated profit or anticipated overhead. Client shall make a final termination payment within sixty (60) days after 3D/I has delivered the last of the partially completed items. 3D/I shall not be paid for any work done after the effective termination date, or for any costs incurred by 3D/I's suppliers or subcontractors, which 3D/I could reasonably have avoided.

Termination for Cause:

Client may also terminate this Agreement or any part hereof for cause if any of the following events occur:

- .1 The 3D/I refuses or fails to supply enough properly skilled workers or proper materials or equipment;
- .2 The 3D/I fails to make undisputed payment to Subcontractor(s) for materials and/or equipment or labor in accordance with the respective agreements between the 3D/I and the Subcontractor(s);
- .3 The 3D/I disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;
- .4 The 3D/I disregards the reasonable instructions of Client (when such instructions are based upon the requirements of this Agreement);
- .5 The 3D/I breaches any warranty made by the 3D/I under or pursuant to the Agreement;
- .6 The 3D/I fails to furnish Client with assurances satisfactory to the Client evidencing the 3D/I's ability to complete the Work in compliance with the Agreement, including, without limitation, the timely furnishing of any and all surety bonds required under applicable Arizona law;
- .7 The 3D/I fails after commencement of the Work to proceed continuously with the completion of the Work for more than fourteen (14) days except as permitted under the Agreement.
- .8 The 3D/I is adjudged bankrupt or insolvent or makes a general assignment for the benefit of 3D/I's creditors, or a trustee or receiver is appointed for 3D/I or for any of its property, or files a petition to take advantage of any debtor's act, or to recognize under bankruptcy or similar laws, and in such event fails or is unable to provide CLIENT with timely and adequate assurance of future performance of the work in accordance with the terms and conditions contained herein; or
- .9 The 3D/I otherwise materially breaches the Agreement.



Upon the occurrence of any of these events set forth above, 3D/I shall be in default and Client may provide written notice to 3D/I that the Agreement shall be terminated unless the default is cured within fourteen (14) days of 3D/I's receipt of such notice or, in the event the 3D/I cannot reasonably cure such default within fourteen (14) days, if the 3D/I does not commence cure of the default within fourteen (14) days of such notice.

If 3D/I, within such fourteen (14) day period, fails to cure, or reasonably commence to cure, such default, then Client may declare the Agreement terminated for cause by providing written notice to 3D/I of such declaration. The Agreement shall be terminated effective as of the date Client delivers such notice to 3D/I.

Upon declaring the Agreement terminated, Client may employ any person or persons to complete the work and provide all of the required services and other items.

In the event of such termination, 3D/I shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, the 3D/I will only be entitled to be paid for the actual cost of Work correctly performed prior to its default.

If Client's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then 3D/I shall be obligated to pay the difference to Client and/or Client may withhold the amount of such excess cost and expense from any balance due to 3D/I for Work correctly performed prior to the default. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Client in connection with the re-procurement and defense of claims arising from 3D/I's default.

If Client is deemed to have improperly terminated the Agreement for cause; the termination for cause will be converted to a termination for convenience, and 3D/I's damages for such termination shall be limited to the amounts recoverable pursuant to paragraph 1.3A of this section. In no event shall 3D/I be entitled to any incidental or consequential damages alleged to have been incurred due to improper termination by Client.

Termination by 3D/I. 3D/I may suspend the Work upon fourteen (14) days written notice to Client for its failure to pay undisputed amounts when due. In addition, 3D/I may terminate the Agreement if Client has failed to timely pay undisputed payments owed to 3D/I which are past due and payable, or if the Work has been suspended for a period of more than ninety (90) days through no fault of the 3D/I, and only after Client has failed to remedy the same for a period of thirty (30) days after written notice of the alleged basis for the termination has been delivered to Client. 3D/I will not be entitled to suspend the Work or terminate this Agreement based upon alleged non-

payment of amounts that are in dispute. Upon such termination, 3D/I may only recover from Client payment for Work executed or in process, materials, equipment, tools, and construction equipment and machinery, plus the proportionate amount of its fee as provided for under the Contract Documents through the date of termination only. Under no circumstances shall 3D/I be entitled to recover any compensation for work not actually performed, materials not actually provided, or anticipated profits. 3D/I's right to payment, if any, is subject to all of Client's claims related to the Work performed prior to termination, including, without limitation, offsets, and setoffs for defective work, claims by subcontractors and suppliers, or any other breach of the Contract Documents, including without limitation, the reasons that payment may be withheld under any provision of the Contract Documents.

9.13 Client agrees that to the fullest extent permitted by law, the extent of 3D/I's total liability to Client is limited to damages directly caused by its negligence. Such liability includes 3D/I's negligence, errors, omissions, strict liability, breach of contract or breach of warranty. Except to the extent covered by applicable insurance, Client and 3D/I agree that to the fullest extent permitted by law, neither party nor affiliated companies, nor the officers, agents, employees or contractors of any of the foregoing, shall be liable to the other for any action or claim for consequential or special damages, loss of profits, loss of opportunity, loss of product or loss of use, and any protection against liability for losses or damages afforded by any individual or entity by these terms shall apply whether the action in which recovery of damages is sought is based on contract, tort (including sole, concurrent or other negligence and strict liability of any protected individual or entity), statute or otherwise.

9.14 3D/I shall place and maintain with responsible insurance carriers the following insurance. At Client's request, 3D/I shall deliver to Client certificates of insurance, which shall provide thirty days notice to be given to Client in event of a cancellation.

A. Workers' Compensation and Employer's Liability Insurance in compliance with the applicable state and federal laws.

- Employer's Liability Limit \$1,000,000

B. Commercial General Liability Insurance including Blanket Contractual, XCU\* Hazards, Broad Form Property Damage, Completed Operations and Independent Contractor's Liability all applicable to Personal Injury, Bodily Injury and Property Damage to a combined single limit of \$1,000,000 each occurrence subject to \$2,000,000 annual aggregate for Completed Operations and Personal Injury other than Bodily Injury, Explosion, Collapse and Underground Cave-in.

C. Automobile Liability Insurance including owned, hired and non-owned automobiles, Bodily Injury and Property Damage to a combined single limit of \$1,000,000 each occurrence.

D. Architects & Engineers Professional Liability Insurance affording, professional, liability, if any, to a combined single limit of \$1,000,000 each occurrence/claim, subject to \$2,000,000 annual aggregate.

IN WITNESS WHEREOF, the Town of Cave Creek by its Mayor and Town Clerk have hereunto subscribed their names this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

TOWN OF CAVE CREEK

\_\_\_\_\_  
Vincent Francia, Mayor

ATTEST:

\_\_\_\_\_  
Carrie Dyrek, Town Clerk

PROJECT MANAGER:

3D/International, Inc.

By: \_\_\_\_\_  
Ward Simpson, Vice-President

APPROVED AS TO FORM:

\_\_\_\_\_  
Scott Holcomb, Town Attorney

## Scope of Services and Deliverables

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### *Services*

3D/I's Services are described below.

## **Exhibit A**

*3D/I will work with Town staff and the selected Design Build Operate Contractor (“DBO”) to establish and maintain controls and procedures for the project development process based on the contract commitments.*

- ☑ **Advise on phasing strategies:** Analyze the DBO’s proposed division of work into separate contracts to permit phasing. Consider such factors as construction durations, permitting requirements, seasonal roadway restrictions, construction document preparation, long-lead-time materials and equipment, and interface requirements between contractors.
- ☑ **Monitor submittal process:** Monitor submittals and assist in expediting of approvals.
- ☑ **Review design alternatives:** Review alternate design solutions in order to finalize selections prior to construction. Evaluate materials and techniques appropriate for the project. Review function, price and local construction practices to determine compatibility with the Town’s goals for this project.
- ☑ **Identify value engineering opportunities and constructability issues:** Identify areas for value engineering study as the design progresses. Review proposed methods and materials for construction for potential cost saving opportunities.
- ☑ **Review plans and specifications:** Review plans and specifications for general conformance with design standards and project program at 30% and 90% design development milestones. Check construction feasibility and coordination of all design disciplines. Advise on contract provisions for controlling construction schedules. Advise on special and general conditions sections of the specifications.
- ☑ **Review GMPs’ for each phase of construction:** Review GMPs’ for each phase of construction. Consider such factors as current construction costs and the Town’s budget for each phase of construction. Advise Town of potential budget deficits and identify items that may need to be revised/deleted in order to meet project budget.
- ☑ **Conduct preconstruction meetings:** Organize and lead preconstruction meetings with the DBO contractor and his subcontractors and consultants as specific construction phases are implemented. Review project organization, lines of authority and project procedures.
- ☑ **Organize on-site inspection staff:** Assist the Town in selecting and assigning qualified field staff to monitor the work of the construction contractors, to see that the work conforms to plans and specifications.

- ☑ **Manage independent testing:** Assist the Town in the selection of independent testing agencies. Review their reports and make recommendations regarding any non-compliant findings.
- ☑ **Monitor progress of construction:** Review contractor's construction schedules. Observe overall construction progress and report deviations from the schedule that will jeopardize job progress. Review recovery schedules, if required, and advise Client regarding adequacy of recovery plans.
- ☑ **Maintain project records:** Maintain a current record of contracts, drawings and specifications. Maintain files containing correspondence, directives and meeting minutes.
- ☑ **Administer progress payments:** Develop, implement and maintain a procedure for the review and processing of contractor applications for payment. Review contractor's schedule of values for conformance with GMP and use in processing payments.
- ☑ **Recommend desirable modifications:** Make recommendations for modifications in the work, which are dictated by field conditions or will save time or money or improve quality.
- ☑ **Coordinate submittals:** Monitor submittals and expedite approvals of shop drawings. Maintain logs and sets of documents.
- ☑ **Conduct regular project meetings:** Schedule and conduct regular meetings at the job site. Include all Town and contractor representatives and appropriate consultants. Discuss job progress. Track and record decisions.
- ☑ **Prepare monthly status reports:** Record the progress of the work and comment on quality, cost and timing issues.
- ☑ **Provide photographic records:** If required, arrange for sequenced video coverage or monthly photographs of the work in progress.
- ☑ **Coordinate close-out schedule:** Work with the DBO contractor to produce a detail schedule of close-out activities. Include punchlists, equipment testing, start-up procedures and phased operation of the new plant followed by final de-commissioning of the existing plant.
- ☑ **Coordinate acceptance inspections:** Schedule and direct inspections to develop punch lists. Establish substantial and final completion dates for construction.
- ☑ **Coordinate warranty work:** Review DBO contractor and subcontractors' warranty schedules.

## Schedule for Performance of Services

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### **Exhibit B**

- PM Contract Award January 22, 2008
- Scheduled Completion of Services September 30, 2009

## Fees and Payments

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### Exhibit C

For the Services as described in Exhibit A 3D/I shall be compensated the amount of \$241,500.00, inclusive of expenses incurred in connection with the performance of Services.

Months 1 through 21	Monthly Fee - <b>\$11,500</b>
Total Fee	<b>\$241,500</b>

Compensation for Additional Services shall be at the following hourly rates for FY 07/08 and may be increased up to 5% for each subsequent fiscal year:

- Project Director \$140.00
- Project Manager \$100.00
- Support Services Staff \$40.00